

## Notes

# MEASURING DAMAGES FOR TEMPORARY REGULATORY TAKINGS: AGAINST UNDUE FORMALISM

Joseph P. Mikitish

## INTRODUCTION

The United States Supreme Court has long recognized that the Constitution limits government's power to regulate land use. In 1922, the Court held in *Pennsylvania Coal Co. v. Mahon*<sup>1</sup> that the fifth amendment's edict — "nor shall private property be taken for public use without just compensation" — protects private property from over-restrictive government regulations, as well as from government appropriations of land.<sup>2</sup> If government regulates to such an extent as to deny all use of the property, the land owner may bring suit in inverse condemnation to have the regulation declared unconstitutional.<sup>3</sup> In applying regulatory takings principles, courts historically differed as to the proper remedy for constitutionally invalid regulations. Some courts merely invalidated the regulations, while others required the government to compensate the property owner.<sup>4</sup>

In 1987, after four previous attempts to resolve the issue,<sup>5</sup> the Supreme Court, in *First English Evangelical Lutheran Church of Glendale v. County of*

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1. 260 U.S. 393 (1922).

2. Justice Holmes proclaimed in *Pennsylvania Coal* that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

3. The courts have struggled to determine when a regulation has in fact gone too far. Justice Brennan set out three criteria for defining when a regulation results in a taking in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978): the economic impact on the claimant, the extent to which the regulation interferes with the claimant's distinct investment backed expectations, and the character of the governmental action. This Note generally will not discuss how regulatory takings are determined, but rather will focus on measuring compensation once a taking has been established.

4. Most courts simply invalidated the over-restrictive regulation; California and Arizona both followed the invalidation rule at one point. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); *Davis v. Pima County*, 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1978), *cert. denied*, 442 U.S. 942 (1979). New Jersey adopted an obligation to pay rule as early as 1968. *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968).

5. The Court failed to reach the merits in four separate cases from 1980 to 1986. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Elec.*

*Los Angeles*,<sup>6</sup> made clear that the fifth amendment's Just Compensation Clause requires compensation even if the regulation is invalidated. In a 6-3 decision, the Court determined that governmental entities must compensate landowners for any such temporary regulatory takings<sup>7</sup> for the period of time during which the regulation was in effect.<sup>8</sup> The Arizona Supreme Court reached a similar conclusion one year earlier in *Corrigan v. City of Scottsdale*,<sup>9</sup> applying the state constitution.

The effects of mandating compensation for over-restrictive regulations have been strongly debated. Proponents argue that the money damages remedy compensates landowners for economic losses resulting from overzealous planners and that the damages remedy forces these planners to constrain their regulations within constitutional limits.<sup>10</sup> Opponents assert that it subjects local governments to substantial liability and financial hardships, unduly "chills" local planning efforts, and increases the amount of needless litigation in this area.<sup>11</sup>

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Co. v. City of San Diego, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

6. 482 U.S. 304 (1987).

7. The Court defined temporary regulatory takings as "those regulatory takings which are ultimately invalidated by the courts." *Id.* at 310. Thus, the government must compensate the property owner for the effective period of the regulation prior to its invalidation in court. For example, in *First English*, the county enacted an ordinance restricting the church from building on its property. If the ordinance were invalidated by the courts as an overly restrictive infringement on property rights, the county would have to pay compensation for the period during which it temporarily "took" the Church's property. *Id.* at 321.

8. *Id.* at 321.

9. 149 Ariz. 538, 543, 720 P.2d 513, 518 (1986). For an analysis of *Corrigan*, see Note, *The Money Damages Issue: Arizona Takes a Stand*, 29 ARIZ. L. REV. 99 (1987).

10. As Justice Brennan pointed out in his dissent in *San Diego Gas & Electric*, invalidating improperly restrictive regulations without allowing a damage remedy fails to compensate the property owner for any economic losses resulting from the taking. 450 U.S. at 655 (Brennan, J., dissenting). In discussing potential policy considerations, Justice Brennan also suggested that a monetary remedy encourages more responsible planning that considers both the costs and benefits of regulations. The liability might "encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner?" *Id.* at 661 n.26 (citation omitted).

The Arizona Supreme Court advanced similar policy reasons in deciding *Corrigan*: Public officials should consider their actions before enacting them. Mere invalidation does not provide any incentive for public planners not to experiment at an individual property owner's expense. Neither does invalidation provide any deterrent impact; instead the city can and often does enact another similarly restrictive regulation and force the landowner to undergo another costly litigation battle.

149 Ariz. at 542, 720 P.2d at 517. See also Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L. REV. 685 (1986).

For a discussion of federal action taken in response to these decisions, see generally Marzulla, *The New "Takings" Executive Order and Environmental Regulation — Collision or Cooperation?*, 18 ENVTL. L. RPT. 10254 (1988). The Executive Order adopted by the Reagan administration requires executive departments and agencies to identify the benefits of government regulations and the potential costs, should they later be determined to constitute a taking. *Id.* at 10258. Marzulla calls the order a "bold effort" to minimize uncertainty in federal agencies' regulating efforts. *Id.*

11. Justice Stevens vehemently argues in his *First English* dissent:

Even though the *First English* majority and dissent strongly debated the damages remedy, the decision failed to give much guidance regarding just how compensation is to be measured.<sup>12</sup> *Corrigan* provided a variety of possible damages measures but failed to discuss under what circumstances each should be used.<sup>13</sup> Lower courts and legal commentators now must continue to examine the goals of Just Compensation and how they should apply to regulatory taking awards. The compensation measure likely will have a significant impact on the decisions of government planners and property owners alike.

This Note examines the measurement issue left unresolved by *First English* and *Corrigan*. It first discusses the general goals of the Just Compensation Clause of the fifth amendment. It follows with a brief overview of the facts and legal history of *First English* and *Corrigan*. Finally, it examines the possible measures suggested by the United States Supreme Court and the Supreme Court of Arizona. It offers no one optimal method of measuring damages for all temporary taking cases, but rather this Note discusses the strengths and weaknesses of each method in the context of the problems which persistently arise. It concludes that the courts should apply the measure that best advances the goals of Just Compensation in each individual case.

## I. GOALS OF JUST COMPENSATION

Courts throughout this century struggled to define the proper role of the fifth amendment's Just Compensation Clause.<sup>14</sup> During the last few decades, numerous scholars also have debated the underlying purposes and goals of Just Compensation in their attempts to establish comprehensive takings analyses. Scholars often note two fundamental goals of the Just Compensation Clause: the assurance of fairness to the individual property owner, and the promotion of economic efficiency.<sup>15</sup>

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One thing is certain. The Court's decision today will generate a great deal of litigation. Most of it, I believe, will be unproductive. But the mere duty to defend the actions that today's decision will spawn will undoubtedly have a significant adverse impact on the land-use regulatory process. . . .

The policy implications of today's decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action. Much important regulation will never be enacted, even perhaps in the health and safety area.

482 U.S. at 322, 340-41 (Stevens, J., dissenting) (footnote omitted). See also *Corrigan*, 149 Ariz. at 542, 720 P.2d at 517; Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

12. Justice Brennan earlier suggested that the Constitution itself does not require the states to adopt "any specific procedure or form of remedy." *San Diego Gas & Elec.*, 450 U.S. at 660 (Brennan, J., dissenting).

13. 149 Ariz. at 543-44, 720 P.2d at 518-19.

14. See Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988). Professor Williams notes "some twenty-odd" Supreme Court land use cases during the Twentieth Century which, he argues, are marked by competing legal theories and social ideals. *Id.* at 427-28.

15. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Professor

Discussion of the Just Compensation Clause typically begins with the principle that government acts in society to advance public goals.<sup>16</sup> It may, through the power of eminent domain, acquire private property to serve some public need, such as federal acquisitions of factories used in the war effort in the 1940's.<sup>17</sup> Government may also regulate the use of private property to protect some local amenities, such as historic structures,<sup>18</sup> or to prevent harmful effects on the community at large, such as pollution.<sup>19</sup> In economic terms, government serves to promote public goods and discourage negative externalities.<sup>20</sup> It does so to increase the welfare of the community as a whole.<sup>21</sup>

Government actions also redistribute the benefits and burdens of economic life.<sup>22</sup> While the entire country benefited from the public use of factories during wartime, for example, the private owners were deprived of the use of those factories. The owner of an historic building may be charged with the full burden for maintaining the site, even though it increases the cultural and scenic value for potentially the entire community.<sup>23</sup> Government also may force the polluter, through regulations, to give up a profitable property use in order to free the community from pollution.<sup>24</sup> The public welfare burden in these instances is placed disproportionately on an individual property owner or group of owners. The Just Compensation Clause limits government's ability to "take" private property, either through eminent domain or overly restrictive regulations, by forcing the entity to pay for what it takes.<sup>25</sup>

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Michelman states that these goals may lead to different results in some instances, "but in general decisions made under their guidance turn on much the same factors. . . ." *Id.* at 1225.

16. *Id.* at 1172-83.

17. *See* *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

18. *See Penn Central Transp. Co.*, 438 U.S. at 129.

19. *Sax, Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Professor Sax uses an example of a mineral owner performing strip mining. *Id.* at 152-54.

20. *See* J. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 119-23, 220-35 (1988). Public goods are those which are not feasible or desirable to ration. *Id.* at 119. One example is a scenic environment. Negative externalities are costs caused by private activity that are not born solely by individuals but fall on the public at large. *Id.* at 214-15. The typical example is pollution.

21. *Michelman, supra* note 15, at 1173.

22. *Id.* at 1225. Professor Michelman notes that "collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be reased by compensation settlement."

23. *See Penn Central Transp. Co.*, 438 U.S. at 131.

24. Professor Sax argues that when government regulates property uses which create spillover effects, it should not be required to pay compensation. In those instances, he asserts the recognition of "public rights." *Sax, supra* note 19, at 155.

25. Professor Fishel states that "[t]he taking clause seems to be the ideal remedy for these regulatory excesses. . . . Its focus is not on whether the government may provide this or that public amenity, but on whether it should have to pay for it." Fishel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1583 (1988). *See also* Michelman, *supra* note 15, at 1226.

### A. Fairness to the Individual

Many scholars assert that one major goal of the clause is fairness to the individual.<sup>26</sup> They argue that the clause is designed to force government to spread the costs of public goods among the entire citizenry and prevent it from heavily concentrating the burdens on certain individuals.<sup>27</sup> The clause, in their view, is a mechanism to assure that everyone pays roughly his or her fair share of public burdens.

Just Compensation also promotes fairness, according to some, through its inherent check on political majoritarianism.<sup>28</sup> Proponents of this view stress the potential for abuse of the government's ability to redistribute the benefits and burdens of economic life.<sup>29</sup> Politically powerful citizens cannot personally gain wealth through the auspices of government by injuring rivals through government acquisition or regulation, because the Just Compensation Clause discourages government action.<sup>30</sup> Professor Epstein further asserts that the clause reinforces private property as a natural right with which government may interfere only in limited instances.<sup>31</sup> Epstein strongly emphasizes the public purpose requirement of the clause as an additional limit to prevent political majorities from impeding the rights of individuals.<sup>32</sup>

### B. Promotion of Economic Efficiency

Scholars often cite the promotion of economic efficiency as another goal of Just Compensation. The clause first promotes efficiency, they assert, by acting as a type of insurance against government intrusion.<sup>33</sup> Many economists view government interference with private property as an ever-present risk to the property owner which distorts the private market.<sup>34</sup> For example, the risk of the government acquiring an individual's factory may decrease that individual's level of capital investment in that factory if compensation is not assured. The risk of government's regulating property to the extent of eliminating all viable use may also decrease property investment if compensation is not available. The Just Compensation Clause assures payment to the individual for losses inflicted by government action and thus eliminates the distortionary effect of that risk on the private market.<sup>35</sup>

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26. Michelman, *supra* note 15, at 1218-24. Professor Michelman bases much of his discussion of compensation and fairness on the analysis of John Rawls, another commentator prominent for his work on social justice.

27. *Id.* See also Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

28. Fishel, *supra* note 25, at 1582-83.

29. *Id.* at 1582.

30. *Id.*

31. R. EPSTEIN, *TAKINGS PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5-6 (1985).

32. *Id.* at 115.

33. Note, *Retroactive Compensation and the Illusion of Economic Efficiency: An Analysis of the First English Decision*, 35 UCLA L. REV. 1267, 1269 (1988).

34. *Id.* See also Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 571 (1984).

35. Note, *supra* note 33.

The clause also promotes economic efficiency by forcing government actions to behave like market transactions.<sup>36</sup> Market transactions occur, under theories of economic efficiency, when each party believes it will benefit from the transaction.<sup>37</sup> Alternatively, each party must believe the benefit it receives from the transaction will outweigh its costs. By this method, the market allocates resources to the parties that value them most.<sup>38</sup> The fifth amendment, under this view, forces government to act like a private party by forcing it to consider the costs of its actions, the compensation it must pay, along with the benefits it receives.<sup>39</sup> For example, government will only acquire a factory if the public benefit received is greater than the compensation it must pay. Only if its public value outweighs its acquisition cost, the factory will be put to the most efficient use by the government. Likewise, the government will strictly regulate property only if the public benefit, such as the historic or scenic value, outweighs the cost of compensation. While it is unlikely that Just Compensation perfectly mimics market transactions, scholars assert that the clause does promote efficiency to some degree.<sup>40</sup>

## II. *FIRST ENGLISH* AND *CORRIGAN*

Both *First English* and *Corrigan* involved alleged governmental regulatory takings by over-restrictive local ordinances. In *First English*, a Lutheran church challenged a county flood ordinance which it claimed denied all use of its campground site, known as "Lutherglen," along the banks of Mill Creek in the Angeles National Forest.<sup>41</sup> In 1979, Los Angeles County adopted an interim development ordinance after a fire denuded the hills above Lutherglen in 1977 and severe flooding destroyed the site in early 1978. The ordinance, as applied to the church, prohibited the rebuilding of Lutherglen. The church claimed the ordinance amounted to a regulatory taking of its property and sought monetary damages.<sup>42</sup>

The Superior Court of California rejected the church's taking claim, following the California Supreme Court's rationale in *Agins v. City of Tiburon*.<sup>43</sup> Applying the *Agins* rule, the court held that the church could not seek monetary damages for an alleged regulatory taking, but only request invalidation of the ordinance. The Court of Appeal affirmed and the California Supreme Court denied review of the ruling.<sup>44</sup>

The church appealed the decision to the United States Supreme Court, arguing that the fifth amendment required the County to pay compensation, and not merely eliminate the ordinance, if it denied the church all use of Lutherglen. The Court agreed, holding that denial of the damages remedy was

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36. *Id.* at 1272.

37. R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (2d ed. 1977).

38. *Id.* at 10-11.

39. Note, *supra* note 33, at 1273.

40. Professor Epstein points out that takings compensation fails to award the total, subjective value of the property which the owner may have been able to obtain in the free market. R. EPSTEIN, *supra* note 31, at 182.

41. 482 U.S. at 307-08.

42. *Id.* at 308.

43. *Id.* at 309. See also *Agins*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372.

44. 482 U.S. at 308-09.

inconsistent with the constitutional requirement to compensate for governmental takings.<sup>45</sup> The Court found that, while the owner cannot require the government to permanently acquire its property, the government, after invalidating the over-restrictive ordinance, must pay compensation for the effective period of the regulation.<sup>46</sup> It stated that "where the government's activities have already worked a taking of all use of property, no subsequent action can relieve it of the duty to provide compensation during which the taking was effective."<sup>47</sup>

The *First English* decision, while clearly requiring compensation for temporary regulatory takings, gives very little guidance on exactly how to measure these damages. The Court noted only that it found "substantial guidance" in cases involving the government's temporary occupation and use of private property.<sup>48</sup> Citing *United States v. Dow*,<sup>49</sup> the Court stated that compensation for temporary regulatory takings would be by "the principles normally governing the taking of a right to use property temporarily."<sup>50</sup> The Court then cited three decisions in which the federal government physically appropriated property for a temporary period during World War II.<sup>51</sup> These cases generally utilized a rental value of the property to measure compensation. Justice Brennan, in his *San Diego Gas & Electric Co. v. San Diego*<sup>52</sup> dissent, suggested that these decisions can provide the basis for measuring damages arising from temporary regulatory takings.<sup>53</sup> The Court followed Justice Brennan's reasoning, but failed to elaborate on the viability of these measurements.

In *Corrigan*, the plaintiff challenged a city development ordinance which she, like the Lutheran church, claimed denied all use of her property. Ms. Corrigan owned three contiguous parcels of undeveloped property in and around the McDowell Mountains in Scottsdale, Arizona. In 1977, the city passed a zoning ordinance creating a comprehensive plan which divided the

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45. *Id.* at 310-11.

46. *Id.* at 321.

47. *Id.* On remand, the California Court of Appeal held that, because of the safety concerns involved, and because the regulation did not deny "all uses" of the property, the regulation did not amount to a taking. 210 Cal. App. 3d 1353, 1362, 258 Cal. Rptr. 893, 902 (1989), *cert. denied*, 110 S. Ct. 866 (1990). For demonstrative purposes within this Note, the regulation will be assumed to have taken the church property.

48. 482 U.S. at 318.

49. 357 U.S. 17 (1958).

50. 482 U.S. at 318 (quoting *Dow*, 357 U.S. at 26).

51. These cases involved property temporarily taken by the United States under the Second War Powers Act of March 27, 1942, § 201, 56 Stat. 177 (1942). See *Kimball Laundry Co.*, 338 U.S. at 7 (acquisition of a family corporation owned laundry plant for Army use); *Petty Motor Co.*, 327 U.S. at 381 (acquisition for public purposes of building leased by plaintiff); *General Motors*, 323 U.S. at 380 (acquisition for military purposes of warehouse leased by plaintiff on a long term basis).

52. 450 U.S. at 638. Justice Brennan's dissent in *San Diego Gas & Elec.* set the foundation for the Court's opinion in *First English*.

53. Justice Brennan stated:

Rules of valuation already developed for temporary "takings" may be particularly useful to the courts . . . although additional rules may need to be developed. . . . The States should be free to experiment in the implementation of this rule [of valuation], provided that their chosen procedures and remedies comport with the fundamental constitutional command [of Just Compensation].

*Id.* at 659-60 (Brennan, J., dissenting) (citations omitted).

mountains into two sectors: a conservation region and a development area. Much of Ms. Corrigan's land was included in the conservation region, which was to be used "solely for the conservation of open space."<sup>54</sup> Ms. Corrigan argued that the ordinance was an unconstitutional taking of her property and sought declaratory relief and monetary damages for the effective period of the ordinance.<sup>55</sup>

The trial court ruled that the ordinance was constitutional and thus the city had not taken Ms. Corrigan's property. The court of appeals reversed, stating that the city had unconstitutionally taken the Corrigan property through an over-restrictive ordinance. It denied the damages claim, however, under *Davis v. Pima County*<sup>56</sup> which held that invalidation was the sole remedy for over-restrictive regulations.<sup>57</sup> The Arizona Supreme Court vacated the appellate court ruling and overruled *Davis*, finding that "once an unconstitutional taking is shown, a person should receive damages for the time in which the confiscatory zoning ordinance has 'taken the property', that is the time between the taking and the invalidation of the ordinance."<sup>58</sup>

*Corrigan* provides more substantive guidance than *First English* regarding possible measurements of damages. The court noted five measures of temporary regulatory takings which might be used for various situations: rental return, options price, interest on lost profits, before and after valuations, and benefit to the government.<sup>59</sup> It ultimately held that the proper measure will depend upon the facts of each case.<sup>60</sup> The court recognized that some measures work well in some cases but not in others. The court emphasized that no matter which measure is utilized, however, the landowner may receive only the actual loss resulting from the taking of his property. The actual loss approach appears to strike a balance between the interests of the landowner and the government.<sup>61</sup> The private owner will be compensated for any actual harm he suffers while the government generally will not face enormous liability from its regulations. The court pointed out that, in order to establish the landowner's actual losses at trial, the parties may either stipulate to a certain measure or present evidence at trial on the appropriateness of a given measure, if one is not mutually acceptable.<sup>62</sup>

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54. *Corrigan*, 149 Ariz. at 539, 720 P.2d at 514.

55. *Id.*

56. 121 Ariz. 343, 590 P.2d 459 (Ct. App. 1978), *cert. denied*, 442 U.S. 942 (1979). *Davis* held that zoning is a legislative function and that the proper judicial remedy for wrongful legislative acts is "the undoing of the wrongful legislation and not money damages." *Id.* at 345, 590 P.2d at 461.

57. 149 Ariz. at 540, 720 P.2d at 515.

58. *Id.* at 541, 720 P.2d at 516. The parties reached a settlement in March, 1990 in which the city agreed to modify the ordinance and pay Ms. Corrigan's attorneys' fees. Telephone interview with James Powers, attorney for the plaintiff (March 15, 1990).

59. 149 Ariz. at 543, 720 P.2d at 518 (citing Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, in 1982 ZONING AND PLANNING HANDBOOK 201, 218-27 (F. Strom ed.).

60. *Id.* at 543, 720 P.2d at 518.

61. *Id.* at 544, 720 P.2d at 519 (citing Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 ARK. L. REV. 612, 645 (1983)) ("This approach adequately balances the public interest against private interest by requiring compensation for regulatory takings while limiting that compensation to actual losses for temporary takings."). *Id.*

62. *Id.* at 544, 720 P.2d at 519.



*Corrigan* also noted persistent problems with measuring damages in temporary takings cases. These include the speculative nature of the damages, the determination of when the taking occurred, whether any damages actually existed, and whether the regulation was acquisitory or nonacquisitory.<sup>63</sup> *Corrigan* failed to state, however, how and under what circumstances these problems could be alleviated.

Some damages measures suggested by *Corrigan*, and implied by *First English*, appear to provide better estimates and more effectively avoid the recurring problems in certain contexts than in others. Each also seems to advance the fairness and efficiency goals of Just Compensation in different manners. These considerations are useful in determining which measure to apply in given factual situations.

### III. MEASUREMENT ALTERNATIVES

#### A. Rental Value

Rental value is the measure of damages generally applied in temporary physical takings cases.<sup>64</sup> The rental value of property has been defined as "that amount which, in the ordinary course of business, the premises would bring or for which they could be rented, or the value, as ascertained by proof of what the premises would rent for, and not the probable profits which might accrue."<sup>65</sup> A court using the rental value measure assumes a hypothetical lease arrangement between the governmental entity and the property owner.<sup>66</sup> The amount that probably would have been bargained for through the haggling and negotiations of the parties for the period of the taking is set as the rental value of damages.<sup>67</sup> In determining this value, the court may compare leases of similar property within the relevant market as a standard of reference.<sup>68</sup> The market comparison is an important factor in measuring the amount of compensation because it lends an external validity to the award.<sup>69</sup>

The rental value measure works well when exchanges of similar leases frequently occur in the marketplace.<sup>70</sup> The measure is appropriate in physical appropriations cases because the government generally takes the property for some specific use. A large number of property leases with diverse terms constantly occur in the ordinary course of business and can serve as comparisons. The parties may argue that the property in question compares favorably or unfavorably to rented property in the marketplace, but the standard of reference is available. For example, in *United States v. General Motors Corp.*,<sup>71</sup> the federal government acquired a Chicago warehouse in 1942 which

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63. *Id.* at 543, 720 P.2d at 518.

64. See 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.5 (3d ed. 1985).

65. *City of Austin v. Teague*, 570 S.W.2d 389, 395 (Tex. 1978).

66. *Kimball*, 338 U.S. at 6-7. See also Hagman, *supra* note 59, at 218-22.

67. *Kimball*, 338 U.S. at 4-7.

68. *Id.* at 6.

69. *Id.* at 5.

70. *Id.* at 6.

71. 323 U.S. 373.

plaintiff was leasing.<sup>72</sup> The government filed a petition in district court for the immediate possession, use, and improvement of the property for military purposes. The initial term of the acquisition was set for one year, with an option to renew for additional one-year periods. Experts for each party provided opinions regarding the rental value and a witness for General Motors testified to the actual rent paid for the use of the premises. The parties then argued how a hypothetical sublease to the government might have differed in price from the plaintiff's lease due, for example, to the moving expenses incurred by General Motors.<sup>73</sup> The rental value measure, therefore, properly reflected a hypothetical market price for the premises.<sup>74</sup> It also accurately reflected the property interest taken, the temporary use of the premises, and the direct and indirect costs to the owner.<sup>75</sup>

While the rental value measure reflects both the fairness and efficiency goals of the Just Compensation Clause,<sup>76</sup> it appears most closely aligned with the economic efficiency theory of simulated market transactions. The government is forced to behave like a private party and weigh the benefits of an acquisition with its cost in the market place. The market cost is determined by the court through the hypothetical lease assumption and the government will acquire the property only if it values the property more than its cost. The property, therefore, is put to its most efficient use.

In transferring the rental value measure from temporary *physical* appropriations to temporary *regulatory* takings, however, it is important to note the similarities and differences between each form of governmental intrusion and the effects of compensation. The property interests taken in both situations are similar, the temporary use of one's property. One major distinction exists, however, in that the property in the physical invasion cases cited in *First English* all had some present use at the time of taking.<sup>77</sup> Most land use regulations, on the other hand, restrict the future development of property which either is not utilized or underutilized at the time.<sup>78</sup> The rental value measure loses some of its external validity in the regulatory context because it has no market comparisons. There is simply no market for renting barren land. Any measure of rental value must, therefore, be based upon assumed future uses, values and returns.<sup>79</sup>

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72. *Id.* at 375.

73. *Id.* at 375-77.

74. *Id.* at 379-80.

75. *Id.* The Court recognized that any costs such as alterations to the premises, or moving expenses of the owner, resulting from the temporary occupancy would likely be included in the rental price.

76. *See supra* notes 13-37 and accompanying text.

77. The property in *Kimball* was used as a laundry plant by the owners. 338 U.S. at 6. The building in *Petty Motors* was leased for use by the plaintiffs. 327 U.S. at 373. The warehouse in *General Motors* was leased for storage by the plaintiff. 323 U.S. at 375.

78. *See Johnson, Compensation for Invalid Land Use Regulations*, 15 GA. L. REV. 559, 596 (1981). Professor Johnson argued the rental value measure "ignores the fact . . . that the land was undeveloped and therefore probably had no rental value for any use denied by the challenged regulation." *Id.* at 596.

79. In *Usdin v. State of New Jersey*, 175 N.J. 311, 414 A.2d 280 (1980), the court determined a hypothetical rental value by assuming the property would have been developed, determining what its value would have been once developed, and establishing a fair return on the developed property.

Also, in regulatory takings, the landowner often does not lose the actual use of his property because he is merely holding it for future development. In this context, the rental value does not represent the owner's cost of being displaced from his business because the owner does not have to rent other property to continue any present business operations.<sup>80</sup> The landowner instead loses the ability to confidently plan for future development. Granting a rental value thus may create a windfall to the landowner.

*Corrigan* illustrates the difficulty of applying a rental value measure of damages to a regulatory taking. Ms. Corrigan owned three parcels of raw land with no plans of immediate development.<sup>81</sup> She did not carry on business or other activities on the property which would generate rental income.<sup>82</sup> Thus any rental value measure would be highly speculative in nature.

The rental value may work more effectively in *First English*, if the church establishes that it had definite plans to rebuild Lutherglenn. The church then might prove that it could have rented the premises as they existed prior to the flood. The award would be less speculative in this case because the property was used prior to the ordinance.

### ***B. Interest on Lost Profits***

Under "the interest on lost profits" measure, the court assumes that the landowner would have developed his property but for the over-restrictive regulation, and would have earned profits from its sale or lease. The court then awards the interest that would have been received on these profits as the measure of damages actually suffered by the landowner.<sup>83</sup> This measure acknowledges that the property owner might recoup actual profits from selling the property after the regulation is invalidated. Thus, it only awards the actual loss — the interest that would have been gained in the interim.

In *Prince George's County v. Blumberg*,<sup>84</sup> the plaintiffs sought damages for the county's revocation of permits to develop apartment buildings. Both the county and the sanitary commission issued the appropriate permits to the plaintiffs to build a multi-million dollar high-rise apartment complex on a forty-acre tract of land. After the plaintiffs completed the development plans and began construction, the governmental entities revoked the permits, apparently due to local political pressures and environmental concerns. The circuit court held that the revocation was improper and awarded damages of \$1,800,000 in interest from lost profits.<sup>85</sup> The Maryland Court of Special Appeals found the circuit court erred in its manner of calculating damages, but did not overturn its use of interest on lost profits as a measure of damages.<sup>86</sup>

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80. See *General Motors*, 323 U.S. at 379-80.

81. Ms. Corrigan had not submitted any plans for development to the city before or after filing her suit. 149 Ariz. at 539, 720 P.2d at 514.

82. The property was originally zoned as R-1-35 when annexed by the city in 1963. This classification permitted one single family residence on each 35,000 square feet. *Id.*

83. See Hagman, *supra* note 59, at 224-26.

84. 44 Md. App. 79, 407 A.2d 1151 (1979).

85. *Id.* at 83-90, 407 A.2d at 1155-62.

86. The court noted, however, that the county did not dispute the type of damage measure itself. Therefore, it did not address whether the interest on lost profits was the proper measure of damages. *Id.* at 92-93, 407 A.2d at 1174-75.

This measure has two advantages — its simple application and its reflection of actual damages.<sup>87</sup> First, courts can easily apply this method. The landowner need only prove (1) that the development was likely to occur absent the regulation, and (2) his projected profits from its sale or lease.<sup>88</sup> The court itself would only determine the amount of interest on that profit lost during the period of the taking. Second, and more importantly, this measure accurately represents the landowner's losses when development is imminent prior to the regulatory taking. Once the regulation is invalidated by the courts, the landowner will presumably recapture his lost profits by developing and selling the property.<sup>89</sup> The landowner actually loses only the return on these profits.

This measure, however, is difficult to apply to a wide range of temporary takings cases. First, because the court must presume that the regulation prevented development, it must make many assumptions regarding the property's development and sale. The plaintiff must prove that development was imminent, that purchasers or lessees were actually available, and that the plaintiff would have realized enough income during the regulation period to make a profit.<sup>90</sup> These assumptions, in many cases, make the damage appear speculative.<sup>91</sup>

The most important problem with the interest on lost profits measure is that it seems to be in the nature of consequential damages.<sup>92</sup> While the term "consequential damages" is somewhat ambiguous,<sup>93</sup> it has been defined in the temporary taking context as damages to a group of rights not related to the physical property itself.<sup>94</sup> These include losses to the owner's business, such as lost profits, damage to goodwill and the expense of relocation.<sup>95</sup> Such losses, personal to the owner or lessee and not reflected in the value of the property itself, generally have not been recoverable in temporary takings cases.<sup>96</sup>

But despite these problems, the interest on lost profits measure appears to emphasize the fairness goal of Just Compensation.<sup>97</sup> It does not attempt to simulate market transactions, but reflects harm presumably suffered by the owner or lessee. The measure may accurately represent the owner's actual losses when the development of raw land is imminent, as in *Blumberg*. The problems regarding the consequential nature of the losses may nevertheless make it unacceptable to many courts.

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87. For a discussion of the importance of easy application, see generally Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). The need for reflecting actual damages is stated in *Corrigan*, 149 Ariz. at 544, 720 P.2d at 519.

88. Hagman, *supra* note 59, at 226.

89. See Johnson, *supra* note 78, at 596-97.

90. Justice Brennan noted that compensation must be paid from "the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." *San Diego Gas & Elec.*, 450 U.S. at 658 (Brennan, J., dissenting).

91. *Teague*, 570 S.W.2d at 394-95.

92. *General Motors*, 323 U.S. at 380.

93. See 4 J. SACKMAN, *supra* note 64, at § 14.

94. *General Motors*, 323 U.S. at 379-80.

95. *Id.*

96. *Id.* But see Note, *Inverse Condemnations: Valuation of Compensation in Land Use Regulatory Cases*, 17 SUFFOLK U.L. REV. 621, 652 (1983) (noting a "modern trend" allowing consequential damages in inverse condemnation cases).

This measure is not useful in either *First English* or *Corrigan*. The First English church apparently planned to rebuild Lutherglen for its own use, not future sale or lease. The plaintiff, therefore, could not prove that it would have had profits to invest. Ms. Corrigan, on the other hand, likely would have been unable to prove that development was imminent or that purchasers or leasers were readily available.

### C. Before-After Valuation (Two Methods)

#### 1. Before Regulation Begins — After Regulation Ends

Using this measure, the court compares the value of the property prior to the regulation's enactment to the value after the regulation has been declared invalid.<sup>98</sup> The court, therefore, determines the long-run diminution in property value resulting from the regulation's imposition. This measure acknowledges that the property might regain its lost value after the regulation is invalidated.

The trial court in *Cordeco Dev. Corp. v. Vasquez*<sup>99</sup> applied this measure and reduced a jury verdict based upon lost return. The challenged regulation in *Cordeco* restricted the owner's power to mine sand. The court noted that the value of sand increased during the period of the taking and that the restriction simply denied the owner "the right, for a period of time, to deplete an asset of the land."<sup>100</sup> The court, therefore, limited damages to one dollar because the property's value had not diminished during the period of the regulatory taking.<sup>101</sup>

The advantage of this measure is that it prevents any windfall to the landowner. It recognizes the landowner's ability to recoup the land use, and thus profit, once the regulation is invalidated.<sup>102</sup> The damage award reflects only the decrease in value of the property which might result from significant changes in the market during the delay in property development.<sup>103</sup> These changes include a decrease in potential income or an increase in development costs.

The Supreme Court, however, rejected this measure in a temporary physical taking decision. In *Kimball Laundry Co. v. United States*,<sup>104</sup> the Court denied the laundry owner's request to use this method on the basis that it did not reflect the value of temporary occupancy.<sup>105</sup> It also noted that using this measure would deny compensation to many landowners "because the market value of the property had not decreased during the period of the taker's

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97. See generally Michelman, *supra* note 15.

98. See Hagman, *supra* note 59, at 224-26.

99. 539 F.2d 256 (1st Cir. 1976).

100. *Id.* at 261 n.8.

101. *Id.* at 261.

102. See Note, *supra* note 96, at 649 (noting the importance that a temporary damages formula reflect the possibility of landowner's recoupment).

103. *Id.*

104. 338 U.S. 1.

105. *Id.* at 6-7.

occupancy."<sup>106</sup> The Court, therefore, implied that the temporary loss of property use has value to the owner, even when no decrease in value occurs.

This before-after measure still may be useful, however, in the *regulatory* taking context when the value of the property decreases during the period of the regulation.<sup>107</sup> This measure promotes the economic efficiency goals by protecting property owners against declining market opportunities. The compensation would serve as insurance against losses resulting from regulation.<sup>108</sup> This measure might be particularly appropriate when the government regulates in bad faith, purposefully denying the owner's ability to earn a profit.<sup>109</sup> The damages may appear consequential in nature, however, so it is important that the damages are shown to be reasonably certain. The plaintiff should be required to show that development was imminent and that buyers or lessees were available. The owner should also be required to prove that he cannot reasonably expect the value to increase in the near future when development is again possible.

This measure might be useful in both *First English* and *Corrigan*. If the First English church suffered increased costs of rebuilding Luther Glen during the regulatory period, then this measure might reflect its actual damages. Likewise, if development was profitable for Ms. Corrigan before the regulation but not later, this measure might also accurately reflect her damages. The use of this measure might then depend on other factors, such as the good faith of the government's actions.

## 2. Before Regulation Begins — After Regulation Begins

This measure compares the value of the property prior to the regulation's enactment to its value immediately after the regulation is instituted.<sup>110</sup> For example, the trial court would compare the value of Ms. Corrigan's property with and without the restriction against development in the "conservation" region. In this manner, the court determines the short-run effects of the regulation on the property's value. The court then assumes what "price" the parties would have agreed upon for the diminution in value over the period of the regulation.<sup>111</sup>

This measure is similar to the rental value because it derives its calculation from a hypothetical bargain between the parties.<sup>112</sup> The rental value method, however, measures the hypothetical price given *present* property uses

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106. *Id.* at 7.

107. Professor Hagman argued that *Cordeco* serves as better precedent for harsh regulation cases than *Kimball*. Hagman, *supra* note 59, at 224.

108. Note, *supra* note 33, at 1267-69.

109. Justice Brennan noted the danger that the government could adopt multiple unconstitutional regulations if a damages remedy were not available. *San Diego Gas & Elec.*, 450 U.S. at 655 n.22 (Brennan, J., dissenting). He quoted a city attorney's advice regarding land use zoning: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN." *Id.* (citing Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations*, 38B NIMBLE MUN. L. REV. 192-93 (1975)).

110. Hagman, *supra* note 59, at 225.

111. *Id.* See also Note, *It's Not Just Compensation, It's a Theory of Valuation as Well: Valuing "Just Compensation" for Temporary Regulatory Takings*, 14 COLUM. J. ENVTL. L. 247, 257-58 (1989).

112. Hagman, *supra* note 59, at 225.

while the before-after measure must *presume* property uses. The before-after measure, therefore, does not have the ready availability of market comparisons that rental value has because generally no present use of the property exists. This measure is also similar to a negative covenant restricting the use of the property.<sup>113</sup>

The advantage of this measure is that it focuses on the loss the landowner sustained during the effective period of the regulation. It values the temporary loss of property use in and of itself. It likewise assumes that parties will bargain to impose this loss on the landowner, and attempts to determine the hypothetical price. The application of this method appears straightforward and has been praised for its simplicity and adaptability.<sup>114</sup>

This measure requires the court to make various assumptions in determining the hypothetical price without a standard of reference. First, under this method, the court must compare the property value before and immediately after enactment of the regulation, possibly without a market comparison. The court must then determine the hypothetically bargained price. Without the external validity of a market value, the measure has a speculative nature which makes proving actual damages difficult.<sup>115</sup> The court also assumes that the parties, prior to the regulation's enactment and later invalidation, knew the length of time the regulation would be in effect. The price would likely be very different if the parties originally believed that the regulation would be permanent. Given the uncertain nature of regulatory takings law,<sup>116</sup> this is a substantial assumption which adds to the speculative nature of the award.

This measure, similar to rental value, is useful when similar transactions occur in the open market. In this context, the measure mimics a market transaction and promotes economic efficiency.<sup>117</sup> For example, a regulation prohibiting campgrounds in rural areas may be quite similar to a negative covenant between private parties. The negative covenant, if similar enough in restrictions to the regulation, may then act as the market standard of reference.<sup>118</sup> If similar market transactions do not exist, however, this before-after measure becomes speculative in its damage awards. The measure would be useful in both *First English* and *Corrigan* only if negative covenants similar to the imposed regulation existed in the open market.

#### D. Benefit to the Government

Under the benefit to the government measure, the court determines compensation by using the regulatory government's gain from imposing the

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113. See Note, *supra* note 109, at 259-60.

114. *Id.* at 266. The Note suggests that this before-after measure could be a general guideline for all temporary regulatory damages because of "its theoretical simplicity and easy applicability."

115. For the importance of market value, see *supra* notes 65-67 and accompanying text.

116. *First English*, 482 U.S. at 340 n.17 (Stevens, J., dissenting). See also *Penn Cent. Transp. Co.*, 438 U.S. 104 (Justice Brennan stated that determining regulatory taking is essentially an ad hoc judicial decision); *First English Evangelical Lutheran Church of Glendale*, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (noting difficulties of applying takings rules).

117. See Note, *supra* note 33, at 1272-74.

118. See Note, *supra* note 109, at 259-60.

regulation.<sup>119</sup> The court may attempt to determine the actual public benefit derived from the regulation, although this itself would be very difficult to measure monetarily.<sup>120</sup> But this measure is also similar to restitution because the government is forced to give up ill-gotten gains.<sup>121</sup> This might occur for example when the government purchases property at a lower price after imposing a restrictive regulation and later resells it after removing the restriction. The government may be forced to give up the amount gained by those actions, assuming the regulation was an unconstitutional taking. This might be appropriate when the government action is particularly egregious.

This measure does not apply well in *First English* or *Corrigan*. It would be difficult, if not impossible, to determine in monetary terms the actual public benefits derived in either case. Also, it does not appear that either government entity received any unjust enrichment by purchasing at a reduced price.

In addition, this measure is not consistent with Supreme Court holdings providing that compensation is to be granted for the value of the landowner's losses.<sup>122</sup> It also seems to conflict with the compensation clause's goals of fairness to the individual and economic efficiency. The government's gain from regulation does not necessarily relate to the burdens concentrated on particular individuals, even though it may discourage political majoritarianism if certain individuals disproportionately gain from government action. This measure also does not advance the economic efficiency goal by simulating market transactions or insuring against losses from government intrusion. This measure offers no additional assistance in determining the value of the interest taken and, therefore, should not be utilized.

### E. Option Value

Under the option value method, the court assumes the government, through its regulation, has acquired an option to purchase the landowner's property.<sup>123</sup> The regulation becomes in essence a means of "freezing" the property in its current state while the government considers whether to acquire it through eminent domain.<sup>124</sup> The court then may use expert testimony to determine the value of that option for the effective duration of the regulation.

The New Jersey Supreme Court, in *Lomarch Corp. v. Mayor of Englewood*,<sup>125</sup> used the option value measure in awarding damages for a city regulation. The city had adopted an official city map which designated the plaintiff's land for park use. Under the designation, the city reserved the right, for one year, to purchase the property. The court held that the proper award for this acquisitory regulation was the option value of the temporary taking.<sup>126</sup>

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119. Hagman, *supra* note 59, at 227.

120. J. STIGLETZ, *supra* note 20, at 132-37, 145-76 (discussing theories of demand for public goods and public choice mechanisms).

121. D. DOBBS, REMEDIES § 4.1 (1973).

122. See *First English*, 482 U.S. at 319. See also *United States v. Causby*, 328 U.S. 256, 261 (1946).

123. Hagman, *supra* note 59, at 222-23.

124. *Lomarch Corp. v. Mayor of Englewood*, 51 N.J. 108, 110, 237 A.2d 881, 883 (1968).

125. 51 N.J. 108, 237 A.2d 881.

126. *Id.* at 109-10, 237 A.2d at 882-83.



This measure has many advantages. First, it accurately reflects the property interest taken from the landowner, the temporary use of his property. Under the restrictive regulation, the owner cannot develop his property and does not have reasonable hopes of selling it in the interim.<sup>127</sup> Second, this method accurately reflects the property interest obtained by the government. The government benefits from "freezing" the property in its present state, and it always retains the power to acquire it later by eminent domain. This measure would be useful for acquisitory regulatory takings when the government sought to acquire the property after imposing a harsh regulation.<sup>128</sup> Third, and most importantly, the option has a general market value which gives an external validity to the compensation award.<sup>129</sup> Land developers and speculators often acquire options on undeveloped property which have potential for future development. Thus the value of the regulatory taking can be compared to similar, freely bargained for, options.

The option value measure also has some disadvantages. First, it assumes that the parties knew of the regulation's duration in advance. It also assumes that comparable option market transactions exist which are similar in extent, duration and detail to the restrictive land use ordinance. Because these assumptions are often contrary to the facts, they add a speculative nature to the award. Additionally, the option value method assumes that the government is regulating the property intending to acquire it later. But, while the regulations allow the government to "freeze" the property and later purchase the property in its present condition, this may not be the government's intention. It may desire either to regulate the property or leave its use to the owner's discretion.

The option value may be most useful in regulatory takings cases such as *Corrigan* when the property has no present use. The city essentially "froze" Ms. Corrigan's property in its undeveloped state and maintained the ability to acquire it under eminent domain.<sup>130</sup> Similar to the rental value and the "before regulation-after regulation" measurement, the option value measure primarily advances the economic efficiency goal by simulating a market transaction between the hypothetical option purchaser and the seller.<sup>131</sup> It also accurately reflects the property interests taken from the owner, including the ability to sell the property. Market standards of reference can be utilized to assess the fairness of the award.

## CONCLUSION

While *First English* and *Corrigan* determined that compensation must be paid for temporary regulatory takings, the courts still face many difficulties in deciding the amount of compensation due. Without established methods of determining compensation, the exact effect of these rulings on property owners and government planners is still unclear. Will property owners assert their property rights more readily through litigation? Will government officials

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127. Sheer v. Evesham, 184 N.J. Super. 11, 40, 445 A.2d 46, 75 (1982).

128. But see Johnson, *supra* note 78 at 588-90, arguing that acquisitory purpose is not relevant to the remedies issue.

129. See *supra* notes 65-67.

130. 149 Ariz. at 539, 720 P.2d at 514.

131. Note, *supra* note 33, at 1272-74.

forgo necessary regulations because of potential liability? If damage awards are large, the likelihood of these events will increase. If courts limit damages to relatively small awards, neither seems likely to result. In either event, clear and consistent guidance from the courts is essential in this increasingly important area of constitutional law. The persistence of measuring problems, including speculation, timing and the government's motive, make selection of a method extremely important.

Recently, courts and commentators have advocated single methods for use in temporary regulatory takings cases.<sup>132</sup> Yet lower courts should not develop overly formalistic approaches to granting just compensation. Rather, they should examine the general goals of this constitutional provision and the Supreme Court rulings in similar cases to develop various remedial methods that will apply in differing circumstances. No one method appears to be optimal in all potential regulatory takings cases, but several analyzed here work well and advance both the state's goals and the fifth amendment's principles in given situations. The courts should also develop new measures under those same guidelines when given facts do not comport with the measures discussed here.

The "rental value" measure appears best suited to measure damages when the property has some present use at the time the restrictive regulation is imposed. When the property has no present value but development is imminent, the "interest on lost profits" measure appears to best represent the owner's actual losses. The "before regulation begins — after regulation ends" measure may work best when the property has no present use and the profitability of development substantially decreases during the interim of the regulation. The "before regulation begins — after regulation begins" measure appears best suited to instances when the property has no present use, and restrictions similar to the regulation occur in the open market. The "benefit to the government" measure is noted by *Corrigan* and may serve to limit government liability but it is fundamentally inconsistent with the previous takings cases in its focus, and therefore should not be utilized. The "option value" measure performs well when the property has no present use and the regulation is acquisitory in nature.

Once courts adopt a measure for a given fact pattern, they should apply it consistently to similar cases in order to provide greater certainty to the parties. This will permit better planning for both private property owners and government entities. These principles will allow courts to carry out the constitutional mandate of just compensation in regulatory takings cases.

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132. See *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987) (using a rate of return on decreased market value measure); Note, *supra* note 109 (advocating a variation of the before-after methods as a general guideline for compensation). But See Comment, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove*, 74 IOWA L. REV. 1243 (1989) (criticizing the *Wheeler* decision and advocating a flexible case by case approach).