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THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL. By Fred Bosselman, David Callies, and John Banta.* Washington, D.C.: Council on Environmental Quality, 1973. Pp. xxiii, 329. \$2.00.

Reviewed by Robert W. Benson**

“. . . nor shall private property be taken for public use, without just compensation.”¹

Addressing itself to one of the most significant environmental issues facing American communities, *The Taking Issue* attempts to resolve the apparent conflict between land use controls and the fifth amendment's taking clause. Although scholars may not be enthusiastic about the book² because it gives rather short shrift to the analyses of some of those in academia,³ it is probably the most significant thing yet written on the topic since it could well turn around the thinking of people of practical affairs—attorneys, government regulators, legislators, judges and, with luck, maybe a few landowners—most all of whom are perpetrators, witting or unwitting, of the cherished American myth of “just compensation.” This myth holds that the Constitution guarantees every landowner the right to do whatever he pleases with his land and that when government significantly interferes with that right (certainly

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1. U.S. CONST. amend. V.

2. Professor Donald G. Hagman of the Law School, University of California at Los Angeles, has reviewed the book and was not unenthusiastic; but he urges greater attention to certain compensable regulatory schemes, such as his “windfalls and wipeouts” project. Hagman, Book Review, 87 HARV. L. REV. 482 (1973) (see text accompanying notes 51-53 *infra*).

3. Professor Michelman's notion of “just compensation” as fairness in protecting the expectation interest is fundamental to these questions yet receives no treatment by the authors. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman]. One of the important ideas expressed in Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), receives heavy emphasis, but only for about a page and one-half. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964), makes useful points about the historical origins of the just compensation principle which are not drawn upon by the authors, although they have done a superb historical analysis of their own. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971), is relied upon, however, fairly extensively for its categorization of the confused case law.

when the interference goes so far as to remove any chance of selling the land for a profit), government must remunerate the landowner for having "taken" his property.⁴

The authors are out to slay that myth, to change public thinking on the taking issue. The attempt has been made before without apparent success,⁵ but now, no doubt, the time is ripe. For it is quite clear that we are currently in the midst of a fundamental transition, nationwide, from fragmented systems of land use controls in the hands of small, local jurisdictions, to comprehensive control systems in the hands of regional, state and even federal agencies.⁶ This transition has been called a "quiet revolution" by Fred Bosselman and David Callies, two of the three authors of the present book, in their earlier work for the Council on Environmental Quality.⁷ Some of the important public and private sector forces which are bringing the change to fruition have been described by Professor Heyman in *Legal Assaults on Municipal Land Use Regulation*,⁸ and there is evidence that the movement has caught hold within the "Establishment" to a sufficient degree so that it is not likely to be reversed.⁹

The Achilles' heel of this movement, however, is the myth surrounding the taking issue. Fear that too restrictive a regulation will invite inverse condemnation suits, political heat, and, perhaps, judicial holdings of unconstitutionality, inhibit government land use planners, and their attorneys, from asserting their legitimate powers as frequently or as effectively as they might. This fear affects not only the formal assertions of agency powers, but also the informal negotiations

4. A typical manifestation of the myth can be found in Nilsson, *Letter to the Editor*, Los Angeles Times, Feb. 17, 1974, pt. IX at 2, col. 5. See also the statement on the myth by a former county planning commissioner, CRY CALIFORNIA, Winter 1968 (Vol. III, No. 3), at 1.

5. Heyman, *The Great "Property Rights" Fallacy*, CRY CALIFORNIA, Winter 1968 (Vol. III, No. 3), at 29 [hereinafter cited as Heyman].

6. Examples in California include the regional Bay Conservation and Development Commission in San Francisco, the bi-state Tahoe Regional Planning Agency, the state Coastal Zone Conservation Commission, and the federal Environmental Protection Agency which is beginning to get into the land use control business in order to enforce the air pollution laws.

7. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

8. Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URBAN LAW. 1 (1973).

9. See, e.g., the state land use controls urged in the Nixon Administration proposals (S. 924, 93d Cong., 1st Sess.) and in Senator Henry Jackson's National Land Use Policy bill which has passed the Senate (S. 268, 93d Cong., 1st Sess.); see also the provisions for state and regional intervention in the American Law Institute's MODEL LAND DEVELOPMENT CODE (Tent. Draft. Nos. 1-5, 1968-73).

between developers and agencies which are critically important in determining what will actually be built—negotiations involving, for instance, trade-offs between square footage of open-space and number of dwelling units.¹⁰ Thus, while the Establishment is just beginning to consider the idea of transferring land use controls from local to higher jurisdictions, it must be confronted with an even more startling proposition: that government can constitutionally regulate land, without paying compensation to owners, to a much greater extent than the traditional taking myth would lead us to believe.

In its journey from being an interest-group idea to becoming part of the "new wisdom," this proposition has moved out of the pages of the environmentalist journals¹¹ and into the conferences of the opinion brokers—those persons with one foot in the special interest realm and the other in the Establishment. In this case, the Council on Environmental Quality (hereinafter CEQ), itself a Celestina for environmentalists and the Establishment, commissioned members of a well-known Chicago law firm with a history of public planning law work to write a "study" of the taking issue in order "to encourage informed public debate"¹² At the same time, CEQ was receiving the recommendations of a prestigious private citizens' group headed by Laurence S. Rockefeller. (The group is advisory to the CEQ, and its staff director was a lawyer-planner on leave from the CEQ staff.) The group's report, *The Use of Land: A Citizens' Policy Guide to Urban Growth*, recommended that:

[T]he U.S. Supreme Court re-examine its earlier precedents that seem to require a balancing of public benefit against land value loss in every case and declare that when the protection of natural, cultural or aesthetic resources or the assurance of orderly development are involved, a mere loss in land value will never be justification for invalidating the regulation of land use. Such a re-examination is particularly appropriate considering the consensus that is forming on the need for a national land-use policy.¹³

The Taking Issue, then, should be seen, along with the Rockefeller group report, as the first major attempt by the opinion brokers to persuade the Establishment to adopt a new view of the taking clause.

10. Related to me by a staff attorney of a statewide land use agency.

11. Heyman, *supra* note 5.

12. Train, *Foreword*, *THE TAKING ISSUE*.

13. CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY, TASK FORCE ON LAND USE AND URBAN GROWTH, *THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH* 175 (1973).

The argument of the authors can be briefly stated here, prior to fuller description of the book's contents:

1. For more than seven centuries, from the Magna Carta to 1922, the Anglo-American legal system had understood a "taking" to require compensation only when the government physically took the land. Mere regulation was never a compensable taking.

2. In 1922, in *Pennsylvania Coal Co. v. Mahon*,¹⁴ Justice Holmes injected his peculiar views into the regulation issue and required a balancing test, measuring the public need for regulation against the loss incurred by the private property owner. That test has been applied in some, but by no means all, cases to require compensation when regulation decreases land value significantly; more importantly, it has given rise to the myth that government can never regulate without paying for severe losses of land value.

3. The Holmes opinion fights history and rests on no legally sound basis; recent cases abandon the Holmes' test in practice, if not in theory.

4. It is time to discard the taking myth in order to allow the new land use control systems to work effectively. The authors see five potential strategies for debunking the myth:

a. Abandon the principle of *Pennsylvania Coal* and return to the simple, historic, strict construction of the taking clause, leaving land use regulations to be reviewed only for a "rational basis," just as other regulations of property rights are reviewed. Although the authors are ambiguous, they seem to prefer either this strategy or the next one.

b. Accomplish much the same result as in *a* by emphasizing to the courts that, in applying the balancing test, "our increasing knowledge of the environmental damage caused by some patterns of land use makes many public purposes weigh so heavily that they can virtually never be out-balanced by an individual's loss of property values." Recent cases seem to support this approach.¹⁵

c. Encourage the state legislatures to enact statutory guidelines for determining when compensation is required (much as the British have done), in anticipation that reasonable legislative guidelines will be deferred to by the courts.

d. Gather extensive evidence of threatened environmental dam-

14. 260 U.S. 393 (1922).

15. See notes 38 & 40 *infra* and accompanying text.

age, and draft land regulations with great caution, for more regulatory schemes would be upheld, even under the Holmes test, if presented with a firmer evidentiary basis and if more precisely tailored to meet constitutional objections.

e. "Sidestep" the taking issue by any number of means (most all of which are expensive), including compensable regulations, the public trust doctrine and land banking.

These, in a nutshell, are the authors' proposals. But why should one have such high expectations from this book; how will it turn around the thinking of people of practical affairs, as I stated at the outset it would do? It will be effective, I think, in part because of the quality of its legal analysis, but primarily because it is a highly practical book. Photo-reproduced from the typewritten manuscript and soft-bound by the Government Printing Office, the book looks, feels and reads like a brief or a manual for practitioners.¹⁶ One can envision whole segments being lifted from its pages and used in government and environmentalist briefs.

The legal analysis is pragmatic also. Referring to the recent academic scholarship on the taking issue, the authors, who are practicing attorneys, remark:

We were impressed with the profound logic by which each author attempted to make sense out of the confused body of cases—at least until we read the next article in which a new author convincingly demolished the logic of his predecessor and expounded a new and even more convincing system of analysis.

We eventually came away with a sense of frustration, convinced that the world did not need one more analytically good, true and beautiful solution to the taking problem. Holmes' own observation that experience, not logic, governed the law, seemed most appropriate here.¹⁷

This mild charge of ivory-towerism, reflecting the impatience with theory that is at once the virtue and the vice of practicing attorneys, should be taken *cum grano salis*, for it comes from the pens of lawyers who have obviously relished the experience of rummaging through seven centuries of English taking law¹⁸ and who have given us a schol-

16. The resemblance goes so far as to include the occasional typographical errors which always creep into briefs being rushed to meet deadlines.

17. Pp. 324-25.

18. The authors recount their discovery of the full text of a sixteenth century statute: "[I]n a subbasement of Westminster Palace on the bottom shelf of the storeroom for old statutory series there is a quaint (and quite large) leather-bound volume replete with brass fittings (quite sharp, in fact) entitled . . ." P. 66 n.43.

arly analysis of Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.¹⁹ Nevertheless, as a result of their understandable desire to apply experience rather than "beautiful solutions" to the taking problem, the authors de-emphasize certain ideas, theories if you wish, that in my view are potent weapons for those who wish to affect the law of taking. Those ideas will be discussed in due course; with or without them, however, we have a book whose influence can be expected to be widespread.

Part I is a sweeping overview of the cases and circumstances giving rise to questions of taking across the country. We are given a region by region tour, from the air-space over Grand Central Terminal to the shoreline of the West Coast, and we are shown the pervasiveness of claims that regulation of land amounts to compensable taking. The factual details in this kind of material are fast outdated, but the cumulative impact of seeing the taking doctrine appear as the fulcrum in battles between regulators and developers in the woods of Maine, the wetlands of Massachusetts, the resorts of Florida, the suburbs of Boise, and on and on, should convince the neophyte that he or she is being introduced to as potent a clause as there is in the Constitution. Indeed, it affords perspective even to Californians, who since November of 1972 have been living with some of the most significant land use control legislation in the country,²⁰ to see the tremendous environmental and financial stakes across the nation which, rather suddenly, are dependent upon the taking issue.

Having oriented us in space, the authors next orient us in time. Part II places the issue in historical perspective, from Article 39 of the Magna Carta²¹ to the watershed of *Pennsylvania Coal Co. v. Mahon*.²² The essence of these chapters is that, during the seven centuries that lie between these two legal landmarks, a compensable taking by the state was universally understood to be only an actual, physical takeover of land. We are told, for example, that Queen Elizabeth in 1580,

perceiving the state of the City of London (being anciently termed her chamber) and the suburbs and confines thereof to increase daily, by access of people to inhabit the same, in such ample sort, as thereby

19. 260 U.S. 393 (1922).

20. Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE ANN. § 27000 *et seq.* (West Supp. 1974).

21. "No freeman shall be . . . deprived of his freehold . . . unless by lawful judgment of his peers and by the law of the land." MAGNA CARTA art. 39.

22. 260 U.S. 393 (1922).

many inconveniences are seen already,²³ forbade by proclamation the construction of any new housing within three miles of the city. A few years later, Parliament addressed the same problem with a large-lot zoning statute which prohibited construction at a density greater than one building to four acres.²⁴ Yet no one's sense of sixteenth century justice was offended by the lack of compensation accompanying these regulations.

The authors' discussion of American colonial history also suggests a similar experience. Although the colonies typically provided compensation for physical appropriation of lands, as Massachusetts did by giving "reasonable satisfaction" for land taken for roads,²⁵ they did not pay for anything less than a physical seizure. This was true even though many colonial regulations not only restricted land usage, but also imposed affirmative duties on landowners, such as the Virginia House of Burgesses' Acts requiring landowners to grow two acres of corn,²⁶ one pound of flax and hemp,²⁷ and ten mulberry trees per 100 acres.²⁸

The authors trace the genesis of the taking clause through Coke, Blackstone, the first state constitutions and James Madison, without much success in pinpointing the precise conception which gave it constitutional birth in the fifth amendment. The historical record, including the congressional debates on the amendments, is apparently barren of discussion or controversy over the taking clause, and the authors therefore conclude that "[t]here is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land."²⁹

The initial approach of the judiciary to the taking clause was one of strict construction. This narrow approach to the clause remained constant throughout the nineteenth century as the country progressively urbanized and industrialized:³⁰ the authors take us from quaint early cases upholding bans on church cemeteries³¹ to later cases such

23. S. RASMUSSEN, LONDON, *THE UNIQUE CITY* 67-68 (1937), *quoted at* p. 64.

24. An Act against the erecting and maintaining of cottages, 31 Eliz., c. 7.

25. P. 85.

26. P. 82.

27. P. 82.

28. P. 82.

29. P. 104.

30. It was broadened in one respect: to include physical invasions of land by floods, earth movements, etc., caused by government activities, even though the government had not taken the fee.

31. *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. 1826).

as *Mugler v. Kansas*,³² in which Justice Harlan refused to find a compensable taking in Kansas' police power regulation prohibiting manufacture and sale of liquor, even though plaintiff's brewery was rendered practically worthless.³³

In 1922 we come to the judicial watershed of Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.³⁴ The case involved an attempt by the Pennsylvania Legislature to prevent widespread destruction of houses, buildings, roads and utilities by prohibiting coal mining causing earth subsidence. Subtitled ". . . Holmes Rewrites the Constitution," this chapter, together with a later chapter criticizing *Pennsylvania Coal*, is the most analytical, and perhaps the most effective, of the book. Justice Holmes eliminated the distinction between eminent domain and the police power, and substituted a balancing test whereby the government's police power interest would be weighed against the owner's property interest. Under this *ad hoc* approach to the problem, private property interests must give way to the police power until the police power reaches a "certain magnitude" at which point "there must be an exercise of eminent domain and compensation to sustain the act."³⁵ Although Justice Holmes did not expressly overrule earlier narrow construction cases,³⁶ his balancing test clearly revolutionized the constitutional taking standard and propelled the court on a course that led it astray from the historical perspective of seven centuries of taking law.

Part III tries to make sense of the post-*Pennsylvania Coal* taking law. It does so by slicing the cases two different ways for analysis: first, by categories of types of cases (mining, flood plain, wetlands, subdivision dedication, historic district, etc.); second, by the presence of certain key factors (the existence of a "traditional" purpose, such as suppression of a nuisance, compatibility of the uses allowed with the land and with surrounding uses, and the extent of diminution of land value). Others have treated these categories more exhaustively than have the authors,³⁷ but it is not their purpose to replace that prior

32. 123 U.S. 623 (1887).

33. *Id.* at 664.

34. 260 U.S. 393 (1922).

35. *Id.* at 413.

36. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (municipal ordinance prohibiting manufacture of bricks in given area upheld without compensation against a plaintiff whose brick operation lost over 90% of its value because of the ordinance).

37. The authors use and cite Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971), for much of this section.

work. Rather, their purpose is to provide a leading reference for their practitioner audience to the various threads in the taking cases which have often appeared decisive.

The authors do, however, add a thread of their own, a very significant one. Purporting to have discovered yet another "quiet revolution" in land use control, the authors examine cases³⁸ from the first three years of the 1970's and conclude, tentatively and cautiously, that there may be a quiet revolution in judicial attitudes toward the taking issue. I disagree. There is a revolution, but there is nothing quiet about it (unless all revolutions within the judicial framework are quiet). The book notes the striking, though embryonic, record of litigation success of the new regional land use regulatory bodies, such as those described in *The Quiet Revolution in Land Use Control*.³⁹

In cases upholding these agencies' regulatory powers against constitutional challenges based upon the taking clause, the courts seem to accord impressive weight to the comprehensive, regional scope of the regulatory systems.⁴⁰ Conversely, some of the recent cases in which local regulations have been invalidated as takings have voiced concern over the parochial nature of local attempts to regulate (or exclude) problems of regional dimensions. Although these trends are discussed, it is disappointing to note that the authors drop them with the ambiguous comments that (a) courts seem to be giving a strong presumption of validity to land use schemes of state legislatures that are regional in scope, and (b) perhaps local governments are finally being directed by courts back to the requirement, inherent in the *Euclid* case,⁴¹ that controls be in accordance with a comprehensive plan.⁴² These themes are vaguely picked up again in the final part of the book, which describes alternative strategies for government regulators facing the taking issue, but the themes are, in my view, of utmost significance and should have been given much greater emphasis.

Part IV discusses the five alternative strategies (outlined earlier in this review) which the authors anticipate will be used in the future. Each strategy has had, and will have, its champions. The authors are ambiguous about their preference, but it is difficult not to conclude that they prefer either the first or the second strategy, *i.e.*, either an explicit

38. See, e.g., *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 293 A.2d 241 (Md.), *cert. denied*, 409 U.S. 1040 (1972); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

39. See note 8 *supra*.

40. See, e.g., *Candlestick Properties Inc. v. San Francisco Bay Conservation & Development Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

41. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

42. *Id.* at 392-95.

overruling of *Pennsylvania Coal's* balancing test or an almost axiomatic conclusion that the public's environmental interest outweighs any individual's loss of property values in most instances. (The book is largely a brief for these two strategies.)

The case for an overturning of *Pennsylvania Coal* rests primarily on the assumption that it is plainly at odds with the historical use of the taking principle, with the understanding of the draftsmen of the taking clause, and with all other exercises of the police power over property rights which can be carried out without regard to economic loss if rationally related to a legitimate public purpose (a point for which Holmes himself long contended⁴³). The authors conclude that it was only Holmes' "[f]ascination with the 'Bundle of Sticks,'"⁴⁴ *i.e.*, his concern with the abolition of the mineral rights expressly reserved by *Pennsylvania Coal*,⁴⁵ which led him to this inconsistency with his own judicial philosophy.

Yet Justice Brandeis, Holmes' partner in the effort to establish the test of reasonableness in police power cases, had little difficulty in finding that the *Pennsylvania* regulation was substantially similar to the liquor regulation in *Mugler v. Kansas*⁴⁶ which had constitutionally rendered a brewery practically worthless. The authors emphasize this latter point, but they might well have come down even harder on it. For some reason it does not surprise people to learn that government must often pay for losses when regulating certain types of land use (if the losses amount to a taking), even though it can impose similar or greater losses without compensation when regulating economic activity and personal conduct on real property.⁴⁷

If there is any distinction between cases involving regulation of economic activity or personal conduct and the land use cases requiring compensation, it is that the former cases relate to well-accepted public

43. Recall his dissent in *Lochner v. New York*, 198 U.S. 45 (1905).

44. P. 240.

45. 260 U.S. at 412.

46. 123 U.S. 623 (1887) (see text accompanying note 32 *supra*).

47. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 376 U.S. 241 (1964) (prohibition of racial discrimination in motel); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (cessation of operations of gold mine); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (installation of fire protection equipment in hotel); *West Coast Hotel v. Parrish*, 300 U.S. 370 (1937) (minimum wage for chamber maid); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (prohibition of the manufacture or sale of oleomargarine); *Mugler v. Kansas*, 123 U.S. 623 (1887) (prohibition of the manufacture and sale of liquor); *Yen Eng v. Board of Bldg. & Safety Comm'rs*, 184 Cal. App. 2d 514, 7 Cal. Rptr. 564 (1960) (destruction of building which threatened health and safety).

purposes such as health and safety (although often disputed moral purposes underlie the liquor and discrimination cases), while environmental and social purposes, without solid acceptance, underlie the land use cases. It is the authors' second strategy that is directed at this disparity, to persuade the courts that the environmental and social purposes of land regulations are at least as deserving of legal recognition as the more direct encroachments permitted to promote the public health and welfare. The advantage in pursuing this strategy is that *Pennsylvania Coal's* balancing test need not be directly overruled, a step many courts would be unwilling to take.

One road to legitimacy for the public purposes of land regulations may lie in utilizing Professor Sax's point that one owner's use of his land frequently has spillover effects on surrounding owners and on individuals using publicly owned rights.⁴⁸ Relying on Sax's work, the authors suggest that, in comparing the social costs inflicted on the public by an unregulated owner with the loss suffered by a regulated owner, the public interest would in most instances outweigh the individual's interest. Sax, whose article yields other fertile ideas which the authors might well have utilized, also contemplates the recognition of a public interest *equal* to that of the private owner's. In such a case, he would seek to "maximize net benefits from the resource network in question,"⁴⁹ and either claimant might be constitutionally required to give up its interest without compensation.

Yet another road to sanctification of public purposes of land regulation, and the one some courts appear to be taking,⁵⁰ is for the courts to defer to the legislature's judgment on the weight of the public interest underlying the regulations. If the cases continue in the trend the authors describe, in which local regulations are sometimes disfavored but regional schemes are upheld by deference to the legislature's judgment, it may well be that courts are again asserting the ignored requirement of *Euclid*—a *comprehensive* plan.⁵¹ The importance of comprehensiveness, of course, is that it conduces to a consideration of all the inter-relationships of land use, which is to say it conduces to rationality. The appeal to courts of legislative schemes regional in scope is this very rationality, as well as the handing to a legislative body or quasi-legislative agency the job of balancing all of the related in-

48. Sax, *Taking Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

49. *Id.* at 158.

50. See notes 38 & 40 *supra*.

51. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

terests, a task for which the courts are ill-suited. If the courts are accepting these schemes by deferring to the judgment of the legislature, they are at last applying the rational basis test, and land regulation may be ready to join the rest of the law of the police power.

The proposals examined thus far can hardly be expected to engender landowner support. In fact, landowner groups, sensing the impending success of the new law of taking, have already begun to fight back. In California it is reported that an Orange County group is attempting to place an initiative on the ballot which would amend the state's constitution to require "full and just" compensation to landowners whenever their property is "taken, damaged or diminished in value."⁵² In the California Legislature a bill was introduced that would have required payment to landowners in the amount of any decrease in fair market value attributable to changes in city or county zoning classifications.⁵³

A proposal which seems to be a compromise between the landowner-proponents of the myth and regulators is being developed by Professor Donald G. Hagman of the UCLA Law School. Hagman has done much to bring about the marriage of law and planning, which is the sine qua non of an intelligent land use control system.⁵⁴ His proposal, therefore, will merit serious consideration. As described in his review of *The Taking Issue* in the *Harvard Law Review*,⁵⁵ Hagman's "Windfalls and Wipeouts" project, financed by a grant from the Department of Housing and Urban Development, will suggest ways to redistribute some of the increases in land values resulting from governmental regulations (windfalls) to landowners whose land values have declined because of that regulation (wipeouts). "It surely makes sense," says Hagman, "to recapture from those who have windfalls in order to be more generous to those who are wiped out."⁵⁶

It will be interesting to observe what is ultimately proposed, but the underlying notion of a "wipeout" raises serious questions at the outset. It is true that someone who profits from public land regulation, let us say, allowing him to build multiple units instead of a single home on his land, has realized a "windfall." There is no constitutional rea-

52. Berthelsen, *How Business and Labor Are Challenging the Ecologists*, 5 CALIF. J. 59, 60 (1974).

53. Cal. A.B. 2610, Reg. Sess. (1973-1974).

54. See, e.g., HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT (1973).

55. Hagman, Book Review, 87 HARV. L. REV. 482 (1973).

56. *Id.* at 493.

son not to tax that windfall away from him. He had no legal right to be the beneficiary of a legislative decision; even if he had purchased with the expectation that the land would someday be zoned for higher density, it would be most radical to suggest that the expectation should be protected by the law as a property interest.

Is not a "wipeout" subject to the same rules? If someone's undeveloped land is zoned from a multiple unit to a single-family area he has been "wiped out" *only* in the sense that his expectation has been disappointed.⁵⁷ The treatment of such disappointed expectations is, as Michelman has persuasively argued,⁵⁸ the very heart of the just compensation problem. In fact, one can agree with the excellent legal analysis in *The Taking Issue* and still be left somewhat disturbed by its failure to squarely face Michelman's argument that just compensation law should in some manner protect the expectation interest, because it is both utilitarian and fair to do so. But perhaps, to use a phrase of Mr. Justice Frankfurter, this is a horse soon curried: if land use regulations are to be treated like any other economic and welfare regulation under the police power, then owners are clearly on notice that the permitted uses of their land may be legislatively changed at any time, just as they are on notice that they may have to pay their employees a higher minimum wage,⁵⁹ cease manufacturing liquor,⁶⁰ or install the newest fire protection equipment⁶¹ at any time. Since they are on notice as to all of these things, they have no reasonable expectation as to such matters. Indeed, the case is the strongest as to land regulations, for whatever expectations exist as to land use were created by an earlier land use regulation in the first place.

Nevertheless, Hagman's notion of a "wipeout" has intuitive appeal. Even if landowners should not reasonably have expectations about the use of their land, are there not some who *do* and who suffer real hardship from changes in the regulations? Surely there are, just as there are hardship cases under most other police power regulations. Thus it may be that, not as a matter of constitutional requirement, but as a matter of legislative relief, we should ease the hardship on some of those landowners who have truly been "wiped out." Which are

57. He also had paid ad valorem taxes at a higher rate while he held the property undeveloped, and it may be that some relief ought to be forthcoming from the legislature for that "loss," although traditional legal doctrine has not required it.

58. Michelman, *supra* note 3.

59. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

60. *Mugler v. Kansas*, 123 U.S. 623 (1887).

61. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946).

these? Certainly they are not the speculative developers, who can be expected to be eager to cash in on the "wipeout" idea; perhaps they are individuals who had purchased property long ago for anticipated personal uses. For example, it seems equitable to compensate (or relieve from regulation) an individual who had held uniquely scenic property for fifteen years in hope of building a retirement home on it, only to find that the land has been re-zoned for exclusively non-residential uses. The expectation interest in that case arguably involves precious human values worthy of favored legislative treatment. Evidence of the existence of those values consists of the lengthy holding period (*i.e.*, expectation), the personal use intended and the ownership in the hands of an individual. None of these factors is present in the case of a developer who buys property to build condominium units and two years later, before building, finds his property has become an agricultural reserve. Precious human values are not at stake here, only economic ones, and as harsh as the losses may be, we do not entertain notions of public compensation for investment losses in the securities market, so why should we do so in the real estate market?⁶²

If the legislatures are to make a contribution in the just compensation area, let it be in fashioning relief for the precious individual values sometimes "wiped out" by land regulation. If the courts at the same time begin to apply some of the analysis of *The Taking Issue* and uphold land regulations on the same basis as other police power regulations,⁶³ then together the legislatures and the courts will have at last slain the American myth of just compensation.

62. *Cf.* Michelman, *supra* note 3, at 1238.

63. The Court's opinion in *Village of Belle Terre v. Boraas*, 42 U.S.L.W. 4475 (Apr. 1, 1974), applies the rational basis test to a zoning regulation with an unknown impact on property value. But the Court cites Justice Holmes' opinion in *Block v. Hirsh*, 256 U.S. 135 (1921), for the statement that "property rights may be cut down, and to that extent taken, without pay." *Id.* at 155. It is unclear whether this breathes new life into Holmes' balancing test, whether it cleverly uses Holmes' own language to reject the balancing test, or neither.

