Government Liability for Unconstitutional Land Use Regulation

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INTRODUCTION

Government officials at all levels, from policemen to Supreme Court Justices and the President, regularly make decisions that implicate constitutional questions. No single remedy or set of remedies is available for all cases in which decisions by government officials violate constitutional rights. Sometimes, as when "political questions" are involved, official violations of constitutional rights are beyond judicial redress; the only remedy is at the polling booth.[1] Other times, the unconstitutional action will be "undone" or given no effect by the courts. Thus, a statute regulating protected speech will be invalidated;[2] evidence obtained as a result of police misconduct will be excluded at trial.[3] Still other times, those injured by unconstitutional official action can recover damages, either from the official responsible or from a governmental entity. Civil liability under the Civil Rights Act[4] is an example.[5]

In *Williamson County Regional Planning Commission v. Hamilton Bank,*[6] a landowner is seeking money damages against the county government to remedy allegedly unconstitutional restrictions imposed on his land by a county ordinance. The Supreme Court has agreed to hear this term an appeal by the county challenging a jury award of $350,000 to the landowner. Thus, the Court will once again consider whether the Constitution imposes liability on municipalities for the effects of their unconstitutional land use ordinances. Three years ago, in *San Diego Gas & Electric Co. v. City of San Diego,*[7] the Court declined to resolve the issue. The California courts had limited injured landowners to declaratory and injunctive relief.[8] Although a majority

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1. *See* Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973).
2. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).
3. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).
4. 42 U.S.C. § 1983 (1982).
5. *See* Owen v. City of Independence, 445 U.S. 622 (1980).
6. 729 F.2d 402 (6th Cir.), *cert. granted,* 105 S. Ct. 80 (1984).
7. 450 U.S. 621 (1981).
8. *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 272-74, 598 P.2d 25, 28-31, 157 Cal. Rptr. 372, 374-75 (1979), *aff'd,* 447 U.S. 255 (1980).

of the Supreme Court held the order of the court below nonfinal and declined to address the issue,[9] at least four Justices were willing to hold that the California courts could not, consistent with the Federal Constitution, deny the remedy of money damages to landowners subjected to unconstitutional land use ordinances.[10]

Awarding damages as a remedy can serve two distinct purposes. Sometimes damage awards reflect a judgment that an injured party is deserving of compensation, even if the injuring party did not, in the decisionmaker's judgment, act wrongfully, and even if the decisionmaker does not want to discourage the activity that resulted in the injury.[11] Thus, a manufacturer may be strictly liable in tort for injuries caused by product defects that could not have been prevented even by the exercise of due care.[12]

Frequently, however, the legal order[13] uses a damage remedy not so much to compensate injured victims but to influence behavior by imposing on potential actors the threat of liability for their actions. For example, converters are required to disgorge their "unjust enrichment" even if the victims of their activities have suffered no injury or only nominal injury.[14] The legal order also attempts to influence behavior by awarding treble damages for certain statutory violations.[15]

Even when a damage remedy is intended primarily to compensate injured victims, it may nevertheless influence people to behave in a manner that reduces the possibility of liability. Although this form of behavior modification is sometimes desirable, the threat of liability may discourage behavior that deci-

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9. 450 U.S. 621, 633 (1981).

10. *Id.* at 653 (Brennan, J., dissenting, joined by Stewart, Marshall, and Powell, JJ.). *See also id.* at 633-34 (Rehnquist, J., concurring in result, but "agreeing with much of what is said in the dissenting opinion").

11. *See generally* Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (for an analysis that focuses on the "corrective justice" basis for tort law).

12. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); Codling v. Paglia, 32 N.Y.2d 330, 340-41, 298 N.E.2d 622, 627-28, 345 N.Y.S.2d 461, 468 (1973) (noting, however, that "to impose this economic burden . . . should encourage safety"). *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119-24 (1969).

13. Scholars in the Critical Legal Studies movement, among others, question the existence of a legal order in which "doctrine reflects a coherent view about the basic relations between persons." *See, e.g.*, Trubek, *Where the Action Is: Critical Studies and Empiricism*, 36 STAN. L. REV. 575, 577-78 (1984). One can even agree that doctrine as a whole is a mass of contradiction, but still conclude that a particular decisionmaker has selected a particular rule to further one policy rather than another. *See, e.g.*, Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1963-94 (1976) (lawmaker who awards punitive damages or specific performance "indicates that he is not indifferent as between the courses of action open to the parties").

14. *See* RESTATEMENT (SECOND) OF TORTS § 927 comment f (1977); RESTATEMENT OF RESTITUTION §§ 151 comment f, 157, 202 (1937).

Of course, merely requiring disgorgement provides no strong incentive not to convert; it only removes some of the incentive to convert. In that sense, denying converters unjust enrichment is not nearly as likely to influence behavior as are punitive or treble damages.

15. *See, e.g.*, 15 U.S.C. § 15 (1982) (antitrust suits by persons injured).

sionmakers consider useful. As a result, damages are appropriate to remedy a particular type of injury only if the social desire to compensate injured victims outweighs the negative social consequences, if any, that result from the alteration of behavior caused by the threat of damage liability.

Resolution of the question raised in *Hamilton Bank* then, requires analysis both of the deprivation landowners would suffer if they were left without a damage remedy when subjected to unconstitutional ordinances, and of the potential social consequences of discouraging government behavior through imposition of damage liability. This article undertakes that analysis. Before doing so, it examines, in sections I and II, the doctrinal foundation for the argument that the Constitution "requires" that a damage remedy be available. Section I focuses on the "takings" cases, and section II discusses the broader range of cases in which unconstitutional activity by municipal officials has resulted in damage liability. Sections III and IV address the policy questions. Section III focuses on the fairness aspects of a damage remedy, while section IV examines the effects a damage remedy is likely to have on governmental decisionmaking processes.

The analysis in those sections leads to a number of conclusions. First, so long as declaratory and injunctive relief are available, it is not generally unfair to deny money damages to landowners subjected to unconstitutional ordinances. Second, awarding damages to landowners would not be likely to increase the efficiency of land use. Third, the threat of municipal damage liability for enactment of unconstitutional ordinances would probably cause municipal officials to engage in more extensive evaluation of constitutional issues. However, because municipal officials are not, as a group, well-suited for constitutional decisionmaking, damage liability is likely to deter enactment of constitutional and socially desired ordinances while producing little gain in constitutional enforcement.

Finally, section V synthesizes the preceding discussion and expresses the conclusion that municipal damage liability for enactment of unconstitutional land use ordinances is generally unwise. The synthesis suggests, however, that when an unconstitutional ordinance results not from official uncertainty about constitutional law, but from municipal attempts to delay or discourage vindication of established constitutional rights, the policy reasons for denying a damage remedy are not applicable, and municipal damage liability is appropriate.

I. "TAKINGS" LAW: THE DOCTRINAL FRAMEWORK

In concluding that money damages should be available to landowners injured by enactment of unconstitutional land use regulations, Justice Brennan, writing for the dissenters in *San Diego Gas & Electric Co. v. City of San Diego,* characterized the question as one involving "express constitutional guarantees," and therefore, one not to be determined by resort to policy

judgments.[16] The doctrinal foundations on which Justice Brennan's assertions rest merit some exploration.[17]

A. The Doctrinal Argument for Damages

If money damages were not available to those injured by unconstitutional land use regulation, other remedies would remain. First, a landowner could assert the constitutional violations defensively in a proceeding to enforce an ordinance against him. Relying upon that remedy, of course, would present substantial risk to a landowner uncertain about the constitutionality of an ordinance.[18] But two other remedies, the declaratory injunction and the writ of mandamus, can provide the landowner with relief from the offending regulation without running the same risk. The landowner would, however, have to bear the cost and delays of litigation.

Concluding that these traditional remedies were insufficient to meet constitutional standards, the dissenters in *San Diego Gas* proposed a constitutional rule requiring a government entity that has enacted an unconstitutional regulation to pay interim damages to affected landowners.[19] That is, the government entity must "pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[20]

The doctrinal argument advanced by the dissenters can be summarized simply. First, the Supreme Court said in *Pennsylvania Coal Co. v. Mahon*:[21] "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[22]

16. 450 U.S. 621, 661 (1981) (Brennan, J., dissenting).

17. Two articles in a recent land use symposium discussed the remedies issue. *See* Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981); Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L.Q. 491 (1981). *See also* Bosselman & Bonder, *Potential Immunity of Land Use Control Systems from Civil Rights and Antitrust Liability,* 8 HASTINGS CONST. L.Q. 453 (1981).

Other recent commentary includes Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis,* 77 CALIF. L. REV. 569 (1984); Sallett, *The Problem of Municipal Liability for Zoning and Land Use Regulation,* 31 CATH. U.L. REV. 465 (1982); Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations,* 29 UCLA L. REV. 711 (1982).

18. The principal risk would be that, in a proceeding to enforce the ordinance, a court would conclude that the ordinance did not violate the Constitution, and would require the landowner to remove any prohibited improvements and to cease further construction. Such a conclusion might cause both out-of-pocket expense and contract liability to contractors and other parties with whom the landowner dealt.

19. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting).

20. *Id.*

21. 260 U.S. 393 (1922).

22. *Id.* at 415. Statements of similar character have been made in a number of subsequent cases. Cited by Justice Brennan in *San Diego Gas,* 450 U.S. at 648-49, were PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Andrus v. Allard, 444 U.S. 51, 65-66 (1979); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

B. The Cases

In *San Diego Gas,* Justice Brennan identified *Pennsylvania Coal Co. v. Mahon*[27] as the source for the proposition that the just compensation clause restrains government power to enact land use restrictions. In *Pennsylvania Coal,* homeowners, relying upon a state statute that prohibited all coal mining that would cause subsidence of dwellings on the surface, sued to enjoin a coal company from mining in a way that caused subsidence of their home. However, more than forty years before enactment of the statute the coal company had executed a deed, on which the homeowners' title was based, conveying the surface, but expressly reserving the right to remove all coal under the surface, and expressly imposing on the grantee the risk of damage that might arise from mining the coal. The Supreme Court concluded that the statute was unconstitutional as applied to the parcel in question and lifted an injunction awarded by the Pennsylvania courts.[28]

In the course of his opinion, Justice Holmes stated that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[29] Despite that much-quoted language,[30] the *Pennsylvania Coal* opinion is, for two reasons, a less-than-compelling foundation for the argument that the constitutional restraint on land use regulation is located in the just compensation clause.

First, Justice Holmes never characterized the challenged ordinance as an exercise of the eminent domain power. In fact, he indicated that the legislature's use of its police power in *Pennsylvania Coal* offended the due process clause, not the just compensation clause.[31]

Second, except when issues of remedy are involved, the source of the constitutional protection has little practical importance. But in *Pennsylvania Coal,* remedy was not an issue; damages were not sought, and they were not awarded. The coal company asked only to have the injunction lifted, and that is all it received.

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27. 260 U.S. 393 (1922) (cited by Justice Brennan in *San Diego Gas,* 450 U.S. at 649).

28. *Pennsylvania Coal,* 260 U.S. at 416.

29. *Id.* at 415.

30. Justice Holmes' use of the oft-quoted phrase is explained when one recognizes that the *Pennsylvania Coal* opinion was a response to the proposition that exercise of the police power to protect the health, morals, or safety of the public can never exceed constitutional bounds. The proposition was developed most extensively by Justice Harlan writing for the Court in Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), and served as the basis for the dissent by Justice Brandeis in *Pennsylvania Coal,* 260 U.S. at 417-18, 420-21. The thrust of Justice Holmes' opinion in *Pennsylvania Coal,* and of the language so often quoted, was to establish the contrary principle that there are constitutional limits on the legislature's power to regulate land use, even when a public purpose for the regulation exists.

Professor Sax has compared in detail Justice Harlan's view with Justice Holmes' contrasting philosophy. *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 38-46 (1964).

31. Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

260 U.S. at 413.

Second, in other cases not involving invalid regulation, the Court has said that the just compensation clause[23] is self-executing and that compensation may be due even if the government never institutes formal condemnation proceedings.[24] Consequently, if an invalid regulation "goes too far" and becomes a "taking," the just compensation clause by its own terms requires the payment of money damages as compensation for the taking.

The dissenters' syllogism, however, is not immune from attack. Although the Supreme Court has established that the Constitution protects landowners from some forms of restrictive regulations, the Court's decisions do not establish that the constitutional protections are embodied in the just compensation clause of the fifth amendment. Instead, the protections against confiscatory regulation could be derived just as easily from the due process clause.[25] Thus, the doctrinal argument would run, confiscatory regulation is an abuse of governmental police power in violation of the due process clause. The regulation is not itself a "taking" in violation of the just compensation clause, but if government chooses, it can maintain the otherwise unconstitutional regulation by "taking" property and paying compensation in the exercise of its eminent domain power.[26] This doctrinal argument is as consistent with existing precedent as the one advanced by the dissenters in *San Diego Gas.*

One might reasonably ask why it matters what constitutional provision restrains government power to regulate land use, so long as the restraints are embodied in the Constitution somewhere. It matters only if one believes, with the dissenters in *San Diego Gas,* that once a regulation is deemed to be a "taking," the just compensation clause requires a particular remedy: payment of just compensation. If, on the other hand, a regulation is invalid because it violates the due process clause, no constitutional provision requires any particular remedy. The state courts, within limits established by the Supreme Court, would be free to fashion remedies that take appropriate account of the policy concerns involved.

Given the alternative of locating the restraints on power to regulate land use in the due process clause, it is curious, at least, that the dissenters in *San Diego Gas* would choose an alternative source that they believe precludes consideration of the policy concerns that might make one remedy preferable to another. As a prelude to discussion of those policy concerns, the remainder of this section briefly examines the existing doctrinal framework to demonstrate that the conclusions drawn by Justice Brennan in his *San Diego Gas* dissent, although not without support, are not inescapable.

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23. U.S. CONST. amend. V.

24. *See* United States v. Clarke, 445 U.S. 253, 257 (1980); Jacobs v. United States, 290 U.S. 13, 16 (1933).

25. U.S. CONST. amend. XIV, § 1.

26. The New York Court of Appeals, in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976), identified the due process clause as the source of constitutional protection against overly restrictive land use ordinances. *See infra* notes 59-61 and accompanying text.

Pennsylvania Coal was decided four years before *Village of Euclid v. Ambler Realty Co.*,[32] in which the Supreme Court first sustained a local zoning ordinance against constitutional attack and thereby set the stage for vast expansion of local land use regulation. Since *Ambler Realty,* the Court has invalidated a land use ordinance in only one case, *Nectow v. City of Cambridge.*[33] In *Nectow,* the attack on the zoning ordinance was framed not in "taking" terms, but as a fourteenth amendment deprivation of property without due process.[34] As a remedy, the landowner sought not compensation, but a mandatory injunction directing city officials to disregard the zoning ordinance in passing on his building permit application. The Supreme Court held that "the action of the zoning authorities comes within the ban of the fourteenth amendment and cannot be sustained."[35]

In both *Pennsylvania Coal* and *Nectow* there was no dispute over the remedy, the only issue for which it might be important to determine the source of the constitutional right involved. Neither case, then, is persuasive authority for locating the constitutional restraint on land use regulations in the just compensation clause or, for that matter, in the due process clause. To the extent that the language used by the Court is significant, the Court in *Pennsylvania Coal* combined the famous "taking" language with express citation of the due process clause; in *Nectow,* the Court relied only upon the due process clause.[36]

Although no land use regulations have been invalidated since *Nectow,* the dissent in *San Diego Gas* cited a selection of the cases in which the Court had found "takings" and awarded compensation even though no formal condemnation proceedings had been instituted.[37] These were cases in which governmental action resulted in physical invasion or alteration of land or the airspace above it. But, Justice Brennan reasoned, "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."[38]

In these physical invasion or alteration cases, however, as in *Pennsylvania Coal* and *Nectow,* neither the parties nor the Court focused on the question

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32. 272 U.S. 365 (1926).
33. 277 U.S. 183 (1928).
34. *Id.* at 185.
35. *Id.* at 189.
36. In *Nectow,* the Court emphasized that a zoning restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188. The language used is very similar to that used to invalidate other regulatory measures in the group of "substantive due process" cases decided during the same period. *Compare Nectow,* 277 U.S. 183, *with* Williams v. Standard Oil Co., 278 U.S. 235 (1929) (state statutes fixing price of gasoline held unconstitutional because gasoline not "affected with a public interest") *and* Weaver v. Palmer Bros. Co., 270 U.S. 402, 414 (1926) (state prohibition on use of "shoddy" in bedding and furniture held unconstitutional because "the provision in question cannot be sustained as a measure to protect health").
37. 450 U.S. at 651-55.
38. *Id.* at 652 (footnote omitted).

of remedy.[39] Issue was joined on the constitutionality of government action, not on the remedial consequences of deeming the government action a "taking." The implicit assumption was that if the government action was unconstitutional, compensation would be paid, just as the implicit assumption in *Pennsylvania Coal* and *Nectow* was that the remedy would be invalidation of the offending ordinance.[40] These physical invasion and alteration cases, then, are also inadequate authority for the proposition that regulations, if confiscatory in effect, fall afoul of the fifth amendment's just compensation clause.[41]

Finally, two recent cases in which the Court sustained local land use regulations, *Penn Central Transportation Co. v. City of New York*[42] and *Agins v. City of Tiburon,*[43] are also inconclusive. In neither case did the Court reach the issue of remedy, and only in a somewhat obscure footnote in the *Penn Central* opinion did the Court venture to conclude "we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel."[44] The Court, however, did not trace the implication of its footnote for the remedial problem, nor did it indicate that New York would have been compelled to provide a monetary remedy if the ordinance had been held unconstitutional.[45]

The purpose of this survey has been only to demonstrate that the Court has not "bound" itself to one constitutional source or the other for restraints on land use regulations, not to demonstrate doctrinal error in locating protection in the just compensation clause. It bears note, however, that two of

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39. *See, e.g.,* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Causby, 328 U.S. 256 (1946); Jacob v. United States, 290 U.S. 13 (1933). All of these cases were cited by Justice Brennan in *San Diego Gas,* 450 U.S. at 651-55 (Brennan, J., dissenting).

40. Kaiser Aetna v. United States, 444 U.S. 164 (1979), presents a contrast to the other physical invasion cases cited in the *San Diego Gas* dissent. The United States sought to enjoin Kaiser Aetna from excluding the public from a marina that Kaiser Aetna had dredged and made accessible to a navigable waterway. Although the Court concluded that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon,*" 444 U.S. at 178, the Court did not award damages to Kaiser Aetna. Instead, it held only that

> if the Government wishes to make [the pond] into a public aquatic park . . . it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

Id. at 180.

41. *See also* Cunningham, *supra* note 17, at 538-39.

42. 438 U.S. 104 (1978).

43. 447 U.S. 255 (1980).

44. 438 U.S. at 125 n.25.

45. The footnote might, however, have been a response to the doctrine that the New York Court of Appeals had elaborated in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976). That doctrine suggests that an onerous land use restriction might be a violation of the due process clause, but not the just compensation clause, and therefore no compensation would be available. *See also infra* text accompanying notes 59-63.

the nation's more respected state courts, the California Supreme Court and the New York Court of Appeals, have dealt with the issue extensively, and have not interpreted the Supreme Court precedents to establish that restraint on governmental power to regulate land use emanates from the just compensation clause. Both courts have traced the constitutional protections against onerous land use regulations to the due process clause, and both courts have denied damages, limiting the remedies available to landowners aggrieved by unconstitutional ordinances to declaratory and injunctive relief.

The issue first reached the California Supreme Court in 1975, in *HFH Ltd. v. Superior Court.*[46] Plaintiffs brought an inverse condemnation action seeking damages for a decline in land value resulting from rezoning. The California Supreme Court sustained a demurrer to plaintiff's complaint, indicating that mandamus, not inverse condemnation, was "the proper remedy" for arbitrary or discriminatory zoning.[47] The court also held that interim damages were not available for "the period between the enactment of the challenged ordinance and its demise."[48] Quoting Justice Jackson's statement that "[o]f course, it is not a tort for government to govern,"[49] the court found it "[d]eeply rooted in the theory of our polity" that the remedy for improper legislation is a mandate action to undo the governmental action.[50]

The court in *HFH,* however, did reserve judgment in a footnote on "the question of entitlement to compensation in the event a zoning regulation forbade substantially *all* use of the land in question."[51] Relying on that footnote, the District Court of Appeal, in *Eldridge v. City of Palo Alto,*[52] concluded that a damage remedy was available to redress the city's unconstitutional designation of plaintiff's land as "permanent open space and conservation lands."[53]

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46. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied,* 425 U.S. 904 (1976).

47. *Id.* at 513, 542 P.2d at 241, 125 Cal. Rptr. at 369.

48. *Id.* at 518, 542 P.2d at 244, 125 Cal. Rptr. at 372.

49. *Id.* at 519, 542 P.2d at 244, 125 Cal. Rptr. at 372 (quoting Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

50. 15 Cal. 3d at 519, 542 P.2d at 244, 125 Cal. Rptr. at 372.

51. *Id.* at 518 n.16, 542 P.2d at 244, 125 Cal. Rptr. at 372 (emphasis in original).

52. 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976).

53. *Id.* at 617, 129 Cal. Rptr. at 577. In concluding that a damage remedy was available, the *Eldridge* court relied upon three categories of cases. First, the court cited opinions containing dictum to the same effect as Justice Holmes' famous statement that "if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Dahl v. City of Palo Alto, 372 F. Supp. 647, 648 (N.D. Cal. 1974); Brown v. Tahoe Regional Planning Agency, 385 F. Supp. 1128, 1132 (D. Nev. 1973); Turner v. County of Del Norte, 25 Cal. App. 3d 311, 315, 101 Cal. Rptr. 93, 96 (1972). In none of these cases did the courts award money damages.

In the second category are airplane overflight cases in which landowners have been awarded damages against municipalities operating adjacent airports. Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162, *cert. denied,* 419 U.S. 1122 (1974); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963). In these cases, the landowner objected not to regulatory activity, but to physical interference amounting to a trespass or a nuisance and causing substantial diminution in the value of the land. The physical interference was sometimes,

The *Eldridge* case generated controversy,[54] and the California Supreme Court went out of its way to disapprove it in *Agins v. City of Tiburon.*[55] In *Agins,* a two million dollar inverse condemnation action, the court concluded that the zoning ordinance at issue did not deprive plaintiffs of any constitutional rights,[56] a conclusion subsequently affirmed by the United States Supreme Court. The bulk of the opinion, however, was directed at plaintiff's damage claim.[57] In disapproving *Eldridge* and attempting to clarify its opinion in *HFH,* the court reached beyond the issues presented in *Agins* to conclude that a landowner aggrieved by an unconstitutional zoning ordinance, though deprived of substantially all use of his land, "may not . . . elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid."[58]

The New York Court of Appeals in *Fred F. French Investing Co. v. City of New York,*[59] also concluded that the due process clause, not the just compensation clause, is the source of constitutional protection against confiscatory land use regulation. There, plaintiff sought damages for losses suffered as a result of a zoning amendment that designated land for use as a "Special Park District." The Court of Appeals declared the amendment invalid, but

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but not always, supported by a zoning ordinance imposing height restrictions on the landowner's right to develop.

The third category of cases cited by the court in *Eldridge* involves government action that diminishes the value of land as a prelude to eminent domain proceedings. *See* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated,* 417 F. Supp. 1125 (N.D. Cal. 1976); Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974); People *ex rel.* Dep't of Public Works v. Southern Pac. Transp. Co., 33 Cal. App. 3d 960, 109 Cal. Rptr. 525 (1973); Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1, (1972).

54. *See* Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 HASTINGS L.J. 1569 (1977); Note, *Sizing Up Just Compensation Relief for Down-Zoning After* HFH *and* Eldridge, 10 U.C.D. L. REV. 31 (1977). *See also* Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law,* 31 HASTINGS L.J. 103, 118-20 (1979) (summarizing California Court of Appeal decisions after *Eldridge*).

55. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980).

56. *Id.* at 277-78, 598 P.2d at 31-32, 157 Cal. Rptr. at 378-79.

57. *Id.* at 272-77, 598 P.2d at 27-31, 157 Cal. Rptr. 374-78.

58. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375. The Court also recognized that Justice Holmes' language in *Pennsylvania Coal,* taken in context, provided no support for a constitutional requirement of compensation for enactment of an invalid ordinance. *Id.* at 274, 498 P.2d at 29, 157 Cal. Rptr. at 376. Moreover, the court stressed the undesirable policy implications, particularly "a chilling effect upon the exercise of police regulatory powers at a local level," of a rule requiring compensation. *Id.* at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377. The court, citing Hall, *supra* note 54, at 1597, concluded that it would be unwise to entrust to the judiciary such control over the municipal budget, thus undermining legislative control of the land use process. 24 Cal. 3d at 276, 598 P.2d at 30, 157 Cal. Rptr. at 377. The *Agins* decision did not overturn established California precedent in the airplane overflight and precondemnation activity areas. In fact, *Klopping v. City of Whittier,* 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), a leading precondemnation activity case was cited and distinguished in the *Agins* opinion. 24 Cal. 3d at 278, 598 P.2d at 31, 157 Cal. Rptr. at 378.

59. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

held that compensation was not available as a remedy.[60] The court reasoned that

> a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking" and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.[61]

Although the courts in California and New York have discussed the issue most extensively, the availability of compensation as a remedy for unconstitutional land use ordinances had not, prior to *San Diego Gas,* entirely escaped the attention of other courts. Scattered state courts generally concluded that damages were not available,[62] as did the most significant of a few federal courts.[63] And in the few decided cases since *San Diego Gas,* the courts have been divided on the impact of the decision.[64]

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60. *Id.* at 593-94, 350 N.E.2d at 384-85, 385 N.Y.S.2d at 8.

61. *Id.* at 593-94, 350 N.E.2d at 385, 385 N.Y.S.2d at 8. While adhering to a general rule that only an exercise of the eminent domain power subjects government to a claim for just compensation, the New York courts have recognized exceptions. The most noteworthy of these is illustrated in the sequence of *Keystone Assocs.* cases, decided before *Fred F. French Investing Co.,* involving the old Metropolitan Opera House. *See infra* text accompanying notes 181-84.

62. *See* Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (1978); Gold Run, Ltd. v. Board of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976); DeMello v. Town of Plainville, 170 Conn. 695, 368 A.2d 71 (1976); Mailman Dev. Co. v. City of Hollywood, 286 So. 2d 614 (Fla. App. 1973), *cert. denied,* 419 U.S. 844 (1974); Pratt v. State, 309 N.W.2d 767 (Minn. 1981); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980); Ech v. City of Bismark, 283 N.W.2d 193 (N.D. 1979) (citing California, New York and Minnesota cases); Fifth Avenue Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978) (quoting from *Fred F. French Investing Co.*); Brabham v. City of Sumter, 272 S.C. 597, 274 S.E.2d 297 (1981). *But cf.* Ventures in Property v. City of Wichita, 225 Kan. 698, 594 P.2d 671 (1979) (declining to preclude damage awards against municipalities); Mattoon v. City of Norman, 617 P.2d 1347 (Okla. 1980); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978).

63. Although federal courts, especially in the Ninth Circuit, appeared to be more receptive to damage actions than were state courts, most merely sustained complaints against dismissal or summary judgment motions. *See, e.g.,* Barbaccia v. County of Santa Clara, 451 F. Supp. 260 (N.D. Cal. 1978); Sanfilippo v. County of Santa Cruz, 415 F. Supp. 1340 (N.D. Cal. 1976). Even in those cases, the court indicated that injured plaintiffs would bear a "heavy burden of proving entitlement to monctary relief." *Id.* at 1343. And the First Circuit expressed even greater hostility to a damage remedy:

> Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole . . . . Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation.

Pamel Corp. v. Puerto Rico Highway Auth., 621 F.2d 33, 36 (1st Cir. 1980) (citation omitted).

64. Courts have, however, been more inclined to award damages as a remedy than they were before *San Diego Gas. Compare* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981); Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (1982); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Annicelli

C. Summary

That government is limited in its right to interfere by regulation with land use is established, if not by "express constitutional guarantee," then at least by the Supreme Court's well-entrenched exegesis of the constitutional text. But the Court's exegesis has never been explicit about the constitutional source of the limitation, and the constitutional text does not state that a government entity shall be liable in money damages if it enacts invalid regulations. Nor has the Supreme Court ever held that any particular remedy must be made available to aggrieved landowners.

Limitations on the right of government to regulate land use can plausibly be located in either of two constitutional provisions—the just compensation clause or the due process clause. However, if violations of the just compensation clause always require a court to award aggrieved landowners money damages without consideration of the policy implications, then there is little reason to classify overly restrictive regulations as violations of the just compensation clause when another plausible constitutional source, the due process clause, permits courts to perform a policy evaluation of alternative remedies. In other words, it is curious to require policy to be dictated by doctrine when doctrine could so easily be shaped to accommodate policy.

Of course, locating the source of the constitutional protections in the due process clause would not resolve the questions of remedy; it would merely permit policy inquiry to begin. Many constitutional rights can be vindicated in more than one way. Some of the potentially available remedies may be more advantageous to the victims of unconstitutional behavior than others would be. The Supreme Court, however, has not always made available, and need not make available, the remedy most favorable to injured parties or the remedy most likely to avoid constitutional violations. When the issue is application to the states of one of the amendments which comprise the Bill of Rights, the Court need only assure that a state provides a remedy that implements adequately the constitutional command.[65] Whether any particular remedy is adequate, especially if another remedy would provide the injured party with more complete vindication, is a question that necessarily involves consideration of the social and institutional implications of the alternative remedies. That consideration the Supreme Court has not yet undertaken.

II. Government Liability for Unconstitutional Action: The General Problem

The "takings" cases provide only one perspective on the issue of municipal liability in damages for unconstitutional land use ordinances. The problem

v. Town of South Kingstown, 463 A.2d 133 (R.I. 1983) (all acknowledging availability of compensation) *with* Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31 (1st Cir. 1982) (damages not available); Wyoming Borough v. Wyco Realty Co., 64 Pa. Commw. 459, 440 A.2d 696 (1982).

65. *See generally* Hill, *The Bill of Rights and The Supervisory Power,* 69 Colum. L. Rev. 181, 182-92 (1969); Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1112-22 (1969).

can also be viewed in a broader context. Government at all levels can, through its officials, act unconstitutionally in a variety of ways. Police officers can conduct unreasonable, warrantless searches of homes or automobiles. State legislatures or Congress can enact statutes purporting to forbid abortion. Courts can convict defendants based in part on involuntary confessions. Agreement that all of these actions are prohibited by the Constitution does not resolve, or even address, the question of remedy for citizens who feel aggrieved. Traditionally, victims of such unconstitutional government action have not been entitled, as a constitutional right, to damages.[66] Recent court opinions[67] and scholarly work,[68] however, suggest consideration, although not adoption, of a damage remedy whenever a governmental body or government official acts unconstitutionally.

Several doctrinal obstacles have, until recently, precluded extensive judicial consideration of the appropriate scope of government liability for unconstitutional action. Primary among them have been the immunity doctrines that protect governmental entities from suit. In particular, the longstanding sovereign immunity doctrine has insulated the United States from liability for its unconstitutional actions.[69] Similarly, the states are protected by the eleventh amendment from suit in federal court[70] and by state sovereign immunity doctrines in their own courts.[71]

The immunity doctrines, however, have not been the only doctrinal bars to judicial evaluation of a damage remedy. Until *Bivens v. Six Unknown Federal Narcotics Agents*[72] was decided in 1971, the Supreme Court had been unwilling, in the absence of statutory authority, to imply directly from the Constitution a cause of action for damages. The *Bivens* case involved only

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66. The doctrinal obstacles to recovery of damages against government entities are discussed in the text *infra* accompanying notes 69-75.

67. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Servs., 403 U.S. 388 (1971).

68. *See, e.g.*, Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979); Schuck, *Suing Our Servants: The Courts, Congress, and The Liability of Public Officials for Damages,* 1980 SUP. CT. REV. 281.

69. For a lucid discussion of the historical bases for the sovereign immunity doctrine, see Borchard, *Government Liability in Tort,* 34 YALE L.J. 1 (1924) (the discussion at 28-41 is especially helpful).

70. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

For an extensive treatment of the eleventh amendment restrictions, see Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines, Part One,* 126 U. PA. L. REV. 515 (1977); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States,* 126 U. PA. L. REV. 1203 (1978).

Professor Field begins her study by stating: "The one interpretation of the eleventh amendment to which everyone subscribes is that it was intended to overturn *Chisholm v. Georgia.*" 126 U. PA. L. REV. at 515. The *Chisholm* case, 2 U.S. (2 Dall.) 419 (1793), had held the State of Georgia subject to suit by citizens of South Carolina in the United States Supreme Court.

71. For a survey of the status of state sovereign immunity, see RESTATEMENT (SECOND) OF TORTS § 895A (Tent. Draft No. 19, 1973).

72. 403 U.S. 388 (1971).

liability of federal officials for a violation of the fourth amendment, not liability of the federal government itself. The prior reluctance to imply a cause of action against federal officials, however, would undoubtedly have extended to claims against the government itself had not sovereign immunity independently provided the government with sufficient protection. Nor did section 1983 of the Civil Rights Act[73] provide a basis for awards of money damages against state or local governments. The statute did furnish authority to hold state officials liable for violations of federal constitutional rights, but under the doctrine of *Monroe v. Pape,*[74] municipalities were not considered "persons" covered by the Act. Only when the Court in *Monell v. Department of Social Services*[75] overruled *Monroe,* holding that municipalities were "persons" for the purposes of section 1983,[76] did the Civil Rights Act furnish a basis for municipal damage liability.

As a result of continued sovereign immunity protection, federal and state government liability has not been directly affected by the expanded scope of section 1983 and the increased willingness to imply a cause of action directly from the Constitution. Section 1983 and the *Bivens* doctrine have expanded government liability only to the extent that the government entity has agreed to indemnify its officers for liability they incur. Local governments, because they have never enjoyed sovereign immunity, have been affected more directly. In particular, two recent Supreme Court decisions, *Monell* and *Owen v. City of Independence,*[77] have stripped municipalities of immunity from suit under section 1983 of the Civil Rights Act. The Supreme Court's new interpretation of that statute has provided impetus for considering the scope of government liability for various forms of unconstitutional government action, including enactment of unconstitutional land use ordinances.

In *Owen,* the Chief of Police brought suit against the city, the City Manager, and the members of the city council, alleging that he was discharged without a hearing and without notice of reasons.[78] He sought back pay in addition to declaratory and injunctive relief. In a five-to-four decision, the Supreme Court held that the good faith of the muncipality's officers and agents was not a defense to the municipality's own liability under section 1983.[79] In sweeping language relying upon principles of compensation, deterrence, and equitable loss-spreading, the Court concluded that municipal liability provided the proper allocation of costs among the principals in section 1983 suits.[80] In doing so, it declared that "municipalities have no immunity from damages liability flowing from their constitutional violations . . . ."[81]

73. 42 U.S.C. § 1983 (1982).
74. 365 U.S. 167 (1961).
75. 436 U.S. 658 (1978).
76. *Id.* at 663.
77. 445 U.S. 622 (1980).
78. *Id.* at 630.
79. *Id.* at 638.
80. *Id.* at 650-58.
81. *Id.* at 657.

Despite the broad language in *Owen,* it is unlikely that the Court would find a municipality liable in damages whenever any municipal officials, executing government policy or customs,[82] take actions that the Supreme Court ultimately finds unconstitutional. Two examples are illustrative. First, suppose an elected municipal judge with power to try certain criminal cases admits highly probative evidence later declared to be unconstitutionally obtained, resulting in defendant's conviction and imprisonment. If the broad language in *Owen* is read literally, the municipality would be liable in damages to the defendant for defendant's losses due to his imprisonment, even if defendant were guilty of the crime charged.[83] Second, suppose a local school board has voted, after much deliberation, not to purchase a set of biology textbooks solely because the books do not contain treatment of creationism as a plausible explanation of the development of man. If that decision is unconstitutional, a literal reading of the *Owen* opinion could provide a damage remedy to the injured textbook publisher, to affected students or parents, or perhaps to both.

These examples are raised here only to suggest that there are instances of unconstitutional municipal action not considered by the Court in *Owen*—instances in which the Court might not be disposed to find municipal liability. The Court in *Owen* established beyond question that a municipality's status as a municipality does not furnish a defense to a claim for damages resulting from unconstitutional action. But concluding that a municipality and a private party are equally liable for unconstitutional activities does not end discussion, because there are some municipal activities that are not conducted by private parties.[84] Deciding litigated cases and enacting ordinances are among these activities. The problem is determining whether and in what circumstances performance of those inherently governmental activities in an unconstitutional manner creates a claim on which damage relief should be granted. That determination involves an evaluation of the impact of damage relief on both injured parties and the institutions of government, an evaluation pursued by the Court in *Owen,*[85] but not with sufficient generality to justify an expansive reading of the Court's opinion.

Courts have long recognized that the impact of liability on governmental processes is an important consideration in fashioning rights and remedies against government entities. For one example, the so-called discretionary function exception to municipal tort liability reflects judicial and legislative concern about the institutional effects of a constant threat of liability whenever a government body makes a decision.[86] As another illustration, the Supreme

82. *Id.* at 633.

83. Of course, this assumes that the "edicts or acts" of a judge may fairly be said to represent official policy. *Monell,* 436 U.S. at 694.

84. *See* Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 HARV. L. REV. 209, 215-18 (1963).

85. 445 U.S. at 650-56.

86. For a thoughtful recent judicial discussion of this concern, see Whitney v. City of Worcester,

Court has emphasized the potentially paralytic effect of government officer liability in fashioning absolute or qualified immunity doctrines for various government officials.[87] The institutional dangers do not disappear when the issue is government, rather than officer, liability for unconstitutional action. However expansive the language of the majority opinion, the *Owen* decision did not resolve the issue in favor of liability for all cases of unconstitutional government action.

Supreme Court of Virginia v. Consumers Union,[88] decided less than two months after *Owen,* supports the conclusion that not all unconstitutional government activity gives rise to liability. The issue in that case was the section 1983 liability of the Virginia Supreme Court for promulgating, and not amending, a bar code that strictly prohibited attorney advertising in violation of the first amendment. Plaintiffs sought declaratory and injunctive relief and attorneys fees. The United States Supreme Court held unanimously that the Virginia court was entitled to legislative immunity for its activities in connection with the bar code.[89]

The issue in *Consumers Union,* as in *Owen,* was liability for unconstitutional activity. Also as in *Owen,* both an individual defendant, here the chief justice, and a government entity, here the Virginia Supreme Court, were named as defendants. Yet despite the sharp distinction the Court drew in *Owen* between immunity for individual defendants and immunity for government entities, the opinion in *Consumers Union* never separated the court's immunity from that of the chief justice. In fact, at one point, the Court asserted that

> [t]here is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code . . . the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity.[90]

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373 Mass. 208, 366 N.E.2d 1210 (1977). In *Whitney,* the Supreme Judicial Court of Massachusetts indicated its intention to abrogate governmental immunity if the state legislature did not promptly do so by statute. The court, however, suggested that government entities should continue to remain immune "[w]hen the particular conduct which caused the injury is one characterized by [a] high degree of discretion and judgment." *Id.* at 218, 366 N.E.2d at 1216.

The questions the court deemed relevant in deciding whether government should be immune were:

> Was the injury-producing conduct an integral part of governmental policymaking or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternate remedy available to the injured individual other than an action for damages?

Id. at 219, 366 N.E.2d at 1217.

87. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232, 240-49 (1974); Pierson v. Ray, 386 U.S. 547, 554 (1967).

88. 446 U.S. 719 (1980).

89. *Id.* at 734. The Court also held that the Virginia Supreme Court, when acting in its capacity as enforcer of the state bar code, would be subject to suit for declaratory and injunctive relief under § 1983 of the Civil Rights Act. *Id.* at 736-37.

90. *Id.* at 733-34.

By failing to distinguish among "the legislature, its committees, or members" for purposes of applying the immunity doctrine, the Court indicated that, at least for this type of unconstitutional government action, no liability attaches whether the defendant is an individual officer or a government entity.[91]

Moreover, the Court in *Consumers Union* used "legislative immunity" as a justification for insulating the Virginia Supreme Court from liability. The legislative immunity doctrine was developed to protect individual officers from liability that it was feared would impair the functioning of government processes.[92] The Court's choice of the legislative immunity label reveals an awareness that concerns parallel to those that led to protection of government officers also contribute to a need to insulate government from some forms of liability.[93]

Even after *Owen,* then, the Court remains willing to immunize government entities from liability for some forms of unconstitutional activity. One cannot, of course, divine from the *Consumers Union* opinion whether a municipality would be accorded the same protection as the Virginia Supreme Court, and whether municipal land use regulations would be treated in the same manner as a state bar code. But *Consumers Union* at least indicates that the *Owen* opinion did not foreclose consideration of the broad question—when should a municipality or other government entity be liable for its unconstitutional action?[94]

III. DAMAGE REMEDY FOR UNCONSTITUTIONAL LAND USE ORDINANCES: COMPENSATION AND LOSS-SPREADING IMPLICATIONS

The preceding sections suggest that existing "takings" cases, precedent developing under the *Bivens* doctrine,[95] and section 1983[96] neither establish

91. *But cf.* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 n.29 (distinguishing between immunity of individual members of a bistate agency and immunity of the agency itself).

92. 446 U.S. at 731.

93. The Court, in a footnote, also posited another possible ground for denying plaintiffs relief: "Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy." *Id.* at 734 n.12. The Court cited no authority for this proposition, but the point is undoubtedly related to what Professor Jerry Mashaw, in a slightly different context, has called the "cause-of-action argument." Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability,* 42 LAW & CONTEMP. PROBS. 8, 29-33 (1978).

In discussing liability of government officers for negligent performance of their duties, Mashaw says: "Plaintiffs would, indeed should, still be required to state a cause of action having the usual elements: act, cause, damage, fault. And many official functions, when negligently performed, produce harms that seem to fit poorly within these general contours." *Id.* at 29. Some of the same "fit" problems exist when the issue is government liability for unconstitutional action.

94. *Cf.* K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, 1982 Supplement, § 25:00-4: "The Court's conclusion that 'municipalities have no immunity from damages liability flowing from their constitutional violations,' is likely to be restricted as applied to a city's legislative enactments and to a city's formal adjudication." *Id.* at 401 (citations omitted).

95. *See supra* notes 72-73 and accompanying text.

96. 42 U.S.C. § 1983 (1982).

nor prevent the availability of a damage remedy against municipalities for enactment of an unconstitutional land use ordinance. There are, however, two forceful policy arguments for affording a damage remedy to victims of unconstitutional land use regulation. First, fairness to victims of land use regulation dictates that they be compensated for all of their losses. Second, the spectre of damage awards will increase efficiency in decisionmaking by forcing municipal decisionmakers to weigh the full social cost of potential ordinances against the expected benefits of the ordinances. This section analyzes the fairness argument, and the following section discusses the efficiency concerns.

A. Compensation for Harm: The Role of Fault Principles

In *Owen v. City of Independence,*[97] the city had, by denying Owen notice of reasons and a hearing, dismissed him in violation of his due process rights, causing a loss. The Supreme Court, citing the municipality's unconstitutional action, justified its holding of municipal liability in part by noting that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss."[98] Presumably, it was not merely causation of the loss, but causation of the loss by breach of the municipality's duty to act constitutionally, that led the Court to conclude that the municipality should compensate Owen.

To the extent that the Constitution embodies a set of moral commands to government bodies, violation of which entitles those harmed to compensation because they "deserve" to be free of the impermissible government intrusion or to be compensated for losses caused by the intrusion, the "government fault" analysis in *Owen* is unassailable; indeed, it is self-evident. If the constitutional protections against restrictive land use ordinances reflected a notion that landowners merited absolute protection from losses due to government interference with property rights, then landowners aggrieved by ordinances that transgress constitutional limits would have a fault-based claim for damages. But neither the due process clause nor the just compensation clause is so absolute; the Court has tolerated substantial government interference with property rights, recognizing appropriately that the value and even the existence of property rights depends heavily on governmental action.[99]

Most zoning ordinances diminish the value of at least some land within the community. If that diminution in value were itself wrongful, presumably all harmed landowners would be entitled to redress. The justification for zoning, however, lies in the judgment that a zoning scheme will benefit landowners and the general public more than it will harm adversely affected landowners.[100]

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97. 445 U.S. 622 (1980).

98. *Id.* at 654.

99. *Cf.* Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 331-33, 366 N.E.2d 1271, 1275-76, 397 N.Y.S.2d 914, 918-19 (1977), *aff'd,* 438 U.S. 104, *reh'g denied,* 439 U.S. 883 (1978).

100. For an insightful but brief summary of the purposes of collective action written in the

But even on that premise, the public could compensate affected landowners for their losses and still receive some benefits from the enactment. Yet the Constitution does not require such compensation.

The primary problem with a system that would require compensation for all losses is that the cost of computing compensation and dispensing it would likely destroy the "average reciprocity of advantage"[101] of the ordinance. Appraisals, negotiation, and litigation would be necessary each time a landowner felt mildly aggrieved by an ordinance, even if he had present plans for developing or selling his land. Moreover, the basis for valuation would be far from clear. Even landowners who, on balance, suffer from imposition of a land use ordinance generally receive some benefit from the imposition of a scheme on other landowners.[102] Evaluating that benefit in computing a compensation award would be a formidable task. Finally, if fairness would require elimination of all losses from zoning enactments, it would probably also require disgorgement of unequal benefits enjoyed by some landowners.[103] That process, too, would involve costly computations. Thus, zoning, and derivatively other land use planning, rests on the premise that it is not wrong to diminish the value of some land, even to a very great degree, if the diminution is part of a scheme that, on balance, benefits the public.

On what basis, then, are ordinances declared unconstitutional for "the severity of the impact of the law"[104] on a particular parcel? A landowner knowing that a land use scheme would cause losses, but not knowing on whom they would fall, might in some circumstances choose to risk enduring a variety of losses uncompensated. In particular, he might choose to bear that risk if he recognizes that compensating people in his general position would, over time, cause the community to forgo benefits that he and others in his position would choose to have the community enjoy.[105] But some ordinances might impose restrictions that, frequently due to the size of the individual loss, landowners would not risk enduring as part of a scheme to further the greater

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context of the takings problem, see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1172-83 (1967).

101. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), *quoted in* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting). *See also* Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d at 331-32, 366 N.E.2d at 1275, 397 N.Y.S.2d at 917, *aff'd,* 438 U.S. 104, *reh'g denied,* 439 U.S. 883 (1978):

> Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without discrimination, except for permitted continuing nonconforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve . . . .

102. *See* Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324 at 329, 366 N.E.2d at 1274, 397 N.Y.S.2d at 917 (1977), *aff'd,* 438 U.S. 104, *reh'g denied,* 439 U.S. 883 (1978), where the Court discussed the numerous social contributions to land value.

103. For such a proposal, see D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978). *See also* Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts From Land Use Controls,* 54 U. DET. J. URB. L. 45, 98-99 (1976).

104. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

105. *See* Michelman, *supra* note 100, at 1223.

good. It is these ordinances that should not, and do not generally, survive constitutional scrutiny.

On this view, the just compensation requirement is a loss-spreading device, designed to assure that no individuals are singled out to bear unusually heavy burdens. And if the constitutional demarcation is itself a loss-spreading device, the damage remedy should also be evaluated, in the context of the constitutional design, for its loss-spreading implications and for its potential effects on governmental policy.

B. The Damage Remedy as a Loss-Spreading Mechanism

The majority in *Owen* recognized that "[n]o longer is individual 'blameworthiness' the acid test of [tort] liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct."[106] By imposing municipal liability in *Owen,* the Supreme Court assured that the harm caused by the constitutional violation involved would not be borne by Owen alone, but instead, would be spread among the taxpayers. By analogy, support for a damage remedy for unconstitutional land use measures rests on the premise that the resulting losses could better be borne by the taxpaying public rather than by the individuals affected by the ordinance.

Of course, a landowner who persuades a court to declare a land use ordinance unconstitutional as applied to his property has managed to avoid some, perhaps most, of the loss he would suffer from application of the ordinance. The question is whether the frequently significant interim damages suffered as a result of delay in securing the declaration of invalidity ought to be borne by himself alone or spread among his neighbors.

Whether the costs of delay in determining that an ordinance is unconstitutional should be spread is only one aspect of the larger questions: when and why should any losses caused by enactment of a land use regulation be borne by a single individual rather than spread among those who benefit from the regulatory scheme? The primary justification for land use regulation without compensation is the fear that if compensation was mandated, the costs of administering a compensation system would cause government to forgo regulatory measures that would produce a significant net increase in the aggregate social welfare. In Professor Michelman's terms,

> [a] decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.[107]

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106. 445 U.S. 622, at 657 (1980).
107. Michelman, *supra* note 100, at 1223.

Sometimes, however, a particular decision not to compensate would be difficult to fit into a consistent practice which does not include a significant long-run risk that some landowners will sustain concentrated losses. If that risk is great enough, the prospect of increased aggregate social welfare is unlikely to make potential victims of concentrated loss willing to bear the risk of loss. In that circumstance, if a project that imposes losses is to be undertaken, it should only be undertaken upon payment of compensation.

When the issue is the availability of interim damages, the risk of loss is limited to the costs imposed by delay in obtaining an adjudication of unconstitutionality. Suppose, however, that findings of unconstitutionality are reserved only for those ordinances so egregious that landowners cannot fathom how enacting them would, even in the long run, benefit similarly situated people. An affected landowner might not be convinced that invalidating these ordinances without awarding interim damages would "hold forth a lesser long-run risk to people like him" than would a rule of compensation for interim damages. But it is also likely that the demoralization costs incurred when an unconstitutional ordinance is enacted can be reduced markedly by an adjudication that the ordinance is invalid, even if the judgment is not accompanied by an award of interim damages.

In particular, if the cause of the loss is merely the delay attendant to adjudication, landowners may not regard their loss as unduly concentrated. First, some delay in obtaining the approval necessary for any development to proceed is unavoidable. The delay may be slight if the developer need wait only for issuance of a building permit or certificate of occupancy for a suburban house; it can often be measured in years if the developer needs approval from a large bureaucracy before embarking on an extensive or innovative urban project. Either way, however, so long as a developer can constitutionally be required to obtain the approvals, the developer is obliged to suffer at least reasonable delays while his application receives the necessary consideration.

When the delay involved is in obtaining an adjudication that a particular restriction is unconstitutional, it is a delay in seeking judicial redress from administration denials rather than a delay that can be categorized as "administrative." But that difference, by itself, would be of little practical importance to landowners or potential developers. If, out of fear of potential liability, those responsible for regulating land use took greater time and care in evaluating constitutional issues, the delay in obtaining judicial redress might be shifted to a delay, presumably noncompensable, in obtaining administrative approvals. The practical problem in either case would be that development could not proceed until the government bureaucracy has given its approval.

If delay in obtaining official approvals is a problem commonly faced by landowners, as well as by the population at large, then losses due to delay are not concentrated upon those landowners subject to unconstitutional ordinances. Except when the delays involved in obtaining an adjudication of unconstitutionality are perceived as different in nature from other delays commonly incurred in obtaining government approvals, the "demoralization cost,"

to use Michelman's term,[108] of not compensating landowners for the delay are likely to be low.

But government delay in land use matters is not always the product of the inevitably time-consuming process of evaluating a landowner's claim against relevant constitutional and statutory provisions. Sometimes delay is the result of deliberate obstructionism. Thus, an ordinance may be enacted, a permit denied, or a litigation started not because municipal officials believe there is any chance that the landowner can constitutionally be prevented from developing, but merely because the municipality wants to erect as many obstacles as is possible to discourage or at least postpone the inevitable. Delay that results from such obstructionism may create demoralization costs not associated with "ordinary" delays. Losses suffered as a result of obstructionist delays present a more compelling case for compensation because they are not regarded as prevalent and unavoidable incidents of securing government approvals. The case would not be compelling merely because an ordinance is ultimately declared unconstitutional; it would be compelling only if the landowner could demonstrate that the delay was motivated not by the government's desire for judicial resolution of the constitutional questions, but by factors normally regarded as outside the legitimate bounds of the government decisionmaking process.

If the fairness of a compensation decision is judged by comparing the demoralization costs of not compensating with the settlement costs[109] attendant to awarding compensation,[110] cases of municipal "bad faith," more than other cases involving unconstitutional ordinances, are strong cases for interim damage awards. Because the victim of municipal bad faith sustains, in Michelman's words, "an injury distinct from those sustained by the generality of persons in society,"[111] he may have a sense of exploitation not shared by a landowner who, like numerous others throughout society, has had vindication of his rights delayed by government bureaucracy. And while high demoralization costs are peculiar to victims of municipal bad faith, the settlement costs of providing compensation are at least as great when the municipality seeks an adjudication of constitutionality to relieve uncertainty rather than to foster delay.

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108. Michelman defines "demoralization costs" as "the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathies specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by the demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion." *Id.* at 1214.

109. Again following Michelman, settlement costs are "the dollar value of the time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs." *Id.*

110. Michelman suggests that a utilitarian calculus on the compensation question would require compensation if and only if demoralization costs exceed settlement costs. *Id.* at 1215. Michelman's own fairness principle suggests a similar comparison. *See id.* at 1223.

111. *Id.* at 1217.

If compensation is provided, the taxpayers generally must incur the cost of computing damages. If compensation is limited to delays pending adjudication of the constitutionality of land use restrictions, the effect may not be great, although computation costs may deter a few government programs with net social benefit.[112] On the other hand, delay pending constitutional adjudication is just one of many delays endured as a result of government operation. If compensation were required for all these delays, the computation costs involved would be considerable. And because the range of delays due to government operations is more diverse than if land use alone is considered, the chance is smaller that any one individual would suffer disproportionately from a failure to compensate for all government operation delays. Hence, there is less reason to incur the costs of computation.

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112. In addition to mechanical problems, damage computation raises conceptual difficulties in determining what damages to attribute to enactment of unconstitutional ordinances. The initial difficulty is fixing a date from which interim damages should accrue. Calculating damages from the date of the land use ordinance's enactment would be unfair to the municipality for two reasons. First, unless the landowner was ready to develop or sell at the time the ordinance was enacted, the ordinance, so long as it would ultimately be declared invalid, did him no harm. Second, measuring damages from the date of enactment might encourage landowners to delay bringing suit to allow damages to accumulate.

If interim damages are to be assessed, they ought to accrue from the time the landowner would have developed in the absence of the ordinance. It is at that point that the ordinance first harmed the landowner. But that point cannot be readily identified. Using the date at which a permit or other authorization to develop is sought would also overstate the damages if that were an established rule known to landowners. Every landowner affected by an ordinance of questionable constitutionality could immediately seek a permit to assure the accrual of damages from an early point. Especially because the permit will not be granted, the application is risk-free for the landowner, and it will be difficult for the municipality to establish that a permit applicant had no present intention to develop. On the other hand, a rule that measures interim damages without reference to a particular beginning event, like enactment of the ordinance or denial of a permit, will plunge the court into an investigation of the landowner's state of mind about development of his land.

The date of initial accrual, however, is not the only difficulty in assessing damages. Suppose, to borrow an example from Professor Robert Ellickson, that a landowner can obtain a 10% return on the value of his land and that his land is worth $500,000 unencumbered. Suppose too, that subject to the ordinance, the land is worth $300,000. If the landowner challenges the ordinance successfully, and does not develop the land in the interim, he loses $50,000 for each year of delay. The municipality could argue, however, that even subject to the restriction, the landowner could have received $30,000 annually, so that damages should be limited to $20,000. Professor Ellickson suggests that damages should be limited to that amount in order to encourage mitigation. *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L.J. 385, 496-98 (1977). But if the landowner actually had mitigated by developing in compliance with the ordinance, that development is not likely to be reversible after the ordinance is invalidated. The annual loss of $20,000 is not an interim amount for the period of delay, but a permanent damage figure that will not cease when the ordinance is invalidated. Professor Ellickson suggests the municipality ought to be liable for permanent damages in that circumstance. This suggested mitigation rule is one many municipalities could do without. No solution to the problem, however, is without significant disadvantages.

That damages are difficult to compute is not, of course, an excuse for denying relief. From a policy perspective though, the speculative nature of damages casts doubt on the wisdom of engaging in the process of awarding interim damages. *Cf.* Jaffe, *supra* note 84, at 225-26 (noting that "some injuries have cried out more for remedy than others" and stressing that modes of protection other than money damages are often appropriate for injuries arising from misuse of government power).

In addition, compensating for interim damages creates an unmeasurable risk that government policymakers will acquire an increased and unwarranted timidity, to the ultimate detriment of all landowners and taxpayers. The effect of compensating for interim damages on the decisionmaking process will be explored in greater detail below;[113] for present purposes it is enough to suggest that a decisionmaking process skewed toward inaction is a risk of compensating for interim damages.[114]

To summarize, the decisionmaking processes of government inevitably cause delay. So long as that delay is generally accepted and tolerated as a cost of government, and so long as the effects of government delay generally are endured by a broad cross-section of society, the loss-spreading justification for compensating those injured by government delay is not a strong one. The ommipresence of government and its delays will assure some spreading of losses; reflective citizens will choose to bear the risk of incurring the remaining unspread losses if the costs of spreading those losses are sufficiently great.

That is not to suggest that loss-spreading principles never support damage awards when the government acts unconstitutionally. Frequently, unconstitutional losses are concentrated on one or a few individuals with little likelihood that the remainder of the population would ever have to endure similar hardships. For instance, loss-spreading principles might support a damage remedy for some forms of abusive police behavior because few individuals are ever subject to police abuse or any comparable harm, and because a decision to leave the victims uncompensated cannot easily be fit into a broader scheme that would justify the failure to compensate.[115]

Similarly, when government delay is the result not of consideration and resolution of difficult policy or legal issues, but of a municipality's attempt to avoid its legal obligations, the resulting losses are more likely to be concentrated on few individuals rather than spread among the citizenry. Government is expected to take time to deliberate; government is not expected to knowingly obstruct the vindication of settled legal rights. Because society expects, or at least hopes, that government obstructionism is not prevalent, loss-spreading principles may impel compensation in those instances when obstructionism does cause losses even if losses caused by government delay are not generally compensated. Thus, loss-spreading principles may suggest awarding interim damages when a municipality enacts or seeks to enforce an unconstitutional ordinance "in bad faith"; unconstitutionality of the ordinance alone does not justify an award of damages on loss-spreading principles.

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113. *See infra* notes 116-78 and accompanying text.

114. *See infra* notes 122-27 and accompanying text.

115. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), for instance, could be justified on this ground. A similar rationale might justify a damage award in *Owen,* 445 U.S. 622.

IV. The Impact on Municipal Policy: The Efficiency Case for a Damage Remedy

Much of the law and economics literature focuses on means to internalize external costs and benefits, that is, means to visit upon decisionmakers all effects of their decisions.[116] When a municipality enacts an unconstitutional ordinance, damage liability visits upon the municipality the consequences of its decision. The Supreme Court, in *Owen v. City of Independence,*[117] made explicit its inclination to internalize the costs imposed by the decisions of municipal decisionmakers: "[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[118]

Although municipal liability socializes the costs of municipal action, it internalizes those costs only to the extent that municipal decisionmakers feel the pangs of municipal liability. Only if municipal decisionmakers, in contemplating potential action, are affected by the prospect of municipal liability for their actions does a damage remedy internalize the costs of municipal action. Unfortunately, the effects of municipal liability on individual decisionmakers raise unresolved empirical questions.[119] Officials contemplating municipal action might, or might not, consider the potential damage liability of taxpaying constituents regardless of the existence of a damage remedy. Much depends on the relationships among the municipal entity, its constituents, and its decisionmakers.[120]

Even were one to assume that socializing the costs of government action generally internalizes them, a more basic question would remain: is socialization of the costs of government action a sensible goal? Sometimes internalization of costs is inconsistent in principle with widely accepted activities of

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116. *See, e.g.,* G. Calabresi, The Costs of Accidents 68-95, 135-73 (1970); Demsetz, *Toward a Theory of Property Rights,* 57 Am. Econ. Rev. 347, 347-57 (1967).

117. 445 U.S. 622 (1980).

118. *Id.* at 651-52.

119. *See* Baxter, *Enterprise Liability, Public and Private,* 42 Law & Contemp. Probs. 45 (1978), suggesting that imposing liability on government enterprises for certain of its officials' actions is less likely to cause the enterprise to account for the consequences of those actions than is an enterprise liability role for private enterprises:

> When one turns to the question of government-enterprise liability, one must recognize that there is far less assurance that either intra-enterprise adaptation or output reduction will occur: in many instances output price is zero; in others price will bear no specific relationship to cost; incentives for cost minimization appear to be weak; and empire-building may constitute the dominant institutional motivation.

Id. at 51.

120. *See generally* Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship between Structure and Style in American Administrative History,* 10 Law & Soc. Rev. 187 (1976). Nelson's historical study explores the relationship between the means of acquiring administrative office and the process of making administrative decisions.

government. For example, all intentionally redistributive policies are designed to create external benefits and to impose external costs. Or when government enacts rules that seem less consciously redistributive—rules forbidding theft or pollution, for example—society would not want government to bear the losses that such rules impose on thieves and polluters. The rules themselves are designed in part to force potential thieves and polluters to internalize the costs of their activities. To force government to bear the costs imposed by its rulemaking activity would defeat the purpose of the government activity.

But if all the costs of government actions are not to be socialized, should the costs of any particular government actions be socialized? For instance, would government processes be improved if the losses imposed by unconstitutional government actions were socialized? Would they be improved if the losses suffered as a result of unconstitutional land use enactments were socialized? In addressing these questions, the next two sections will discuss first, the impact on the policymaking process of a general rule that would make government liable whenever policymakers make unconstitutional decisions, and second, the particular justifications that support municipal liability for unconstitutional land use ordinances even if a more general damage remedy is not available.

A. Municipal Liability as "an incentive for officials . . . to err on the side of protecting citizens' constitutional rights"[121]

Even if it would be wrong in principle and difficult in practice to internalize the costs of all actions taken by government decisionmakers, some costs might warrant attempts at internalization. For instance, constitutional limitations may be considered sufficiently important that government decisionmakers should not approach them without weighing the risk of potential municipal liability. The Supreme Court's opinion in *Owen* appears to rest, in part, on that premise.[122] Of course, because of the prohibitions on damage awards against the states and the federal government,[123] the principal focus of the debate over government liability has been at the municipal level.

1. The Damage Remedy and Skewed Incentives for Municipal Inaction

A rule that subjects municipalities to liability in damages for all policy decisions that transcend constitutional limitations, but for no other decisions, presents at least two problems. First, a blanket liability rule could provide a general incentive for government inaction because no comparable damage sanction would attach to a decision not to act. Second, a blanket liability

121. Owen v. City of Independence, 445 U.S. 622, 652 (1980).
122. *Id.*
123. *See supra* notes 66-94 and accompanying text.

rule could engage municipal officials in a level of constitutional decisionmaking that is either wasteful or counterproductive in the context of our system of government.

Because constitutional standards are flexible and often ambiguous, the effect of municipal liability on official behavior, if there is any, will be to deter enactment of some ordinances that the Supreme Court would hold constitutional as well as some it would hold unconstitutional. Presumably, the constitutional ordinances not enacted due to the deterrent effect of the threat of damages are ordinances with some social value, at least according to the branches of government that enacted them. Deterring unconstitutional activity, then, is not costless.[124]

Moreover, to the extent that a damage remedy would produce an impact on municipal decisionmaking, the impact would be to deter only municipal policies that require action. Municipal policy may frequently be not to act on a particular problem, and that form of municipal policy would remain undisturbed by a damage remedy. As a result, the damage remedy would serve as a general judicial prod toward municipal inactivity.[125]

Without the threat of municipal liability, a municipal legislature would be free to enact ordinances it believed desirable, and, if the ordinance were challenged, to have a determination of constitutionality made by a court. Because advisory opinions are not generally available,[126] challenge to the ordinance after its enactment would be the only available method for testing its constitutionality. But if damages were imposed for unconstitutional enactments, the legislature would not be able to test the ordinance's constitutionality without risking municipal liability. Since no similar risk would accompany a decision not to enact an ordinance, the damage remedy would provide some incentive for legislatures not to act.

As already noted, the risk of liability would force a majoritarian legislature to internalize costs that would otherwise be shouldered by a small class of constituents—costs the legislature might ignore if judicial review were the only redress available to the aggrieved parties. As a result, municipal liability might

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124. A simple but extreme example, not involving financial liability, is illustrative: the fourth and fifth amendments to the Constitution restrict police activity. On the other hand, a municipality has no federal constitutional obligation to maintain a police force. Since hiring a policeman increases the risk of fourth and fifth amendment violations, a municipality seeking to minimize the risk of constitutional violation would not hire a police force, nor would it order its officers to conduct any searches because of the risk that some searches would be deemed unreasonable and therefore unconstitutional. Although a municipality could order a more discriminating prohibition on certain types of searches, such a prohibition might nevertheless result in some unconstitutional searches that would be avoided by a blanket proscription of searches. Any rule of law designed to deter unconstitutional police action and to encourage police to "err on the side of protecting citizens' constitutional rights" also serves to deter constitutional police action, including apprehension of criminals.

125. *Cf.* Schuck, *supra* note 68, at 309-10; Mashaw, *supra* note 93, at 29-33 (discussing potential effects of asymmetry when government officer liability is at issue).

126. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947).

promote more efficient decisionmaking and reduce the risk of majority oppression of what may be a disfavored or nonvoting minority.[127]

Majority oppression and inefficient decisionmaking, however, can result as well from legislative inaction as from legislative action. Just as an unrestrained majoritarian legislature might enact a program that provides marginal benefit to many at substantial cost to few, a legislature could introduce the same potential inefficiency and oppression by declining to enact a program that would provide substantial benefit to one group at trivial cost to the remainder of the population. But if legislative inaction results in inefficiency when compared with enactment of a proposed ordinance, or if a legislature declines to enact an ordinance that will protect or benefit a vulnerable minority at the expense of majority wishes, money damages are not available. The lack of parallel treatment for inefficiencies or oppression caused by legislative action and those caused by inaction makes it difficult to justify municipal liability for all unconstitutional actions as a judicial assurance that the legislative process is working fairly and efficiently.

2. The Institutional Consequences of Municipal Liability

To the extent that municipal officials are concerned about avoiding municipal liability, the imposition of a damage remedy would require them to evaluate more closely the constitutionality of their actions. One might ask, however, whether evaluation of constitutional issues would require municipal officials to expend disproportionate time and energy for what may be a small gain, if that, in diminished constitutional infringement.

Even if officials did diligently attempt to conform their behavior to constitutional norms, the consequences for enforcement of constitutional rights are not apparent. The problem is partly one of definition. No particular determination about the scope of a constitutional right is "correct" unless a particular determiner is endowed with the power to make a final, binding, and therefore "correct" determination. If an official's own evaluation of constitutional questions is deemed final, then diligent official efforts to conform to norms will, by definition, have eliminated entirely infringement of constitutional rights by government officials. But if the official's determination is judged by reference to the standards of another decisionmaker deemed to be authoritative (and it generally but not invariably is)[128] then, again by definition, the official will commit errors that lead to infringement of constitutional rights. No official is likely to succeed where so many have failed—predicting with perfect accuracy the judgments which the "authoritative" decisionmaker would reach.

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127. *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (concluding that "judicial review . . . can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack"). *Id.* at 181.

128. Professor Lawrence Sager has argued that a decision by the Supreme Court not to enforce an asserted constitutional right should not always be regarded as a decision that the right

To the extent that damages are awarded to deter unconstitutional behavior, they are generally designed to deter behavior that the Supreme Court defines as unconstitutional.[129] And the municipal officials involved in the land use regulation process, because of lack of training and the pressures of their position, are not likely to be adept at predicting the Supreme Court's course or even at understanding and responding to a relatively clear course of Supreme Court authority.

Of course, many government officials face constitutional questions without legal training and without the judiciary's insulation from political pressures. The problem is not peculiar to local legislators and enforcement officials. For instance, Congress is frequently confronted with the constitutional implications of proposed legislation and the appropriate congressional response to these constitutional questions has been a matter of dispute. President Franklin Roosevelt, in urging passage of a piece of New Deal legislation of questionable constitutionality, once suggested that the constitutionality question be left entirely to the courts:

> But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality . . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation.[130]

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is not constitutionally protected and ean be ignored by other government officials. Sager notes that a decision not to enforce a right may rest on institutional, rather than analytical, considerations, and that the Supreme Court may decline enforcement precisely because it believes enforcement is better entrusted to other branches. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms,* 91 HARV. L. REV. 1212, 1217-28 (1978). In these situtations, Sager urges that officials should "regulate their behavior by standards more severe than those imposed by the federal judiciary." *Id.* at 1227.

To the extent that the Supreme Court sustains damage claims for constitutional violations, however, it implicitly concludes that there are no institutional barriers to judicial delineation of the scope of the right involved. And if the Court's limitations on the scope of the right are based on analytical considerations, not institutional ones, then the constitutional norms are not "underenforced," and government officials should not be required to be more protective than the Supreme Court.

In other words, if the right involved is "underenforced" for institutional reasons, then the Supreme Court is likely to be institutionally disabled from formulating a damage remedy. If the Court has the capacity to award a damage remedy, then the right is not underenforced, and we need not encourage evaluation of rights by other officials in order to assure full implementation of the right involved. Moreover, the notion that damages must be made available to vindicate constitutional rights is inconsistent with Sager's basic premise that not all legal obligations need be vulnerable to external enforcement. *Id.* at 1221.

129. When the Supreme Court considers awarding damages to those injured by unconstitutional activity, constitutional determinations by other officials are considered only to the extent that the Supreme Court has granted qualified privileges for "good faith" activities of those officials. *See, e.g.,* Butz v. Economou, 438 U.S. 478 (1978).

130. Letter from President Franklin D. Roosevelt to Congressman Samuel B. Hill (July 6, 1935), in IV FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES 297-98 (S. Rosenman ed. 1938). *See* D. MORGAN, CONGRESS AND THE CONSTITUTION 6 (1966).

More recent surveys suggest that many members of Congress do not believe that Congress should form its own considered judgment on constitutional questions, but should instead leave those questions for the judiciary.[131] This attitude probably reflects two significant concerns. First, if Congress abstains from enacting legislation based on constitutional reservations that the Supreme Court does not share, Congress will have forgone the opportunity to enact legislation its members believed desirable.[132] Second, on many issues, even an earnest congressional effort to anticipate the Supreme Court's resolution of constitutional questions is likely to fail. Many congressmen lack legal training. Moreover, the political environment in which members of Congress function minimizes the chance that congressional resolution of constitutional issues will approximate that of the courts.[133] Perhaps equally important, however, is that Congress, in evaluating a bevy of social factors and making broad policy judgments, cannot always predict the effect an enactment will have in a particular case that subsequently arises.[134]

Of course, the notion that Congress should forgo consideration of the constitutionality of legislation it enacts has engendered strong and reasoned opposition.[135] But that opposition is premised on the belief that Congress should evaluate constitutional questions independently, not that Congress should attempt slavishly to conform its own behavior to its predictions of future Supreme Court actions.[136] Imposition of a damage sanction for failure to act in accordance with Supreme Court standards would be inconsistent with that premise, and indeed, advocates of congressional evaluation of constitutional issues have not suggested imposition of a sanction for enactment of unconstitutional legislation.

This digression on the role of the Constitution in congressional deliberation suggests some difficulties with conferring on municipal officials, and in particular local legislatures, the responsibility for making constitutional determinations. The institutional features that make congressional resolution of

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131. D. MORGAN, *supra* note 130, at 8-10; *see also* Mikva & Lundy, *The 91st Congress and the Constitution,* 38 U. CHI. L. REV. 449, 472 (1971).

132. *See, e.g., supra* text accompanying note 130. *See also* Mikva & Lundy, *supra* note 131, at 483, quoting remarks of Representative Matsunaga: "Let us, therefore, carry out our responsibilities as Members of Congress and legislate as we deem proper and let the Court decide whether or not we acted beyond our constitutional authority. Let us do now what we think is right." 116 CONG. REC. 20,159 (1970).

133. *See* Mikva & Lundy, *supra* note 131:

> [I]t must be concluded that in the rough and tumble of parliamentary debate, careful, meticulous reasoning about matters of constitutional interpretation comes in a very poor second to arguments of urgent necessity, debate on issues of public policy, and—not infrequently—sheer emotion. Careful and precise legal and logical distinctions are far more difficult to make, or at least to make convincingly, on the floor of the House than before the bench.

Id. at 459.

134. *Cf.* Schuck, *supra* note 68, at 355 (discussing relative competencies of the separate branches of government).

135. *See* D. MORGAN, *supra* note 130; Sager, *supra* note 128, at 1222-28.

136. D. MORGAN, *supra* note 130, at 361-62, 1227; Sager, *supra* note 128, at 1227.

constitutional issues problematic would only be exacerbated if zoning boards or other elected municipal bodies were expected to anticipate the Supreme Court's judgment on the constitutionality of municipal ordinances. First, while Congress might be able to inform its deliberations by making more extensive use of constitutional law experts, that option, because of its expense, may be less available to local legislatures. Second, few local issues are more politically charged than zoning questions. Finally, because the validity of local land use ordinances, much more than the validity of federal statutes, is likely to turn on applications to particular cases, the difficulty of foreseeing potential problems is multiplied.[137]

The decision to hold municipalities liable for the constitutional derelictions of its policymakers has another aspect. Not only may those officials be poor predictors of Supreme Court behavior, but if they do engage in Supreme Court prediction, they may be poorer policymakers. First, they may abdicate any attempt at independent constitutional judgment. Second, they may be more timid as policymakers. It is this second concern that has led drafters of modern legislation waiving government tort immunity to retain a "discretionary function" exemption.[138] To whatever extent a discretionary function exception is a desirable safeguard for the policymaking process, one would expect a similar shield from liability for constitutional violations.

In *Owen,* however, the Court declined to apply the discretionary function immunity because

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137. *Cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (noting that whether a deprivation is of a nature that warrants compensation "is a question of degree—and therefore cannot be disposed of by general propositions"). Because of the disparity of impact that even a single land use restriction can have on various parcels, determinations of constitutionality would require detailed study of the numerous potential applications of the restriction.

The fact situation in Agins v. City of Tiburon, 145 Cal. Rptr. 476 (1978), *aff'd,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980), is illustrative. In Tiburon, a city of about 6,000 residents, the city council amended its zoning ordinance to designate certain property for residential planned development and open space uses. The designated property included a five-acre parcel owned by Agin. The new designation limited development to a minimum of one residence per acre. The ordinance was enacted in response to a new California statute requiring each locality to develop an open-space plan and to take steps to preserve open spaces.

To evaluate conscientiously the constitutionality of the ordinance it enacted, the Tiburon city council would have had to obtain both information about the impact of the ordinance on all affected parcels and legal advice based on that information. The city's decision to hire private consultants to prepare advisory reports on development of an open-space plan indicates that staff resources were probably inadequate to assist the council in its evaluation of constitutionality. Moreover, even with more substantial resources or with private consultants, the cost of obtaining that information would be high and the accuracy of the data obtained would likely be low. Considering alternative plans would likely require compilation of data from many parcels, entailing significant cost. In addition, accuracy of calculations made by the municipality or its agents would not be scrutinized in an adversary proceeding that would induce each opposing party to produce relevant information favorable to its cause.

138. *See, e.g.,* 28 U.S.C. § 2680(a) (1982); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 245 (1965) (discretionary immunity for government officers grounded in part on fear that officers would otherwise "hesitate to do what should be done").

> a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.[139]

The distinction reminds one of an earlier Court's conclusion that constitutional interpretation was merely a matter of laying the constitution next to a challenged statute and deciding "whether the latter squares with the former."[140] As Professor Peter Schuck has observed, given the ambiguity of many constitutional standards, application of those standards "necessarily involves second-guessing the discretionary decision and 'interfer[es] with the . . . government's resolution of competing policy considerations.' "[141]

3. Summary

The value of municipal liability as a policy tool when municipal enactments exceed constitutional limitations depends to some degree on the goal toward which the tool is directed. If the goal is a narrow one—to prevent municipalities from engaging in activities defined by the Supreme Court as unconstitutional—municipal liability is likely to be a tool of at least marginal effectiveness. But municipal liability may be no more than marginally effective for two reasons. First, how municipal decisionmakers actually react to the prospect of municipal liability is uncertain. Second, even if municipal officials react to a liability rule by seeking to avoid liability, most municipal officials are not well suited, by training and position, to predict accurately the course of Supreme Court behavior on constitutional law issues.

The effectiveness of a liability rule, however, comes at the cost of additional effort by municipal officials to review their decisions for conformity with Supreme Court decisions. By comparison, if only invalidation were available as a remedy, municipal officials would presumably engage in less extensive review of Supreme Court precedent, but still would be unlikely to

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139. 445 U.S. 622, 649 (1980).

140. United States v. Butler, 297 U.S. 1, 62 (1936).

141. Schuck, *supra* note 68, at 354 (quoting *Owen,* 445 U.S. at 649).

In a footnote to his dissent in *San Diego Gas,* Justice Brennan queried: "After all, if a policeman must know the Constitution, then why not a planner?" 450 U.S. 621, 661 n.26 (Brennan, J., dissenting). Professor Norman Williams has responded caustically, but not inaccurately:

> In view of the record in these two cases [*Agins* and *San Diego Gas*], the obvious reply *is* obvious: and why not a Supreme Court Justice? (At least on the relatively simple question of when a controversy is ripe for decision.) Are we to anticipate that The Court will shortly issue a standard Miranda warning for planners, which makes it unmistakably clear in all instances what is a valid and an invalid regulation, so that planners may know? If so, we have a long way to go from the analysis in the Grand Central case.

5 N. WILLIAMS, AMERICAN PLANNING LAW LAND USE AND THE POLICE POWER § 158.09, at 66 (Cum. Supp. 1983) (emphasis in original).

enact patently unconstitutional ordinances. After all, enacting an ordinance is not a costless endeavor, and if the municipality could, without great effort, ascertain that a potential enactment would be unconstitutional, the municipality is unlikely to incur those costs except in the instances where the municipal purpose is merely to secure the delay attendant to an adjudication of unconstitutionality.

In a broader context, municipal liability may not only be a costly method for securing constitutional rights; it may also have a serious and negative impact on the policymaking process. For instance, to the extent that government liability causes policymakers to conform their decisions to Supreme Court precedent, government liability will prevent policymakers from conducting independent constitutional review. And, in a government of separate but interdependent branches, if there is a reason to have branches other than the judicial branch engaging in constitutional review, the reason lies in the ability of the elected branches to bring a different perspective to constitutional questions, not in their ability to parrot Supreme Court doctrine.[142]

In addition, if the goal of a municipal liability rule is protection against inefficiencies or majority oppression, a liability rule is a double-edged sword. While a municipality liability rule might discourage policymakers from enactments that exceed constitutional limitations, it would also provide incentives toward policymaking inaction, which could also result in inefficiency and majority oppression.

Of course, none of the foregoing discussion establishes that municipal liability for unconstitutional action is always unwise, if, in light of section 1983[143] and *Owen,* that question retains any practical importance. The more a constitutional norm can be reduced to hard and fast rules, and the more ministerial the function of the official involved, the less persuasive opposition to a damage remedy becomes.[144] Moreover, municipal liability is particularly attractive when no other remedy is available to an aggrieved party. Thus, in cases imposing liability for unconstitutional police conduct, a municipal immunity rule might leave injured victims without relief, especially when their own conduct has been most innocent. But when municipal policymaking activity is involved, especially in areas of constitutional uncertainty, a blanket rule of liability might be overbroad.

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142. *See* D. MORGAN, *supra* note 130, at 334-39. Mikva and Lundy have also justified independent constitutional review as a means of reducing interbranch confrontation. *See* Mikva & Lundy, *supra* note 131, at 498.

143. 42 U.S.C. § 1983 (1982).

144. For instance, although constitutional police activity is an important social goal, rules governing impermissible police activity may be framed with enough clarity that few officers will be deterred from engaging in valuable and constitutional activity. The "*Miranda* warning" provides an example. By giving police explicit instruction about how to behave in particular situations, the risk of unconstitutional behavior without deterring constitutional behavior is limited. Of course, not all rules governing police behavior can be made so explicit, and police officers cannot usefully be treated as programmed automatons. But a large number of constitutional problems they encounter can be reduced to rules of behavior. *See generally* McGowan, *Rule-*

B. *Municipal Liability for Unconstitutional Land Use Ordinances: Efficiency Concerns in the Land Use Context*[145]

If liability were imposed as a blanket rule for all unconstitutional municipal enactments, then money damages would of course be available to victims of unconstitutional land use ordinances. But if a blanket liability rule is rejected, land use ordinances would appear to be particularly inappropriate candidates for a damage remedy. Land use policies are an important, sometimes preeminent, focus for municipal policymaking. However the ordinance-imposing activities of municipalities are categorized, whether as legislative, executive, or administrative,[146] the zoning and planning process requires the exercise of discretion by municipal decisionmakers, and Supreme Court precedent provides precious little guidance to those decisionmakers.

Professor Robert Ellickson has suggested, however, that the background against which municipal decisionmakers currently consider suburban growth controls contains structural incentives to ignore significant social costs produced by those controls.[147] In particular, he suggests that the structure of the housing market frequently enables a municipality to act as a cartel, restricting the level of housing development to reap monopoly profits for the cartel's members—those who already own homes within the municipality.[148]

Making and the Police, 70 MICH. L. REV. 659 (1972) (suggesting increased internal rule-making by police as a method of avoiding extensive judicial intervention).

145. In a recent article on the efficiency implications of a damage remedy, Professors Blume and Rubinfeld examined the impact of land use restrictions on the land market. Blume & Rubinfeld, *supra* note 17. They demonstrated that the difficulties of obtaining actuarially fair insurance can produce inefficiencies in the land market if landowners are risk averse. *Id.* at 582-97. Blume and Rubinfeld suggest that a compensation remedy would provide, in effect, government-sponsored mandatory insurance against the risks of regulation. *Id.* at 597-99.

Blume and Rubinfeld do not conclude, however, that a compensation remedy should always be available. First, they recognize that the administrative costs of a broad compensation remedy are quite high. *Id.* at 599-606, 609, 624. They also recognize that a compensatory remedy directed particularly at risk-averse landowners is workable only if the risk averseness of individual landowners can be measured, a task they concede creates administrative problems of its own. *Id.* As a result, after only a brief examination of the effects of a damage remedy on government process, *id.* at 614-18, 620-23, they conclude:

> Compensation is costly in an economic sense, measured by the administrative and other economic costs associated with the payment of compensation. Administrative costs can be substantial, especially when a broad compensation rule is implemented. Finally, a compensation system that implicitly subsidizes one form of land use relative to another can add distortions to land use decision making. These distortions are more severe than the possible distortions due to uninsured risk. We are not prepared at this point to work out the details necessary to apply our rule for determining when compensation should be paid.

Id. at 624.

146. Professor Rose has recently explored some of the difficulties in categorizing the zoning and planning process. *See* J. ROSE, PLANNING AND DEALING: PIECEMEAL LAND CONTROLS AS A PROBLEM OF LOCAL LEGITIMACY (19xx).

147. Ellickson, *supra* note 112, at 404-10.

148. *Id.* at 400-01, 424-35.

Ellickson concludes that damage liability could reduce this inefficiency of monopoly power in a way that injunctive relief cannot.[149] To the extent Ellickson is right that market structure creates a systematic bias for officials to enact inefficient controls, and to the extent that structure extends to land use restrictions other than suburban growth controls, Ellickson's conclusion deserves careful examination. His model, therefore, serves as a primary focus in this section.

1. Ellickson's Model

In his article, Professor Ellickson mounts an attack on the use by suburban officials of land use controls—excessive minimum lot sizes and building standards, development charges, quotas on construction—to prevent or limit growth within the municipality. Ellickson's attack is based in part on equitable concerns,[150] but also on the inefficiencies created by such controls.[151]

Ellickson demonstrates that a suburb without perfect substitutes for housing consumers, but with the power to enact zoning controls, has a degree of monopoly power in the marketplace. To the extent that municipal officials act, in effect, as agents for a homeowner cartel, the municipality, like other monopolists, has the power to increase the market price for its residential housing product by limiting production.[152] (See Fig. 1.) The municipality would maximize revenue for the homeowner cartel by assuring that housing production was at the level (Q_g) where marginal revenue equals marginal cost. Production would be lower and housing prices higher than if production were expanded to the point (Q_e), the competitive equilibrium point, at which demand and marginal cost are equal. As a result, although more housing could be built at a cost lower than the maximum consumers are willing to pay, that additional housing would not be built. The resulting inefficiency,[153] the inefficiency of monopoly power, leads Ellickson to seek solutions that more closely approximate a competitive equilibrium.

As one remedy, Ellickson suggests an award of damages to housing buyers whenever excessive growth restrictions increase the price of housing above the competitive equilibrium price (P_e). The damage remedy, so computed, eliminates the incentive to price higher than the competitive equilibrium price,

149. *Id.* at 437.

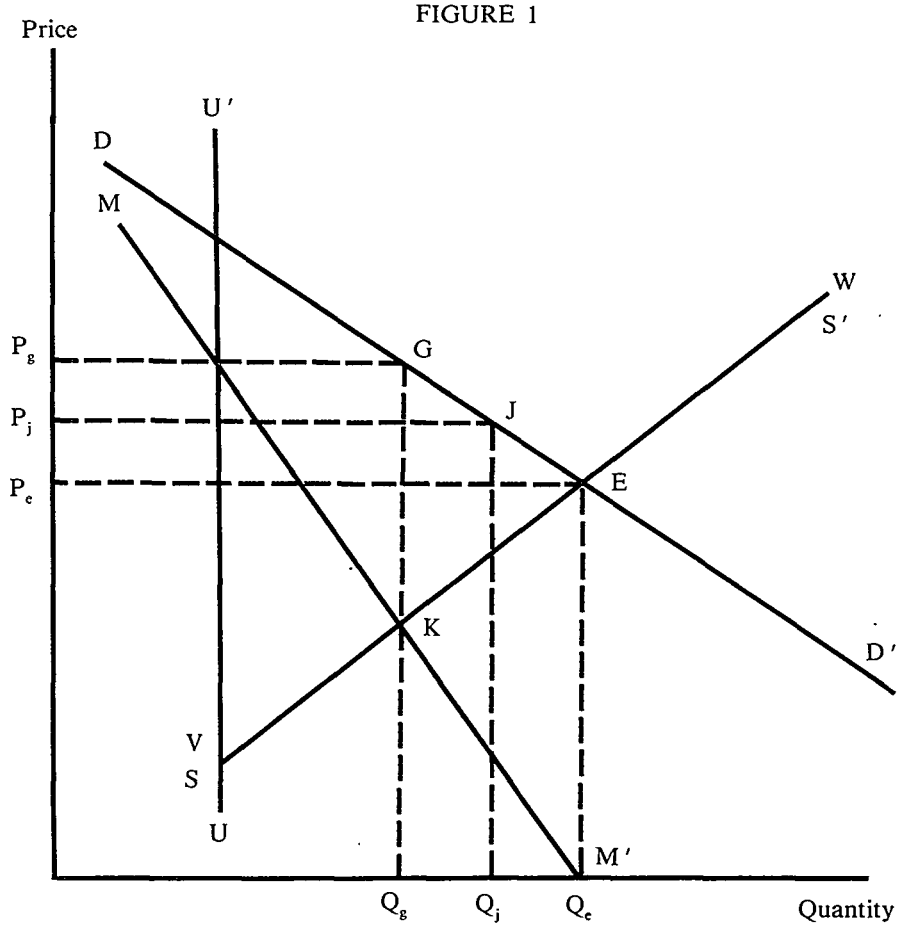
150. *Id.* at 450-65. Ellickson notes that legal rules governing municipal taxation and provision of services serve to redistribute wealth. He concludes that those rules should "ensure that the beneficiaries and victims of municipal wealth redistribution programs are determined in a horizontally fair manner." *Id.* at 454.

151. *Id.* at 424-50.

152. In fact, the motivation of the homeowners may be not simply to increase the market price for their product, but more to impose price restrictions on entry into the community as a means of excluding "undesirable" neighbors. Whatever the motivation, a homeowner cartel would be able to increase the market price for residential housing under Ellickson's model.

153. The competitive equilibrium point is probably, although not necessarily, Pareto-superior to the monopoly equilibrium point. *See infra* note 175.

FIGURE 1



and causes the municipality to abandon its growth restriction, unless restricting growth is, in itself, so important to the municipality that it warrants absorbing the monetary loss that will result. At the competitive equilibrium point, the demand for housing equals the cost of producing it, eliminating any inefficiencies of monopoly power.

2. The Ellickson Model and Constitutional Review

Ellickson does not suggest that constitutional restrictions on land use enactments be transformed into a never-ending quest for competitive equilibrium. Instead he begins with the premise that land use restrictions are valid without compensation if the restrictions are "harm-preventing" or alternatively, if the

fairness test developed by Professor Frank Michelman can be met.[154] Restrictions which are not "harm-preventing" and which fail the Michelman fairness test, by contrast, are unconstitutional and qualify for Ellickson's damage remedy. Ellickson contends that there is an ascertainable difference between restrictions that prevent harm and those that confer benefits, and defines a harmful land use activity as "one that falls below the standards normally met by landowners."[155]

Ellickson himself concedes that there are difficulties with his formulation. First, land uses may be different in kind, but difficult to assess for relative quality, especially when the disparity in type of use is sufficiently great. For instance, to what extent is a luxury apartment building "below the standards normally met by landowners" in an area dominated by modest two-family homes? But even assuming that quality comparisons are possible, Ellickson does not explain his choice of the median quality of existing land uses as the standard by which future land uses are to be judged. In a sense, any new development which is more attractive than the worst existing use, but less attractive than the best existing use, has the potential for both conferring benefits and causing harm to different segments of the community.[156]

Moreover, Ellickson's basic premise that land use restrictions without compensation ought to be permissible only when the restrictions are harm-preventing has little support in judicial precedent or scholarly commentary.[157]

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154. Ellickson, *supra* note 112, at 419-20. Ellickson qualifies his formulation somewhat: "When the challenged ordinance is one that restricts nuisance activities, a landowner should be able to prevail on a taking claim only when he can prove that the ordinance is grossly inefficient—that is, that its costs vastly exceed its benefits." *Id.* at 419.

Ellickson does not argue, however, that the ordinance should be deemed a taking if the cost *to the landowners* exceeds the benefit; he is concerned with all costs and benefits.

155. *Id.* at 422.

156. For instance, in an undeveloped tract between a rundown slum and one-family homes on quarter-acre lots, a mobile home park or a development of prefabricated homes may be either a welcome addition or an unwanted scourge depending on one's perspective.

157. In support of the harm/benefit test, Ellickson cites FREUND, THE POLICE POWER 546-47 (1904) and Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650, 663-69 (1958). He notes criticism of this view in Michelman, *supra* note 100, at 1196-1201, 1235-45, and Berger, *A Policy Analysis of the Taking Problems,* 49 N.Y.U. L. REV. 165, 172-75 (1974). Ellickson, *supra* note 112, at 419 n.89.

For another criticism of attempts to embrace all takings law in simple formulations, and for criticism in particular of the Ellickson approach, see Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies,* 75 COLUM. L. REV. 1021, 1024-33 (1975). In particular Professor Costonis notes: "Even Procrustes, I suspect, would shrink from confronting with a single measuring rod areas as diverse as growth management resource protection, incentive zoning, aircraft overflight, interim zoning and nonconforming use amortization; and these are only a few of the contexts whose unique features so complicate the compensation question." *Id.* at 1026.

Judicial treatment of the harm/benefit test has been no more kind. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), Justice Rehnquist's dissent advocated a modified nuisance-based test. *Id.* at 146 (Rehnquist, J., dissenting). Like Professor Ellickson, Justice Rehnquist was willing to concede the propriety of non-nuisance based restrictions where the regulatory scheme creates an "average reciprocity of advantage." *Id.* at 147. But Justice Rehnquist's analysis was rejected by a six-member majority of the Court. *Id.* at 133-34 & n.30.

Whatever the merits of Ellickson's criteria, if courts continue to make decisions about constitutionality without reference to the criteria, adoption of Ellickson's proposed damage remedy will not have the effect Ellickson seeks.

3. Difficulties with Ellickson's Model

Even if courts were to apply Ellickson's own constitutional standards to all land use ordinances, efficiency would not necessarily be promoted by universal application of a damage remedy. First, as Ellickson himself recognizes, his analysis of suburban growth controls is not entirely adaptable to all municipalities or to all forms of land use control.[158] Ellickson's model assumes a municipality in which all or nearly all voters are homeowners and in which, on any individual issue, the majority rules.[159] Ellickson contends that the assumption of majoritarian control is reasonable for many suburban communities, but recognizes that it is less plausible in other municipalities.[160] Finally, even in municipalities that are ruled largely by the preferences of a majority of homeowners, not all land use controls present the same potential for abuse of monopoly power as suburban growth controls.[161]

Moreover, even on its own terms, Ellickson's analysis is not without difficulties. This section explores three such difficulties.

a. The Harm/Benefit Dichotomy

Ellickson's efficiency discussion starts with the premise that restrictions on harm-producing land uses are unconstitutional unless they meet the Michelman fairness test. Ellickson does not purport to ground that suggested constitutional standard in efficiency considerations. Yet his entire efficiency discussion is dependent on his harm/benefit distinction which, if applied, might itself encourage an inefficient level of development.

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158. Ellickson, *supra* note 112, at 409-10.

159. *Id.*

160. *Id.* at 404-10.

161. For instance, landmark regulation may not be subject to the monopoly power abuses involved when a suburb attempts to restrict growth. Landmark preservation is likely to proceed on a highly individualized basis, making it more difficult for the municipality to control the aggregate supply of new construction by adjusting its landmarks policy.

In addition the number of candidates for landmark restrictions in any municipality is probably a small percentage of the total number of sites developed or available for development. *But cf.* Richland, *The Case for Tightening the Reins on Landmarking,* N.Y. Times, Feb. 21, 1982, § 8 (Real Estate), at 1, col. 3, *with* Menapace, *Landmark Authority Is Wisely Applied,* N.Y. Times, March 7, 1982, § 8 (Real Estate), at 1, col. 6 (expressing differing views on the effect existing landmark regulations have on development in New York City). Therefore, even liberal use of landmark restrictions is not likely to have a substantial effect on growth in the municipality. Moreover, a landmark preservation scheme is likely to be unconstitutional for failing to advance a public purpose if landmarks are chosen based on the likelihood that the restrictions will maximize revenues of existing homeowner members of the cartel. *Cf.* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied,* 423 U.S. 808 (1975).

Let us accept Ellickson's hypothesis of a suburb without perfect substitutes, and with a demand curve for housing (*DD'*) that is downwardly sloped. (See Fig. 1.) The supply curve for used housing (*UU'*) is vertical, illustrating the inelasticity of that supply. The supply curve for new housing (*SS'*) is a traditional, upwardly sloped curve. The aggregate supply curve (*UVW*) then, is the sum of the supply of new housing and of used housing at any given price. The suburb's marginal revenue curve (*MM'*) is located below the demand curve.

Ellickson argues that, absent congestion costs and presumably other externalities, the most efficient level of housing production is Q_e, the quantity of housing produced at the point where the market supply curve intersects the market demand curve.[162] To the extent that a suburban municipality can act as a monopoly cartel, it will restrict housing production to Q_g, the quantity of housing produced at the point where the supply curve intersects the cartel's marginal revenue curve. At the Q_g level of production, Ellickson argues, there is a deadweight social loss of *GEK*. Additional housing will not be produced, even though at every quantity between Q_g and Q_e consumers would be willing to pay more for an additional unit of housing than the unit would cost. To eliminate the loss, Ellickson proposes a damage remedy for consumers. If home buyers were entitled to recover from the municipality the difference between the monopoly-engineered price of housing and the equilibrium price (P_g-P_e), the cartel's financial incentive to restrict housing production would be eliminated. Removing that incentive, Ellickson suggests, would result in an increase in housing production to the efficient equilibrium point.[163]

In constructing his efficiency argument, however, Ellickson ignores his own premise that municipalities are entitled to restrict without compensation "harm-producing" land uses. But some, perhaps much, of the demand for housing in the municipality is likely to be for housing that meets Ellickson's criterion for harm-producing uses—uses below the standards usually met by landowners. For instance, if housing demand in a suburb of single family homes is in some measure demand for apartments, Ellickson's test would permit the municipality to forbid apartment development. That prohibition, however, would reduce production and increase housing prices just as surely as development restrictions that are not "harm-producing."

Assume, for instance, that Ellickson's "harm-producing" standard would permit the municipality to limit production to Q_j. That limitation would cause inefficiency in the sense that every additional unit of production between Q_j and Q_e would cost less to produce than consumers would be willing to pay for it. This inefficiency is apparently one Ellickson is willing to accept. But once that inefficency is accepted, Ellickson's model no longer rests on efficiency considerations alone; distributional concerns have been introduced. At

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162. *See* Ellickson, *supra* note 112, at 431, 436.
163. *Id.* at 436-38.

that point, if one does not accept Ellickson's distributional notions, in particular his harm/benefit formulation, his damages model is less persuasive.

In terms of Ellickson's model, there are two alternatives. Consumers harmed by growth controls may be awarded either P_g-P_e or P_g-P_j. If they are awarded P_g-P_e, the municipality will, in effect, be precluded from imposing any land use restrictions, whether they confer benefits or prevent harm, without compensating consumers for the resulting increase in housing prices. That result runs contrary both to Ellickson's premise and to established law. If consumers are awarded P_g-P_j the remedy is not grounded on efficiency considerations but on the conclusion that the municipality is entitled, on nonefficiency grounds, to restrict production to P_j. At that point the crucial step becomes the location of P_j. Only if one accepts the Ellickson harm/benefit formulation would one locate P_j where Ellickson does. And Ellickson never contends that the harm/benefit formulation rests on economic efficiency grounds.

In sum, Ellickson's argument is a bit schizophrenic. If his damage remedy is designed to eliminate land use restrictions that are not economically efficient, it cannot achieve that goal and at the same time preserve the municipality's right to impose, without compensation, "harm-producing" land use restrictions. On the other hand, if the municipality has a right to restrict some uses of land without compensation, the measure of Ellickson's consumer damages remedy depends not on considerations of economic efficiency, but on the imprecise point at which the municipality's land use regulatory power ends. That point cannot be determined on efficiency grounds.

b. The Irreversibility of Growth-Promoting Decisions

Ellickson would award damages against a municipality to encourage development policies that permit continued growth so long as the market demand exceeds the cost of supplying new housing. However sound that object might be with respect to most goods, the relative difficulty of reversing a decision to permit municipal growth makes undue focus on the current competitive equilibrium undesirable.

All decisions about the use of resources are, in a sense, irreversible. A decision to produce more soap, for instance, precludes using the resources consumed in the soap-making process for other purposes. When the basic economic question is whether to devote resources to capital formation or to current consumption, this permanent loss of resources is significant. When, however, the choice is current consumption of soap or current consumption of toothpaste, the future consequences of the decision are small. If consumer preferences change, the economic system can readily adapt to produce more toothpaste and less soap. A decision by today's consumers does not foreclose a different choice for tomorrow.

The same reversibility does not exist with decisions to permit municipal growth. Most residential, commercial and industrial construction has a lifespan sufficiently long to preclude future generations from making a choice between

development and open spaces, even if their preferences are significantly different. Before land is developed, the decision to be faced is whether the land is worth as much to the community for open spaces as it is to developers for construction. Once land has been developed, however, a community that wants open space must evaluate its desire not only against the cost of the land, but also against the value of the improvements and the cost of their demolition.[164] Moreover, while a community can decide to develop incrementally, a decision to "undevelop" would involve massive and rapid upheaval.

It is true that the lost potential for vacant land in the future is an element of the cost of developing land in the present. In that sense, the current market equilibrium reflects the potential loss of options in the future. But the market reflects the potential loss of options to current consumers, not to future generations.[165] If the market is used as a standard, costs to be incurred in the future are likely to be discounted heavily, raising significant questions of intergenerational fairness.[166] And beyond the market's inadequacy for addressing intergenerational conflicts, even assessing future preferences is a task fraught with uncertainties. Especially if future preferences turn out to be vastly different from those of the present, a current decision to develop land could entail costs not reflected in the price and not felt for years to come.

Moreover, some development decisions may not be reversible even if future generations are willing to absorb great expense to reverse them. Landmarks, once destroyed, can never be recaptured. Decisions to develop wilderness areas, or otherwise to upset ecological balances, cannot easily be reversed even upon payment of money. A municipality that permits development at the expense of the natural environment binds future generations to present preferences.

The irreversibility problem does not suggest that a damage remedy is any less efficient than declaratory relief. Instead, it indicates that attempting to reach the competitive equilibrium point by either method can be shortsighted. Because development decisions have long-term implications, some of them irreversible, there may be long-run diseconomies in permitting development at the competitive equilibrium level. This problem raises questions about the competitive equilibrium level as a goal, not merely about the consumer damage remedy as a means of reaching that goal.

c. The Judicial Costs of the Ellickson Damage Remedy

Although Professor Ellickson concedes that his proposed consumer damage remedy presents "intimidating" problems of measurement, he concludes that

164. Of course, the same evaluation must be made if the society decides to produce less soap: soap-making machines must be destroyed or converted to other uses. But to the extent that building construction has a particularly long contemplated useful life, the problem is exacerbated. Soap-making machines, twenty years after their initial manufacture, probably retain a much smaller percentage of their initial value than do office buildings.

165. *See generally* J. KRUTILLA & A. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS (1975) (chapter 4 is especially helpful); T. PAGE, CONSERVATION AND ECONOMIC EFFICIENCY ch. 7 (1977).

166. *See* sources cited *supra* note 165; *see also* J. RAWLS, A THEORY OF JUSTICE 284-93 (1971).

the difficulties are not unique and analogizes them to the problems of consumer antitrust actions.[167] If the argument, however, is that the damage remedy is the most efficient remedy for overly restrictive land use controls, comparison ought to be drawn not with consumer antitrust actions but with declaratory relief against the municipality. In two respects, providing consumers, or even landowners, with a damage remedy entails costs not present when the only available remedy is declaratory relief. First, as Ellickson recognizes, computing damages is a formidable task, especially if the Ellickson formula is used.[168] Second, because the municipality will often prefer removing its restriction to paying any significant damage award, computing and awarding damages as soon as the land use restriction is found to be unduly restrictive will frequently result in greater expenditure of judicial effort than if declaratory relief alone were available.[169]

Professor Ellickson never details a method for computing and distributing consumer damage awards in growth control cases. Instead, he indicates both that the award "must inevitably be a gross approximation"[170] and that "[t]he administrative costs of calculating and distributing shares of the aggregate damage award to individual housing consumers would usually be unacceptably high."[171] As an alternative, Ellickson suggests using the award to defray attorneys' fees and to compensate those who can prove substantial injury, with the balance of the award to escheat to the state.[172] This suggestion reduces to some degree the difficulties of calculation, although the difficulties that remain are formidable enough. A court would still have to determine the municipality's equilibrium point and the extent to which growth restrictions raised housing prices above the equilibrium price. These determinations are likely to be much more difficult than in private consumers' antitrust cases because both the new and the used housing markets must be taken into account, and measuring the impact on existing housing may be possible only over a period of several years as that housing turns over.

If engaging in the complicated damage computations were necessary to reach the efficient market equilibrium point, perhaps the expenditure of judicial effort to get to that point would be warranted. But by Ellickson's own hypothesis, in the typical case, a municipality faced with the alternative of a damage recovery would remove the restrictions, thereby raising housing production to the equilibrium point.[173] That same result could be reached by

167. Ellickson, *supra* note 112, at 438.

168. *Id.* at 438, 500.

169. The counter-argument is that knowledge of the size of a damage award would enable the municipality to decide more intelligently whether to remove the restrictions or pay the award. But if the municipality knows that maintaining the restriction will require payment to affected landowners, and if it believes the question is a close one, the municipality is capable of making its own estimate of damages. By contrast, when the decision is an easy one for the municipality, requiring judicial computation of damages would require a needless expenditure of resources.

170. Ellickson, *supra* note 112, at 500.

171. *Id.*

172. *Id.*

173. Indeed, that is the purpose of the damage remedy. *See id.* at 435-38.

declaring invalid any restrictions that reduced production to a level below Q_e. The declaratory alternative would require no complex damage computation. Professor Ellickson suggests that the damage approach offers the municipality greater flexibility in cases where congestion costs or other factors would cause a municipality to absorb a damage recovery rather than lifting the growth restrictions. Even if declaratory relief were awarded, however, the municipality would retain the right to impose restrictions by use of its eminent domain power. The valuation problem would then, of course, have to be faced, but only in those cases where the municipality indicates its willingness to pay to maintain its restrictions, not in every growth restriction case. Where it is patent that the municipality would withdraw the restriction rather than pay for it, declaratory relief would avoid the valuation problem.[174]

If the costs of arriving at a damage award are high, there is no persuasive efficiency reason for preferring damages to declaratory relief. The competitive equilibrium point can be reached either by use of a damage remedy or by resort to declaratory relief. In most cases, that point will be reached at less judicial cost by providing a declaratory remedy.

4. Summary

The Ellickson model provides a framework for analyzing the efficiency of suburban growth controls in municipalities with some monopoly power. The model suggests the efficiency advantages of moving from the monopoly equilibrium position to the competitive equilibrium point.[175] There are, however, difficulties with Ellickson's conclusion that a consumer damage remedy is the most efficient redress for overzealous growth controls. Most

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174. *See supra* text accompanying note 169.

175. Underlying the Ellickson model is the assumption that, at least in the absence of congestion costs or other externalities, the level of production at the competitive equilibrium point is more efficient than at the monopoly equilibrium point. While that assumption is probably correct, it merits at least brief discussion.

A move from the monopoly equilibrium point to the competitive equilibrium point will reduce the profits of the monopolist, making the monopolist worse off. To satisfy the Pareto-superior conception of efficiency, the move to competitive equilibrium would not be efficient unless the monopolist could be made no worse off than he was before the move. Because the total dollar value of production at the competitive equilibrium point is greater than that at the monopoly equilibrium point, the monopolist could be compensated for his losses while leaving all others better off, unless the costs of redistribution to the monopolist exceed the gains from moving to competitive equilibrium. Even if the costs of redistribution were high, competitive equilibrium may be desired because the monopolist's profits are considered "illegitimate" in some sense and therefore not entitled to protection. But, the move to the competitive equilibrium point would not be a Pareto-superior move.

In the case of suburban growth controls, the cost of redistribution is not likely to be great. As Professor Ellickson demonstrates, many municipalities have become expert at tailoring development charges to recapture as much developer and consumer surplus as is possible. *See* Ellickson, *supra* note 112, at 394-99, 477-98. Given that expertise, the municipal cartel may feasibly recover enough surplus to compensate for its loss of monopoly profits. Of course, establishing that the competitive equilibrium point is more efficient does not require that such compensation be made; it requires only that the compensation be feasible.

evident is his cavalier treatment of the complexity of computing damages. Perhaps more fundamental, however, are two other weaknesses in his argument—first, the inconsistency between seeking to reach competitive equilibrium and permitting all "harm-preventing" regulation, and second, his failure to account for irreversibility of the decision to develop previously undeveloped land. These difficulties undercut both Ellickson's conclusion that development policy should seek development at the competitive equilibrium level and his conclusion that a consumer damage remedy is the most efficient way to reach that level.

Despite the difficulties with the Ellickson model, it does highlight one recurring concern about the municipal decisionmaking process. The effects of municipal decisions frequently extend beyond the constituents to whom municipal officials are ultimately responsible. If one believes that municipal officials systematically ignore the external effects of their decisions, one might want to impose institutional checks on their behavior, checks not imposed on state or federal officials. But a municipal liability rule is not the only possible check, nor is it necessarily the best one. For instance, the New Jersey Supreme Court, in the *Southern Burlington County NAACP v. Township of Mount Laurel* litigation,[176] has dealt with an externality problem without imposing a rule of municipal liability. Other states have transferred some aspects of land use regulation from localities to the state.[177] Thus, even without a federal constitutional remedy, state legislatures and courts have both the capacity and the incentive to deal with the externalities municipal land use decisions might create.

State decisionmakers also make decisions with external impact. If liability is not imposed on the states when their unconstitutional decisions were motivated by disregard for external effects, the case for imposing an externality-based liability on municipalities as a matter of federal constitutional law, is less than compelling.[178] In short, none of the concerns about inadequacies

176. In Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), the New Jersey court concluded that each developing municipality was obligated to provide an opportunity for construction of its "fair share" of the regional need for low and moderate income housing. *Id.* at 174, 336 A.2d at 724-25. In Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), the court expanded upon the sanctions that might accompany a municipality's failure to comply with its fair share obligation, including judicial orders instructing the municipality to adopt particular amendments to its zoning ordinance or requiring approval of certain developments even if not in compliance with existing ordinances. *Id.* at 285-93, 456 A.2d at 455-59.

177. Land use control in Hawaii is exercised at the state level. *See* HAWAII REV. STAT. § 205-1 (1976). Of course, a number of states exert considerable control at the state level. *See, e.g.*, VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1983). *Cf.* South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 177, 336 A.2d 713, 726 (1975) ("when regulation [has] a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served").

178. By comparison, in a different but parallel context, it has been suggested that the privileges and immunities clause of the Constitution may provide greater protection against discrimination by states than against discrimination by local governments. *See* Massachusetts Council of Constr.

in the municipal policymaking process justify a federally-imposed damage remedy for constitutional violations unless a similar remedy is imposed on other government entities as well.

V. SYNTHESIS

Not all losses give rise to legal redress, and, more to the point of this article, not all losses give rise to the remedy of money damages. It could hardly be otherwise.[179]

There are two potential justifications for awarding damages. First, damage liability may internalize externalities by imposing upon potential actors all of the costs of their actions. In other words, damage liability may discourage potential loss-causers from taking actions that would cause loss. Second, a damage remedy may be used to compensate those injured by the loss-causing activity of others, either because the loss-causing acts were wrong in some moral sense, or because regardless of the rightness of the loss-causing activity, the losses could best be spread by imposing liability on the party who engages in loss-causing activity. The two justifications are not, of course, mutually exclusive.

The issue in *San Diego Gas & Electric Co. v. City of San Diego,*[180] was whether a municipality that has enacted an unconstitutional land use restriction should be liable for the damages caused to restricted landowners up to the time the enactment was invalidated. If a damage remedy is designed to internalize the effects of municipal decisions, the design raises several questions. A preliminary question is whether municipal liability has sufficient impact on municipal decisionmakers to approximate internalization of the costs of municipal decisions. But even if municipal decisionmakers protect the municipal coffers as they would their own, a rule that internalizes only the costs of one form of municipal action—enactment of ordinances that violate the Federal Constitution—could distort the policymaking process. And the potential for distortion is greatest when municipal decisionmakers have little capacity to decipher the Supreme Court's constitutional pronouncements. Constitutional limits on land use regulations are not drawn in bright lines. And municipal policymakers are not, by experience or training, likely to be well-versed in constitutional decisionmaking. As a result, to whatever extent a municipal liability rule does reduce constitutional infringement, and the extent may not be great, the reduction will come at a cost to the policymaking process.

Employers v. Mayor of Boston, 384 Mass. 466, 478, 425 N.E.2d 346, 354 (1981), *rev'd on other grounds sub nom.* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 214 n.12 (1983).

179. After all, the mere payment of a money judgment constitutes a loss to the party forced to pay, which could not be compensated without creating still other losses.

180. 450 U.S. 621 (1981) (Brennan, J., dissenting).

Awarding damages whenever an unconstitutional ordinance is enacted is also troublesome from a compensation perspective. The constitutional proscription is one based not on moral fault, but rather on the desirability of spreading the costs of a government acting for the benefit of all. If a landowner is limited to judicial invalidation as a remedy, the costs of delay in securing an adjudication of rights are concentrated on the landowner seeking vindication.

Delays caused by earnest evaluation of difficult legal and factual questions may be common enough to assume that rough justice is accomplished even when no individual delay is compensated. However, if government delays caused by official efforts to postpone or discourage exercise of known legal rights are sufficiently less common, then to leave the resulting losses uncompensated might be to single out the victims of those delays for different and less favorable treatment than others in society. To the extent that there is no good reason to single out these victims, compensation is appropriate to spread their losses.

Concerns about distorting the policymaking process would be diminished if municipal liability were to attach only when officials disregard constitutional presumptions they "know" to be applicable. If one were able to determine accurately when municipal officials knowingly violate constitutional rights, imposing damages only in these cases would not constrain the behavior of officials discharging their policymaking responsibilities in areas of less certain constitutional boundaries. Of course, the uncertainty of a standard that relies on the decisionmaker's knowledge might still make some policymakers timid. But in the case of knowing violations of the Constitution, municipal liability may be the most palatable alternative. After all, when policymakers effectuate a policy they know the courts will strike down, the end they seek is delay. Declaratory and injunctive relief furnish no protection against such intentional delay of a declaration of unconstitutionality. Moreover, when the end sought by government is delay, declaratory or injunctive relief furnishes no protection against government abuse. A New York case, *Keystone Associates v. State,*[181] furnishes an example.

To preserve the old Metropolitan Opera House after the Opera had moved to its new quarters in Lincoln Center, the state legislature enacted a statute vesting a private corporation with the power to condemn the Opera House property.[182] The legislation also authorized the New York City Superintendent of Buildings to refuse a demolition permit for 180 days upon request of the trustees of the private corporation and a deposit of $200,000 for security in case the property was never condemned.[183] By this device, the legislature bought time for the private corporation to raise money to condemn the Opera

181. 39 A.D.2d 176, 333 N.Y.S.2d 27 (1972), *aff'd,* 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973).

182. *See* Keystone Assocs. v. Moerdler, 19 N.Y.2d 78, 85, 224 N.E.2d 700, 701, 278 N.Y.S.2d 185, 187 (1966).

183. *Id.*

House. In a suit against the state for damages suffered in the period between the statute's enactment and a declaration of its invalidity, the court of appeals held that damages were an appropriate remedy.[184]

In *Keystone Associates,* the heart of the government abuse involved was the attempt to delay the landowner from proceeding with development. Declaratory or injunctive relief would provide little protection against this form of abuse, because the delays attendant to litigating the landowners' claim would secure for the government precisely the result it sought. Damages were necessary to provide protection against this form of government abuse.[185]

Moreover, an award of damages in the *Keystone Associates* case would be unlikely to instill fear in government policymakers who are considering land use measures of undetermined constitutionality. Delay was the explicit purpose of the Opera House legislation; the legislature expressed no doubt that the Opera House could not be preserved, ultimately, without payment of compensation. If damages were limited to cases where land use regulations attempt so blatantly to obstruct or delay the exercise of conceded constitutional rights, policymakers would have few worries when considering issues that raise bona fide constitutional questions.

Damages, then, are justified when landowner losses are caused by government actions that delay or discourage vindication of constitutional rights that are or should be beyond dispute. By contrast, because of the distortions in the policymaking process that damages might cause, especially at the local

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184. Keystone Assocs. v. State, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973).

185. *See also* Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968) (one year freeze on development).

"Condemnation blight," injury caused by preliminary government steps toward ultimate condemnation, may also require a damage remedy on similar grounds. To the extent that the government's goal is to depress the price it has to pay for land it wants to condemn, failure to provide damages, either in the ultimate eminent domain proceeding or in a separate proceeding, would permit the government abuse to go unremedied. Some courts have held that an award for condemnation blight should be included in the ultimate eminent domain award. *See, e.g.,* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); Lange v. State, 86 Wash. 2d 585, 547 P.2d 282 (1976). Other courts have awarded damages for condemnation blight separately. *See, e.g.,* Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd,* 405 F.2d 138 (6th Cir. 1968); Textron, Inc. v. Wood, 167 Conn. 334, 355 A.2d 307 (1974).

In other circumstances, the government may ultimately decide not to comdemn, sometimes after it has deferred decision for so long that productive use of the land is paralyzed. The resulting dilemma is summarized in Drakes Bay Land Co. v. United States, 424 F.2d 574, 586 (Ct. Cl. 1970):

> [P]laintiff remains without a market for its land. The private sector is not interested, understandably, because of the well publicized threat of eventual condemnation . . . . The public sector . . . is not interested because after having successfully thwarted plaintiff's subdivision plans, it realizes that plaintiff is a party who can be deferred interminably, and dealt with at pleasure.

Again, declaratory relief provides no protection against the government abuse involved—the attempt to delay.

Other cases awarding compensation even when the governmental entity has not formally condemned the property include: Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977); Washington Mkt. Enters. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975); Lincoln Loan Co. v. State, 545 P.2d 105 (Or. 1976).

level, damages are not appropriate when unconstitutional ordinances are enacted by municipal officials who are, within reason, unaware or unconvinced of the constitutional infirmity.

Translating those conclusions into a framework for adjudications of landowners' rights presents a host of difficulties. Official motivation is rarely as transparent as it was in the Metropolitan Opera House legislation. Requiring landowners to bear the burden of proving that officials acted with knowledge of constitutional infirmity might substantially limit the number of recoveries. On the other hand, if the municipality were required to prove the state of mind with which its officials acted, a task always difficult but even more so when multiple officials with potentially different motivations are involved, damage awards might be frequent enough to chill the ardor with which municipal officials exercise their policymaking responsibilities.

The difficulty in formulating standards for municipal liability that adequately reflect the competing policy concerns suggests that the Supreme Court should be cautious in adopting any universal rules that would rigidify doctrine before the consequences of rigid doctrinal rules are more fully appreciated. Almost every state in the Union has a state constitutional prohibition against taking property without just compensation,[186] enforceable by whatever state remedies the state supreme court chooses. Moreover, an individual state could choose to enforce even the federal constitutional provisions by awarding any adequate remedy, including money damages, even if the Supreme Court concluded that damages were not constitutionally required.[187] Collectively, the state courts can hear, analyze, and decide many more cases on the question than can the Supreme Court. Premature resolution of the issue on broad terms by the Supreme Court can only stifle analysis in an area where existing analysis is incompletely developed.

CONCLUSION

In a society that prides itself on a constitutional system, remedial deficiencies are intolerable if they leave constitutional rights unvindicated. But many constitutional rights can be vindicated in more than one way. Respect for the Constitution does not require availability of the remedy most likely to produce zealous enforcement of constitutional rights or most likely to satisfy

186. *See* 1 NICHOLS, THE LAW OF EMINENT DOMAIN § 1.3 at 1-91 (J. Sackman rev. 3d ed. 1981), indicating that only North Carolina, New Hampshire, and Kansas have constitutions that lack express prohibitions against takings of property without just compensation. In New Hampshire and Kansas, however, the state constitution has been construed to include a compensation requirement. *See* Buckwalter v. School Dist. No. 42, 65 Kan. 603, 70 P. 605, 607 (1902); *In re* Opinion of the Justices, 66 N.H. 629, 33 A. 1076 (1891). In North Carolina, protection is purely statutory. *See* N.C. GEN. STAT. §§ 40A-62 to 69 (1984).

187. *See* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 184-90 (1969).

those affected by constitutional violations. Persons charged with the responsibility of governing, at every level, have duties to perform other than enforcement of the Constitution. Zealous preoccupation with constitutional rights by these officials, at the expense of their other duties, could lead to unresponsive, ineffective government—an evil the Constitution itself was designed to avoid. The result might be to sacrifice the balance of constitutional government to a chimera of constitutional purity.