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THE WHITE RIVER JUNCTION MANIFESTO*

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INTRODUCTION

We are appalled at the marvel we are witnessing. In the three years since the appearance of Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*,[1] the spread of his "temporary taking" idea threatens to reach epidemic proportions. First, it got a foothold in the Fifth Circuit.[2] Then it cropped up in New Hampshire[3] and New Jersey.[4] Now it has spread to Oregon,[5] the Sixth Circuit[6] and even to North Dakota[7] and Wisconsin.[8] We are astounded at the authority which has been attributed to a dissenting opinion that enjoyed the support of only three of the present members of the Court.

We have all remained comparatively silent too long. Before the seductive simplicity of the notion of "temporary takings"

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* The fact that this paper was conceived over breakfast in a Howard Johnson restaurant in Vermont should neither subtract from nor add to its merit.

** Listed in reverse alphabetical order because Williams paid for the meal.

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1. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

2. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir.) *reh'g denied*, 649 F.2d 336 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). In a companion case in the state courts, the zoning restrictions were upheld. Hernandez v. City of Lafayette, 399 So. 2d 1179 (La. App.), *cert. denied*, 401 So. 2d 1192 (La. 1981), 455 U.S. 901 (1982). Thereafter, the federal court held the state decision to be res judicata. Hernandez v. City of Lafayette, 699 F.2d 734 (5th Cir. 1983).

3. Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981).

4. Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (1982).

5. Seuss Builders Co. v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982).

6. Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984).

7. Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983).

8. Zinn v. State, 112 Wis. 417, 334 N.W.2d 67 (1983).

spreads the infection further afield, we think it is time, if not past time, to declare that Justice Brennan's dissent is wrong as a matter of constitutional analysis and misguided as a matter of judicial policy. We now state without equivocation that as a general proposition neither the Constitution, constitutional jurisprudence nor any decision of the United States Supreme Court commands or justifies the payment of compensation as a remedy when a land use regulation is found to be a constitutionally impermissible taking and is declared invalid as applied to a specific tract of land — even though the regulation does not involve a physical invasion or appropriation of private property.[9] Hence this Manifesto.[10]

I. THE BRENNAN DISSENT

The Brennan dissent in *San Diego Gas & Electric Co. v. City of San Diego*[11] can be summarized briefly. The company bought land as a site for a future power plant. Subsequently, acting under the California mandatory open-space planning legislation,[12] San

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9. There is a wide spectrum of regulatory activities that may result in a taking claim — that is, a claim that the regulation unfairly burdens a particular tract of land by preventing it from being devoted to any reasonable economic use and requiring the owner of the land to bear a financial burden that should be shared by the public generally. The regulatory activities that may produce taking claims can be roughly grouped into six categories: (1) The physical invasion cases, such as flowage and navigation easements, and regulations which have the effect of producing a physical invasion; (2) instances in which government has acquisition on its mind, has said so, and has engaged in other inequitable conduct designed to depress the acquisition price; (3) cases in which regulation prevents any reasonable economic use (for example, zoning land for a park or public use, including those cases in which government had acquisition on its mind at one time, but abandoned acquisition and substituted severely restrictive regulations; (4) the designation of land for future acquisition unaccompanied by inequitable conduct on the part of government; (5) cases in which it is claimed that regulation has substantially diminished the value of land; and (6) moratorium cases, which involve a prohibition of all use but for a limited period of time. For a review of the current crop of taking cases in this analytical framework, see Smith, *The Aftermath of the Brennan Dissent in San Diego Gas & Electric*, 8 PLAN. & L. DIV. NEWSLETTER 1 (1984).

10. For those who may wonder how the five of us could ever agree on the text of this Manifesto, the answer is that we divided the responsibility and each wrote an assigned section of the initial draft. In addition, Williams was responsible for scholarly perspective. Siemon delved into arcane corners of constitutional history. Smith was given the tasks of viewing with alarm and getting Williams to stop writing. Babcock's job was to dress the thing up with fancy words. ("Amaranthine" and "transmogrification" made it, but no place could be found for "gallimaufry.") Footnotes were assigned to Mandelker whose 39 page contribution nearly won the annual Ross & Hardies Helmut Walenfels Footnote Extravaganza Award, but the judges disqualified the entry on the ground that holders of endowed chairs are ineligible.

11. 450 U.S. at 636.

12. CAL. GOV'T CODE § 65563 (West Supp. 1981).

Diego placed a part of the company's land in a restrictive open space zone. San Diego Gas & Electric brought an action in inverse condemnation, claiming the city had taken its land and arguing that compensation must be paid under the taking clause of the fifth amendment. A majority of the Court could find no final judgment, and so did not reach the taking and compensation claims on the merits. Justice Brennan, dissenting, considered the taking question and embraced the idea that compensation should be awarded in land use taking cases. Justices Marshall, Powell, and Stewart concurred in the dissent.

The question, then, is what the proper remedy should be when a court finds a land use restriction invalid as applied to a specific tract of land as in a *Nectow*-type case[13] because it cuts too deeply into ownership rights in real property. Does the Constitution dictate a specific remedy in such instances?

Justice Brennan first concluded that when there is a taking, "nothing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value."[14] What he proposed, instead, was a theory of mandatory compensation for temporary takings that are subsequently rescinded.

Justice Brennan offered several reasons for his conclusion that even a temporary taking through land use regulation requires just compensation:

1. The taking clause is not precatory but demands that compensation be awarded when regulation cuts too deeply into private interests in real property because Justice Holmes said so in *Pennsylvania Coal Co. v. Mahon.*[15]

2. Compensation redistributes the economic cost of a taking "from the individual to the public at large,"[16] where it belongs.

3. Policy considerations must not decide "the applicability of express constitutional guarantees".[17]

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13. Nectow v. City of Cambridge, 277 U.S. 183 (1928). There the Court held that while zoning regulations were constitutionally permissible as a general matter, they might fail to meet constitutional standards in their application to particular parcels of land.

14. 450 U.S. at 658 (Brennan, J., dissenting).

15. *Id.* at 649-50 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

16. *Id.* at 656.

17. *Id.* at 661.

4. If policy considerations are considered, "the threat of financial liability" for land use takings will "produce a more rational basis for decision making that weighs the costs of restrictions against their benefits".[18]

5. "[A] policeman must know the Constitution, then why not a planner?"[19] This is an obvious reference to the *Miranda* warning that must be given by police officers on making an arrest.

Brennan was careful to offer municipalities the hope of an escape hatch, or at least a method of minimizing damages. He said that if, after a decision of invalidity, the local officials repealed the restriction in question, they would not have to pay the full market value of the land. In that case they would be liable for damage occasioned by the invalid restriction, "commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[20] While probably intended to serve as a limitation on municipal liability, the "temporary taking" idea in fact fixes the principle of liability more firmly on municipalities. Justice Brennan would expand the reach of liability by requiring municipalities to respond in damages even if they rescind the offending regulation. For that reason the analysis in this essay is focused on the novel notion that there can be liability for "temporary takings" even when there has been nothing resembling a physical invasion or assertion of dominion over, or possession of, real property.

In a special concurrence, Justice Rehnquist noted that, if there had been a final judgment to review, "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan."[21] While this statement is hardly precise legal analysis, it may suggest that, as of that date, five Justices may have favored a mandatory compensation remedy for overly-restrictive zoning.

II. The Assumptions Underlying the Brennan Doctrine

Justice Brennan's proposal appears to rest upon seven assumptions:

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18. *Id.* at 661, n. 26.
19. *Id.*
20. *Id.* at 658.
21. *Id.* at 633-34 (Rehnquist, J., concurring).

1. As the land-use-control system now works, landowners and developers are most in need of help from the protective arm of the courts.

2. In *Pennsylvania Coal,* Justice Holmes laid down the prevailing rule on "taking" — and what he said should be read literally.

3. There is a readily ascertainable way — a clearly-defined formula—to tell when a land-use restriction is a "taking."

4. Moreover, that formula is recognized nation-wide, and can be applied nation-wide.

5. The special competence of the Supreme Court includes the ability to bring about (3) and (4), by effective supervision of the state courts.

6. Consideration of the effects on public policy are not appropriate in matters of constitutional interpretation.

7. If damages are required to compensate for unconstitutional land use regulation, zoning officials will pay more careful consideration to the rights of citizens.

We submit that several of these assumptions are demonstrably false; the others are highly dubious.[22] The Brennan dissent is merely additional evidence that the members of the present Court are simply not familiar with the course that zoning law has taken in the past six decades.

III. Who Needs Judicial Relief — The Parties In Interest

First, let us set the stage with an examination of the competing interests in land use disputes, to see whether Justice Brennan's assumption about who needs help is justified.

In understanding any land use case, the first point to note is who the plaintiffs are, because normally (that is, in most states) the courts take very different attitudes towards the claims raised by the various parties in interest. We have to start by identifying

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22. Justice Brennan did not suggest, as some compensation advocates would have us believe, that the federal constitution contains an implicit "compensation syllogism" that requires compensation in land use taking cases. One of our number has effectively demolished this argument. *See* Mandelker, *Land Use Takings: The Compensation Issue,* 8 Hastings Const. L.Q. 491 (1981).

the usual parties in interest in a land use dispute, and deciding which (if any) of those parties are likely to need judicial help in vindicating their just claims. Brennan's dissent nominates landowners and developers as the parties who need help.

A land use lawsuit is a land use conflict that has graduated to the judicial arena.[23] Developers and landowners often prefer to build something more intensive (and thus more revenue producing) than what is permitted as a matter of right by the existing regulations. If the municipal authorities refuse a request for relaxation of the restrictions, the developer or landowner may take his grievance to court. Then we have what is called a "developer's case." Residential neighbors almost invariably object to allowing a more intensive land use anywhere near them. If for one reason or another the municipal authorities decide to approve the developer's request for relaxation of the regulations, the neighbors may protest and turn to the courts for vindication. This we may call a "neighbors' case."[24]

A third type of party in interest has come into prominence in the decisions in the 1970's. These parties are those who are wholly excluded from living or working in an area by the operation of the land use control system. Let us call these the "third party nonbeneficiaries." Sometimes the local government (and its officials, elected or appointed) that made the decision has its own special interest, and so may be a separate fourth party in interest. One example is the zoning bureaucrat who believes that the only safe way to administer a zoning ordinance is to say "No" whenever it can be done with a modicum of plausibility. Moreover, not infrequently local government is the claimant, charging that its land use controls have been violated. Sometimes local government interests are linked with those of the citizenry; sometimes they are not.

The courts in the several states have a variety of policies for dealing with the claims made in land use cases, but normally they

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23. If a developer proposes something which is permitted by the relevant zoning and other land use ordinances, he obtains a building permit, and simply goes ahead. When the developer is turned down, he often shrugs and moves on to the next town. Neither result produces any reported legal case. So generalizations about the system tend to be based on those proposals that resulted in litigation.

24. "Neighbors," incidentally, may be an organized or unorganized group whose actual membership extends well beyond the immediate vicinity of the site in question, such as the Sierra Club, 1000 Friends of Oregon, the Environmental Defense Fund, the Pacific Legal Foundation and other such state-wide or nation-wide groups.

treat the claims of the various parties rather differently. Judicial attitudes towards these four types of claims have changed over the years, particularly toward claims brought by developers. To summarize much too briefly, in the first two decades of this century claims made by developers were almost invariably upheld by the courts. In a second period, starting in the mid-1920's and lasting for very different periods in different states, the general principle of public land use control was upheld, but developers usually won if they challenged the validity of zoning as applied to a particular tract.[25] Again speaking very generally, starting about the mid-1950's, state courts began to swing to the other extreme, and many of them upheld almost any land use restrictions. The theory seemed to be that municipalities should be free to experiment with their own future because, even if they erred, they could hardly do worse than the free market had done in the past. By about 1970 some courts became increasingly suspicious about municipal land use decisions, and judicial attitudes began to change again. The immediate symptom of the change was a more searching judicial review. As matters now stand, in most states the courts will insist upon knowing what is really going on.[26] If there is a good answer, all is well—but there had better be one.

Claims made by neighbors are usually treated very differently. On a nation-wide basis, neighbors usually lose in court; but this has been noticeably less true recently, and is definitely not true in certain states—in Maryland, for example, and probably in Massachusetts.[27]

A. *The Land Use Control System and How It Works*

Since *Nectow v. City of Cambridge* in 1928,[28] the state courts have been dealing with land use disputes by the thousands. Most of the decisional law (well over 90%) consists of zoning cases, many of which have been grounded on federal constitutional

25. That is, the courts had approved the general principle of cutting off certain development rights (commercial, industrial, etc.) without compensation, in appropriate cases; but the courts remained available to listen to arguments on whether a given case was appropriate—that is, for example, whether a tract should be zoned commercial instead of residential, or whether multiple family rather than single family dwellings should be permitted.

26. When we talk about "the courts" we mean the various state courts. While land use cases are not unheard of in the federal courts, they are not at all common.

27. See the discussion in 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 6.05-.06 (1974).

28. 277 U.S. 183 (1928).

claims. Until recently almost all of the zoning decisions have come from the state courts, and they have been the primary arbiters of land use disputes. Once the United States Supreme Court had upheld zoning in principle in the 1920's,[29] it remained aloof from the fray, and for nearly fifty years thereafter left zoning matters severely alone. In fact, only one zoning case[30] along with one urban renewal case,[31] were decided by the Supreme Court in the forty-six years between 1928 and 1974. Since 1974 the Supreme Court has reentered the land use field with a vengeance, handing down ten decisions in just nine years.[32] What is most striking (but not entirely unexpected) about the recent spate of decisions is the extraordinary degree of inexperience and even naivete which the Court has demonstrated in handling land use issues.[33] For example, in the first case, *Village of Belle Terre v. Boraas*,[34] decided in 1974, Justice Douglas cited no zoning decision other than the Court's own, and thus necessarily relied on precedents no more recent than 1928. The opinion read as if nothing had been happening in the field in the intervening half-century. The Court's more recent decisions have demonstrated a similar inexperience and a lack of sophistication about the land use control system.[35]

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29. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

30. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

31. Berman v. Parker, 348 U.S. 26 (1954).

32. Larkin v. Grendel's Den, Inc., 456 U.S. 913 (1982); Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981); Shad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Young v. American Mini Theaters, 427 U.S. 50 (1976); City of Eastlake v. Forest City Enter. Inc., 426 U.S. 668 (1976); and Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Despite its newly discovered interest in land use matters, the Court declined to consider the land use ramifications of the expansion of municipal liability under 42 U.S.C. § 1983 that it had adopted in Owen v. City of Independence, 445 U.S. 622 (1980). *See* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

33. Indeed the Court's contribution to the delineation of the bounds of planning law can only be described as regrettable. Some eighteen or more years ago, two of us lamented the United States Supreme Court's refusal to enter the fray of planning law and attributed much of the confusion of the law to that failure. *See* Williams, *Planning Law and The Supreme Court*, 13 ZONING DIG. 57, 97 (1961), and R. BABCOCK, THE ZONING GAME 109-11 (1966). Given the Court's contributions in *Belle Terre, Eastlake, East Cleveland, Mini Theatres, Agins, Metromedia, Schad* and *San Diego Gas & Electric*, Babcock and Williams are persuaded they should have left well enough alone.

34. 416 U.S. 1 (1974).

35. Compare the Court's opinion in City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668 (1976) with the dissent of Justice Stevens in that case, *id.* at 680, and the opinion of the Ohio Supreme Court, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975). The majority of the Supreme Court in *Eastlake* seems to have been either unaware or unconcerned about the

Justice Brennan's dissent clearly reflects an attitude that, under the land use control system as it currently operates, developers and land owners most need judicial help. What Brennan proposes as a solution is really a return to a modified version of either the first or the second period of land use law in the state courts.

This retreat into bygone jurisprudence might be justifiable if it were supported by a convincing analysis of how the present system actually works in the municipal arena, which is often very different from the way the facts read in the reported cases. Unless you know how the land use system operates in the plan commissions and city councils of the country, you can do no better than speculate when you try to devine which party "needs help" and where the "help" is needed. The unhappy fact is that we have very few such studies. The outstanding example is a series of articles in the *Wisconsin Law Review,* produced under the leadership of Professor Jacob Beuscher in the 1950's.[36] In addition, there are some fine recent examples by Professors Dan Tarlock and David Bryden.[37] With those exceptions, the field is practically barren. We do not know the whole picture, and surely Justice Brennan does not either. All any of us, including the authors of this Manifesto, can do is generalize from our own first-hand experience, or from what we have picked up on the gossip circuit or at American Planning Association meetings.

Brennan's assumption that local government is often arbitrary in dealing with the developers is by no means groundless. No one

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blatantly exclusionary purpose underlying the Eastlake referendum requirement.

36. Beuscher, *Private Zoning on Milwaukee's Metropolitan Fringe — A Preface,* 1958 WIS. L. REV. 610 (1958); Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases,* 1955 WIS. L. REV. 440 (1955); Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area,* 1958 WIS. L. REV. 612 (1958); Zile, *Private Zoning on Milwaukee's Metropolitan Fringe: Problems of Drafting,* 1959 WIS. L. REV. 451 (1959).

37. *See* Tarlock, *Not In Accordance with a Comprehensive Plan: A Case Study of Regional Shopping Center Location Conflicts in Lexington, Kentucky,* 1970 URBAN L. ANN. 133 (1970); Bryden, *A Phantom Doctrine: The Origins and Effects of Just v. Marinette County,* 1978 A.B.F. RESEARCH J. 397 (1978). And *see Zoning Variances and Exceptions: The Philadelphia Experience,* 103 U. PENN. L. REV. 516 (1955); Comment, *Zoning: Variance Administration in Alameda County,* 50 CALIF. L. REV. 101 (1962); Bryden, *The Impact of Variances: A Study of Statewide Zoning,* 61 MINN. L. REV. 769 (1977). (Note that every sound law review article has to have a colon or semi-colon in the middle of its title). The impact of large-lot zoning is the only question which has been thoroughly researched. *See, e.g.,* URBAN LAND INSTITUTE, THE EFFECT OF LARGE LOT SIZE UPON RESIDENTIAL DEVELOPMENT (Technical Bulletin No. 32, 1958) (Boston suburbs); Code & Liebman, *Political Values and Population Density Control,* 37 LAND ECON. 347 (1961) (Philadelphia suburbs). For a broader perspective, *see* N. WILLIAMS, AMERICAN LAND PLANNING LAW *passim* (1974).

with first-hand experience in the field would deny that municipal caprice is far more common than it should be. Every practitioner in the field has his favorite horror story.[38]

Although Brennan's concern does have some basis, the best analysis we can make of the present system provides a far better case for precisely the opposite proposition. At the present time, in many areas the cards are often stacked against the neighbors, and they are the ones who really need judicial help. Even more obviously, the cards are normally heavily stacked against third party non-beneficiaries, who need affordable housing. Money damages for the developer who has been the subject of a "temporary taking" will provide little or no benefit for them.[39]

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38. A good example of the damage done by overly restrictive towns is found in the wealthy suburb of Bronxville, New York whose overly restrictive regulations have repeatedly produced unfortunate precedents in New York law. The clearest example of this was the finest flower of the Keating period in New York Court of Appeals land use law. The application of a lot-size regulation for Bronxville was held invalid, and Judge Keating persuaded the court to change the whole theoretical basis of New York zoning law. Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967). Bronxville kept raising the required lot sizes, and as anybody could tell who went to look, all the existing lots in the area involved (including the vacant ones in question) were much smaller than what was required by the regulation. So, the regulation was clearly overly restrictive. Compare also the floor area ratio case from the 1950's, Village of Bronxville v. Francis, 1 N.Y.2d 839, 135 N.E.2d 724, 153 N.Y.S.2d 220 (1956), where plaintiff persuaded the Court of Appeals to announce a new policy on variances: the normal criteria for showing hardship as a basis for variances were limited to use variances, and a far less restrictive criteria ("practical difficulty," whatever that might mean) was thenceforth applied to area variances. In other words, in the most crowded metropolitan area in the United States, variances permitting additional density and congestion were not to be considered as a serious matter. *See also* Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950), where the New York court originated its doctrine that community facilities make a special contribution to the general welfare, and therefore cannot be excluded on the ground that they are harmful to that welfare.

39. *See* J. Brennan's dissent in Warth v. Selden, 422 U.S. 490, 519 (1975) to the majority's refusal to grant the third party non-beneficiaries standing to question zoning practices that were alleged to be discriminatory. In *Warth* and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (a claim that zoning restrictions are racially discriminatory requires proof of intent) the Supreme Court has discouraged the use of federal forums for attacks on exclusionary land use policies. The lower federal courts have also been notably inhospitable forums for claims that land use restrictions are economically discriminatory or ignore the housing needs of the region. *See* Hope Inc. v. County of DuPage, 738 F.2d 797 (7th Cir. 1984); Silken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975); Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Mahaley v. Cuyahoga Metropolitan Hous. Auth., 500 F.2d 1087 (6th Cir. 1974); and Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974).

B. *Fiscal Impacts*

The real operation of the local land use control system as we perceive it needs to be spelled out as best we can. It is essential, in understanding why developers tend to be favored in the present land-use-control system, to recognize that formal land use controls are not the only way in which local governments influence land use. We regard as land use controls *all* those governmental actions which have an important influence on land use, *whether or not* land use regulation was the principal motive for the public action taken. Two other kinds of public action tend to dominate the thinking of local officials about land use decisions, and are at least as important as, or more important than, decisions about the official system of land use control (zoning, subdivision control, the official map, urban renewal, landmark designation, environmental regulations, etc.). One is the influence of the local tax system; the other is the influence of public decisions on capital investment.

Most land use controls are still adopted and imposed at the local level. The most important current fact about local government is that its revenue base is wholly inadequate. The traditional system of financing major public services through local real property taxation, and in some states local sales and excise taxes has visibly been breaking down all around us. The system simply does not produce enough revenue to provide for what are even now regarded as the normal functions of local government. In this situation, local officials are inevitably and necessarily preoccupied with the problem of finding more sources of revenue, and trying to keep down demands for additional services.[40]

Land use decisions are closely linked to revenue problems because different land uses have very different effects on the local real property tax base. Some land uses, for example, research laboratories and high tech modern industry, bring in substantial local tax revenue, without requiring much in the way of services, and are regarded as "good ratables." Other land uses require a lot of services, do not bring in much in the way of revenue, and are regarded as "bad ratables." The obvious example is low and moderate income housing. Some land uses, such as regional shopping malls, generate massive sales tax revenues for one municipality,

40. Where there are local sales taxes, the race for revenues may bias the land use control system in favor of sales tax generators.

while its next door municipal neighbor lives hand to mouth. Thus, land use decisions have fairly important consequences for the local tax base and burden.[41] They also produce major social consequences as well. So in recent decades the thinking of local officials about land use matters has been increasingly dominated by economic and social considerations. A prominent concern is the search for good ratables and the corresponding discouragement of bad ratables. This phenomenon is often called "fiscal zoning," particularly by its detractors.[42]

As a consequence, when any major land use decision comes before a local government, the question of its effect on local tax revenues is a major, if not the dominating, consideration. There is no point in the courts telling local officials to ignore such considerations. Inevitably, they will give them a significant role. This means that there is an inherent bias in the operation of the system in favor of any proposals which will bring in more tax revenue. Coincidentally, those proposals are usually requests for rezoning or development approval in which a more intensive land use is being sought by a developer. It is only a slight over-generalization to say that if a proposal comes up for a change in land use that will increase tax revenues, the local officials are likely to view it sympathetically. They will turn it down only if there is strong and loud neighborhood opposition (the "decibel test"). While the situation will vary among different kinds of municipalities, fiscal zoning considerations are likely to be more dominant in the rapidly growing communities—that is, in just those situations which offer the maximum opportunity to err on the side of the developer. What is even more obvious is that the conjunction of community opposition and a proposal for so "bad" a ratable as low or moderate-income housing will doom a development request. Thus, municipal fiscal imperatives tend to tilt the scales in favor of the developer.

C. *Why the Developer is Favored*

The success of developers in dealing with the land use system is not reflected in the reported decisions because the lack of oppo-

41. Whether "good ratables" are, on balance, all that good, may well be doubted; and the same may be true to some extent about "bad ratables." What counts is what local officials believe about "ratables."

42. See the opinion of Justice Frederick Hall in Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972).

sition at the local level, or the impecunious circumstances of the protesting neighbors, make "neighbors' cases" comparatively infrequent. Apart from environmental issues, where well-organized interest groups have supported sometimes protracted litigation, the bulk of land use litigation is conducted by disappointed developers and landowners whose visions of instant equity through rezoning have been frustrated. This condition of the decisional law obscures what is really happening at local council meetings.

The developer also benefits from the decided preference of local office holders for specific projects rather than general plans. In theory, the basic elements of a town's future should be planned in advance, with some indication of future land use for vacant land, in an adopted document called a comprehensive, master, or general plan. Proposed specific developments should then be evaluated in terms of their impact on the proposed future land use pattern. Unfortunately, comprehensive planning is by no means a universal practice.[43] In some communities, no serious decisions on future land use are made until a developer submits a proposal to the local authorities for rezoning or for a development permit. That proposal is then evaluated largely on an ad hoc basis, usually with fiscal considerations playing a dominant role.

Two further facts of local government life strengthen the developers' role in matters involving particularized rezonings or development permits. First, most local officials think in rather specific short-run terms, and they dearly love to make a deal; that is, their inherent bias is toward reviewing and fussing over the details of specific projects, rather than thinking in long-range terms.[44] It is a constant struggle to get local officials to consider the long-run implications of their development decisions. Their mental bias simply runs the other way. It always has and it probably always will. The petitioning developer may also enjoy a degree of political

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43. However, some states have statutorily mandated consistency between planning and regulation. *See, e.g.*, CAL. GOV'T CODE §§ 65061, 65860 (West 1983); FLA. STAT. ANN. §§ 163.3167, 163.3194 (West Supp. 1984) and OR. REV. STAT. §§ 197.010(3), 197.752(1) (1983). An increasing number of decisions have also stressed the importance of planning as a foundation for reasonable land use regulation. *See* Forestview Homeowners Ass'n v. County of Cook, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); Kindred Homes, Inc. v. Dean, 605 S.W.2d 15 (Ky. 1979); Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); and Baker v. City of Milwaukee, 271 Or. 500, 533 P.2d 772 (1975).

44. The Town Board of Palm Beach, Florida, even wants to pick out the trees and bushes.

clout that makes it virtually impossible for elected local officials to say "No."

The second fact of life flows from the first. Local land use decisions increasingly tend to be festooned with a list of very specific development conditions—a technique that is often referred to as "contract zoning."[45] In fact, what is loosely called "contract zoning" may take many forms.[46] The negotiation process that attends the elaboration of development conditions inevitably involves the developer deeply in the decision-making process. As a result, he is ordinarily in a better position to protect his interests than are the neighbors.

D. *Balancing Competing Interests*

Balancing the interests of the various parties is a most intricate business. Serious and plausible arguments can be made that the system has been skewed in a variety of directions. Clearly, some serious reconsideration is in order. Practically everyone familiar with the land use system agrees on that point, if on no others. But above all else, it is not a situation in which it is appropriate for the major decisions to be made by the courts, and especially not by reading into constitutional doctrine a mandate for a particular remedy in all cases. The difficulty of adjusting competing interests in land use decisions does not require a blunderbuss approach, such as awarding damages every time a town guesses wrong because a court has decided that the zoning action for a given tract of land is unconstitutional.

In assuming that it is developers and landowners who need a

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45. Contract or conditional, rezoning is a process by which a local government enters into a private agreement with a developer either by covenant, deed restriction, or contract, whereby the government exacts a performance or promise from the developer in exchange for its agreement to grant a rezoning. The purpose is to minimize the negative externalities caused by land development which otherwise benefits the community. The developer may agree to restrict development of its property, make certain improvements, dedicate a portion of land to the municipality, or make payments to the government.

A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING 27-45 (1984) (footnote omitted). The topic is discussed at length in § 27.05 of the Rathkopf text and notes 3-5 at pp. 27-48 contain an extensive annotation of the decisions on the subject.

46. The most sophisticated is what is referred to as "planned unit development." This mechanism is an amalgam of various regulatory devices, now also rather common in "conventional zoning," by which the details of a large development are worked out by negotiation at the time development is imminent.

helping hand from the Supreme Court, Justice Brennan has simply misread the problem. Only when governmental policy frustrates or prevents development in which the interests of a developer and a third party non-beneficiary are in tandem does the land use system need the infusion of some additional judicial help. Compensation is the wrong kind of help because it will give *all* developers the coercive threat of a compensation remedy as a lever with which to pry loose regulatory relief from a reluctant local government.[47]

An additional consideration that argues strongly against the Brennan position is that most local governments are in serious trouble because of their inadequate tax base. Several major cities have actually approached bankruptcy in recent years. Given the current financial distress of local government, this does seem a curious time to shift a major financial burden onto governments that cannot cope with their present burdens. Despite the budgetary woes of local government, there are now two major threats that their fiscal burdens will actually be increased. Under the general policy of the present administration, the notion appears to be that local government would be strengthened if many additional responsibilities were to be pushed down to that level, without much financial help—a curious notion, indeed. In addition, the Supreme Court has set the stage for potentially catastrophic civil rights[48] and antitrust[49] damage awards.

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47. Compensation is even the wrong relief in those cases in which a developer is caught in mid-development by a change of regulation or the municipal mind after incurring heavy expenditures. *See* Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed* and *cert. denied*, 429 U.S. 1083 (1977); Raley v. California Tahoe Regional Planning Agency, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977); and Oceanic California, Inc. v. North Central Coast Regional Comm'n, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976). In such cases an order allowing the developer to complete what he started will be more welcome relief.

48. Since Owen v. City of Independence, 445 U.S. 622 (1980), municipalities have been strictly liable for monetary damages occassioned by their ordinances or policies that deprive persons of rights guaranteed by the Constitution or laws of the United States.

49. The fallout from the Court's decisions in City of Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978) and Community Communications v. City of Boulder, 455 U.S. 40 (1982) exposing municipalities to extensive liability under the federal antitrust laws has already been felt in the Chicago metropolitan area where a federal court jury returned a nine and a half million dollar judgment, trebled to twenty-eight and a half million, against the County of Lake, the Village of Grayslake, the Mayor and two County Board members, for refusing to extend sewer service to land which had been annexed to the Village of Round Lake Park for development that was denser and more intense than Grayslake would approve or allow. *See* report in Waukegan News Sun, January 15, 1984 at 1. The intimidating effect of the possibility of large damage judgments has not been lost on the development community in the Chicago area, one of whose members remarked to one of the authors,

Our views on the Brennan dissent in *San Diego Gas* are set against these perspectives on how the current land use control system functions. We now turn to our disagreement with the dissent as an expression of constitutional law and judicial policy.

IV. What Justice Holmes Meant in *Pennsylvania Coal*

According to Justice Brennan, the "taking" principle "has as its source" a passage from Justice Holmes's opinion in *Pennsylvania Coal v. Mahon:* "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[50] An objective look at *Pennsylvania Coal* does not support Brennan's statement.[51] In the context of the matters at issue in *Pennsylvania Coal,* it is apparent that Holmes used the word "taking" not to describe an event requiring payment of just compensation, but as a shorthand description of a regulation that was invalid, and therefore void *ab initio.* Indeed, there could not have been a compensation claim in *Pennsylvania Coal* because it involved only private litigants. The State of Pennsylvania, which had adopted the statute involved, was not a party.

That Holmes did not mean that a police power regulation that "goes too far" automatically becomes an exercise of the power of eminent domain is clear from his opinion.[52] The clarity of this pro-

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"This is the time to get projects approved in Lake County."

50. 260 U.S. 393, 415 (1922).

51. The issue in *Pennsylvania Coal* was the validity of a Pennsylvania statute which prohibited the mining of coal that would cause the subsidence of improvements on the surface of the land (principally roads and houses). The coal company challenged the Act on the grounds that it "destroy[ed] previously existing rights of property and contract" and the Supreme Court found itself confronted with the question of "whether the police power can be stretched so far." *Id.* at 413. The Court's answer was that the police power could not be extended so far and that a total prohibition of the coal company's use of its property "cannot be accomplished *in this way* under the Constitution of the United States," *id.* at 415 (emphasis added) and *invalidated* the statute. The Court did not find, as is so often claimed, that the Kohler Act had actually effected a taking for public purposes; rather the Court found that the attempt to go so "far" by regulation was invalid: "It is our opinion that the act *cannot be sustained* as an exercise of the police power . . . ." *Id.* at 414. Discussions of the meaning of *Pennsylvania Coal* often overlook the fact that compensation was not even an available remedy because the State of Pennsylvania was not a party. The lawsuit was between the coal company and the landowner whose land had subsided and who held title subject to the mineral rights of the coal company. Therefore, *Pennsylvania Coal* is as much a contract clause case as it is a fourteenth amendment case.

52. The Court in *Pennsylvania Coal* stated:

> [S]ome values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in

position is apparently obscured for some authorities by the somewhat ambiguous statement in the opinion that "this is a question of degree" not "disposed of by general propositions."[53] Those authorities, and it may be assumed Justice Brennan as well, conclude that Holmes was saying that the police power and the power of eminent domain themselves differ only "as a matter of degree" and that whether an exercise of police power becomes transformed into a compensable taking is determined by the effect of regulation on the value of property. Consideration of Holmes's opinion in light of his prior opinions on the subject reveals the contrary. His previous stinging criticism of the use of substantive due process doctrine to invalidate legislation had effectively foreclosed him from employing that doctrine as a constitutional principle.[54] Faced with a statute which he found constitutionally offensive, and cut off from reliance on the due process clause, Holmes turned to the taking clause as the basis for his decision.

The "question of degree" comment by Holmes was an expression of the traditional judicial preference for deciding constitutional issues in the context of each case rather than "by general propositions." Although, when exercised, the *effects* of the two powers may differ only as a matter of degree, the powers themselves differ qualitatively. Indeed, the law recognizes them to be separate powers subject to different substantive and procedural due process requirements.[55] The issue in *Pennsylvania Coal* was not, despite the protestations of the inverse condemnation "mavens," whether a Pennsylvania statute prohibiting subsurface mining that would cause surface subsidence created a compensable event, but whether the Act was *valid*.[56] It is imprudent, at the

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> determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an *exercise of eminent domain and compensation* to sustain the act.

Id. at 413 (emphasis added).

53. *Id.* at 416. *See, e.g.*, KANNER, INVERSE CONDEMNATION REMEDIES IN AN ERA OF UNCERTAINTY (1980) and Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983).

54. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, dissenting).

55. *See, e.g.*, Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973) (The court noted that eminent domain rules of valuation do not apply in police power amortization cases).

56. *See* Argument for Plaintiff in Error: "The statute *takes* the property of the Coal Company without *due process of law*," 260 U.S. 393, 395 (1922) (emphasis added). In fact, one argument advanced by the coal company was that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired *only by condemnation*

least, to enshrine what is by definition "mere dictum" as doctrine. If one reads the express language of *Pennsylvania Coal*, the metaphorical nature of Holmes's use of the word "taking" is clear.[57]

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with just compensation to the parties affected." *Id.* at 400 (emphasis added). Moreover, compensation was not an available remedy. *See supra* text accompanying note 51.

57. The word "taking" first appears where Holmes is discussing the balance of public and private interests involved in the case: "[T]he public interest is shown by the statute to be limited . . . . On the other hand the extent of the *taking* is great." *Id.* at 414. If Holmes had intended the word "taking" in the literal sense that Brennan now ascribes to it, Holmes would have gone no further because a "taking" is a "taking" is a "taking;" and once effected, no matter how small, mandates payment of just compensation. But, of course, Holmes was not using the word to describe "taken for public use" but as a short hand description of the *effect* public action may have on the value of property.

That Holmes used the word in a "metaphorical" sense is supported not only by the language and the result in *Pennsylvania Coal*, but by his use of the word "taking" to refer to the state of invalidity in other cases involving constitutional limitations on exercises of the police power. Brennan's rigid literalism in his reading of Holmes's opinion is particularly ironic in the face of Justice Holmes's oft-quoted appreciation for the dynamic character of language: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstance at the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). In Block v. Hirsh, 256 U.S. 135 (1921), Justice Holmes had used the word "taking" in an obviously metaphorical sense:

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the *police power ceases and leaves only that of eminent domain*, it may be conceded that regulations of the present sort pressed to a certain height might amount to a *taking without due process of law.*

Id. at 156 (emphasis added). Similarly, in Martin v. District of Columbia, 205 U.S. 135 (1907), Holmes made it clear that he did not regard an overly restrictive regulation as triggering an award of compensation; rather that an actual taking under the fifth amendment can be accomplished only through an exercise of the power of eminent domain — not by inadvertence through regulations: "Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation *and a taking by eminent domain.*" *Id.* at 139 (emphasis added).

The most explicit statement of the Holmes's "taking" metaphor is found in Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908):

> [T]he police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and *the police power would fail.* To set such a limit would need compensation and *the power of eminent domain.*

Id. at 335 (emphasis added). Thus, the "taking" metaphor was in common usage as a shorthand description of a regulatory action that was *invalid* at the time of Holmes's opinion. *See, e.g.*, Bauman v. Ross, 167 U.S. 548 (1897) ("failed to provide for the just compensation required by the Constitution . . . and was . . . consequently . . . void . . . ." *Id.* at 562).

The literal meaning accorded to the word "taking" under Brennan's theory of liability will inexorably draw the courts into the daily affairs of local government, and accomplish an ironic perversion of Justice Holmes's philosophy of deference to legislative discretion: "The widest scope must be permitted to the inventions of statesmanship, the experimentation

Read in its entirety, the *Pennsylvania Coal* opinion recognizes that eminent domain and the police power are separate and distinct powers. Regulations which are overly restrictive in the constitutional sense—that is, which have an effect that is the equivalent of a taking for public use (and can only be accomplished through an exercise of the separate power of eminent domain) — are simply invalid.[58] The distinction which is implicit in this view is in fact expressed in Holmes's closing paragraph: "We assume, of course, that the statute was passed upon the conviction that an exigency exists that would warrant the exercise of eminent domain."[59]

The "taking" quote, then, does not mean that an over-zealous regulation constitutes a compensable event. It means that a regulation which has an impact on property equivalent to a "taking," is invalid and so is void *ab initio*. If the government wishes to achieve such an impact on property, it must do so through an exercise of the power of eminent domain, not through regulation. "When [a restrictive regulation] . . . reaches a certain magnitude, in most if not in all cases *there must be an exercise of the power of eminent domain* . . . ."[60] So *Pennsylvania Coal* says only that

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and bunglings of legislatures." Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 910, 928-29 (1923). Nothing in the Constitution provides any basis for a new constitutional rule that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, the balance has tilted away from deference to legislative discretion to a judicial theory of strict liability. *See, e.g.*, Cunningham, *Inverse Condemnation as a Remedy for Regulatory Takings*, 8 HASTINGS CONST. L.Q. 517, 538 (1981).

58. Holmes was not saying that an overly restrictive regulation actually effects a compensable taking; rather, he was making the point that the Constitution says that government can accomplish a prohibition of all practical use of property only through an exercise of the power of eminent domain:

> [S]ome values are enjoyed under the implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.

260 U.S. at 413.

59. *Id.* at 416.

60. *Id.* at 413 (emphasis added). There is further evidence that Holmes had no intention of rewriting the Constitution and overruling the holding of Mugler v. Kansas, 123 U.S. 623 (1887). Just three years before *Pennsylvania Coal*, Holmes wrote the opinion in Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) where he considered the validity of a municipal regulation governing the location of petroleum storage tanks. In sustaining the regulation, Holmes cited *Mugler*, the case the pundits now claim he overruled in *Pennsylvania Coal*. Surely Holmes, so obviously familiar with the fundamental principles in *Mugler*,

there are limits to what government can achieve through the police power. Some governmental objectives are only achievable by the exercise of the power of eminent domain.

Justice Breitel, while on the New York Court of Appeals, set out with his usual clarity the alternative argument — that the word "taking" is used only metaphorically in land use cases, in which the issue is actually whether regulation meets substantive due process standards. In holding invalid New York City land use restrictions that zoned land in Tudor City for a park, he observed, in *Fred F. French v. City of New York*,[61]

> [w]hen the State "takes", that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking," and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.
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> True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised.[62]

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would have explicitly referred to *Mugler* in *Pennsylvania Coal* if he had intended to depart so radically from its holding. Moreover, in Samuels v. McCurdy, 267 U.S. 188 (1925), Chief Justice Taft quoted extensively from *Mugler* ("the exercise of the police power . . . is very different from taking property for public use . . . ." *Samuels*, 267 U.S. at 196) without drawing a dissent from Holmes. It can be assumed that Taft's reliance on *Mugler* would have been decried by so rigorous a legal scholar as Holmes if he had in fact intended to overrule its precepts in *Pennsylvania Coal*. Moreover, *Mugler* was cited in Miller v. Schoene, 276 U.S. 272 (1928) again without dissent from Holmes. Finally, in Clarke v. Haberie Crystal Springs Brewing Co., 280 U.S. 384 (1930) Justice Holmes himself drew upon *Mugler* for authority: "It seems to us plain without help from Mugler v. Kansas, 123 U.S. 623, that when a business is extinguished as noxious under the Constitution, the owners cannot demand compensation from the government . . . ." 280 U.S. at 386.

61. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

62. *Id.* at 594, 350 N.E.2d at 385, and 385 N.Y.S.2d at 8. Justice Breitel went on to say:

> The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case was there an actual "taking" under the eminent domain power,

There are also examples of the "metaphorical" use of the word "taking" in modern Supreme Court opinions by Justices other than Brennan.[63] In *Agins v. City of Tiburon*, the United States Supreme Court used the word "taking" not to describe a compensable event, but as a shorthand description of when a regulation is *invalid* on what are really substantive due process grounds. "The

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> despite the use of the terms "taking" or "confiscatory." Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric . . . .

Id. at 594, 350 N.E.2d at 385 and 385 N.Y.S.2d at 9. Notwithstanding the cogency of Breitel's analysis, Justice Brennan in his dissent in *San Diego Gas*, 450 U.S. 621 (1981), dismisses the metaphor analysis as "tampering with the express language of the opinion" of Justice Holmes. *Id.* at 649 n. 14. To the contrary, the express language of Justice Holmes's opinion, taken *in pari materia*, confirms the metaphor. Professor Costonis has pointed out that

> Were . . . the countless zoning measures that have been declared "takings" since *Pennsylvania Coal* truly exercises of the eminent domain power, a very different result would attend a decision favoring the private litigant. The very enactment of such measures would obligate government to pay just compensation and, in return, government would receive a property interest in the challenger's land or, under the special facts in *Pennsylvania Coal*, in the challenger's less-than-fee holding. All such litigation, moreover, would take the form of inverse condemnation actions. In reality, of course, neither courts nor private litigants visualize challenges to regulatory measures in these terms. Instead, the goal of this litigation in conventional land use disputes is simply to preclude application of the measure to the restricted parcel on the basis of its constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.

Costonis, *Fair Compensation and the Accomodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1034-35 (1975) (footnote omitted).

63. The plurality in *San Diego Gas* recognized in a footnote that in a regulatory context "taking" is not meant to imply that there has been an appropriation:

> Contrary to the dissent's argument, the California Supreme Court's *Agins* decision did not hold that a zoning ordinance never could be a "taking" and thus never could violate the Just Compensation Clause. It simply *limited the remedy* available for any such violation to nonmonetary relief. Immediately following the passage quoted by the dissent, *post*, at 640-41 that court stated: "This view is supported by a leading authority who expresses his view in this matter: 'Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of power of eminent domain, but if regulative legislation is so unreasonable or abritrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. *Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary.*' " 450 U.S. 628-29 n. 8 (emphasis in original) (citations omitted).

application of a general zoning law to a particular property effects a *taking* if the ordinance *does not substantially advance legitimate state interests,* or denies an owner economically viable use of his land."[64] In this passage the Court is saying that a regulation which *fails to advance a legitimate state interest* (which, it is settled, violates the *due process clause*) is a "taking"; an obvious use of the word "taking" in its metaphorical sense and as a shorthand description of a regulation that is *invalid.*[65]

V. Some Unconsidered Consequences of Compensable "Takings"

The "constitutional rule" proposed by Brennan fails for reasons other than his misreading of Justice Holmes's opinion. It has serious consequences for some settled features of land use law, and produces more new questions than it answers.

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64. 447 U.S. at 260 (1980) (emphasis added) (citation omitted). The absurdity of the proposed "rule" is underscored by a footnote in *Agins* where the Supreme Court notes that mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay are "incidents of ownership" and *do not constitute a "taking."* "Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when proceedings ended. Mere fluctuations in value during the process of governmental decision-making absent extraordinary delay are "incidents of ownership . . . ." *Id.* at 263 n.9.

65. In Penn Central Transp. Co. v. New York City, a challenge to the City of New York's landmark preservation regulations, the word "taking" is frequently used in Justice Brennan's majority opinion. 438 U.S. 104, 123-24 (1978). Yet, *Penn Central* does not say that a regulation that goes too far requires a payment of just compensation; rather it says that such a regulation is *invalid.* "Indeed, we have frequently observed that whether a particular restriction will be rendered *invalid* by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' " *Id.* at 124 (emphasis added) (citation omitted).

In Prune Yard Shopping Center v. Robins, 447 U.S. 75 (1980), the United States Supreme Court considered whether a state court construction of a state constitution subjecting private property to public use constituted a "taking." Once again, "taking" was not used in its literal, just compensation sense, because the Court held that there had literally been a "taking" but not in the constitutional sense. *Prune Yard,* at least impliedly stands for the proposition that a judicial determination that a regulation constitutes a "taking" does not require payment of compensation; rather, the case says that a government action which attempts to effect a "taking" without payment of just compensation, would be *unlawful,* that is invalid.

In Andrus v. Allard, 444 U.S. 51 (1979), the word "taking" is used as a shorthand description of a regulation which is invalid. Kaiser Aetna v. United States, 444 U.S. 164 (1979) did not involve a regulatory program alleged to be overly restrictive; however, the Supreme Court was careful to point out that if the government wanted to "take" the interest involved, it could do so *only* by "invoking its eminent domain power *and* paying just compensation . . . ." *Id.* at 180 (emphasis added).

One of the most significant impacts of Brennan's proposed rule is on the well-settled doctrine that a mere diminution in the value of property is not a constitutional taking.[66] This basic rule in the state courts on the impact of zoning regulations on land value is fairly clear and prevails in all but a few states.[67] Under this rule, land use regulations to be constitutionally valid must leave an owner with some reasonable use of his land, and (what is usually the same) some reasonable opportunity to derive income from it. If the regulations do so, no serious constitutional taking question is raised by a developer's claim that he can think of a different use (a "highest and best use") that would bring in a higher return. Every year literally dozens—perhaps sometimes hundreds—of reported decisions reiterate this rule. The plaintiff's usual allegation that land use restrictions depreciate the potential value of land is taken no more seriously.

We have long thought this point was settled rather definitively right in *Pennsylvania Coal:*

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.[68]

As the Supreme Court explained in *Agins v. City of Tiburon,*[69] absent extraordinary delay, mere fluctuations in value during the process of governmental decision-making, including judicial review of local legislative decisions, should be recognized as normal "incidents of ownership." These constitutional rules have real meaning and represent what there is of a stable element in American land use law, although they do leave a lot of room for interpretation and are applied quite differently in different states.

Justice Brennan's holding that temporary takings require compensation threatens these rules. The temporary loss in land value while a land use regulation is in effect would seem to be

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66. *See, e.g.,* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87.5% reduction in value) and Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (75% reduction in value).

67. HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) *cert. denied,* 425 U.S. 904 (1976). And see, 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 7.04a (1974 & Supp. 1984) which refers to this doctrine as "the nationwide rule."

68. 260 U.S. at 413.

69. 447 U.S. 255 (1980).

merely a "fluctuation in value" caused by governmental decision-making. Temporary loss in value caused by a temporary taking would also seem to be merely that type of "diminution" in value which ordinarily does not amount to a taking under established land use jurisprudence. So acceptance of the temporary taking idea as a tenet of constitutional jurisprudence would cloud the vitality of the Supreme Court prior pronouncements of the subject of "takings."

Moreover, there is no sure way to identify a "taking," temporary or otherwise, when you see it. If the test were deprivation of absolutely *all* beneficial use, it might not be so difficult. But Justice Brennan has more in mind than regulation that precludes all beneficial use, because he speaks of governmental action that deprives "the owner of all *or most* of his interest in the property."[70] How much is most? Literally more than 50%, but it is doubtful that even the present Court would go so far.

A related rule, perhaps equally threatened, derived from an argument often used by developers, is that the "bundle" of property rights should be divided into groups and the restrictive effect on each group should be considered separately. For example, in *San Diego Gas & Electric*, the implicit acceptance of this argument by Justice Brennan allowed the landowner to split off the most restrictively regulated part of the property, and then claim that there had been a taking of that part, even though it was an integral part of the larger tract on which reasonable beneficial uses were permitted. Other courts have persuasively rejected this approach.[71]

In *Andrus v. Allard*,[72] the Supreme Court explained the

70. 450 U.S. at 653 (emphasis added).

71. In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), the Court rejected an argument that the airspace over an historic landmark building was a severable property right for which the landmark owner could demand compensation. The Court noted that taking jurisprudence does not divide a parcel into "discrete segments" for purposes of determining whether a taking has occurred. *Id.* at 130. *See also* Multnomah County v. Howell, 9 Or. App. 374, 496 P.2d 235 (1972) (reasonableness of zoning to be tested by its effect on the whole of landowner's contiguous property). *Contra* American Sav. & Loan Ass'n. v. County of Marin, 653 F.2d 364 (9th Cir. 1981) (two parcels owned by single landowner were in different land use zones).

72. 444 U.S. 51 (1979). Regulations issued under federal statutes protecting certain species of birds allowed the possessions of bird artifacts but prohibited their sale. The Court held that no taking had occured. Although noting that a significant restriction had been imposed on the owners of the artifacts, the Court held that "the denial of one traditional property right does not always amount to a taking." *Id.* at 65.

Hohfeldian theory of property and pointed out that the destruction of one strand of the bundle of property rights does not constitute a taking "because the aggregate must be viewed in its entirety."[73] The temporary interference in the use of land (for which Brennan now proposes just compensation) destroys only one part of one "strand" of the Hohfeldian bundle of rights. Property has value in many dimensions, including total present worth and value over time. (Timesharing or interval ownership are contemporary examples of the division of property into temporal segments.) The mere inconvenience of a temporary interference in the use of land, while a court tests the validity of a police power regulation, only destroys a part of one strand of the bundle of rights of property. It can hardly be said to be a "taking" when viewed in the aggregate.[74]

In other words, absent extraordinary delay, mere fluctuations in value during the process of governmental decision-making, including judicial review of local legislative decisions, should be recognized as normal "incidents of ownership." They cannot be considered as a "taking" in the constitutional sense.[75] A temporary interference does not displace ownership and does not invade the private domain or make actual use of property. To the contrary, by definition a temporary interference merely interrupts or postpones the private use of property. At the most, a temporary interference only diminishes the cumulative value of property over time. Surely not even Justice Brennan would argue that a mere diminution in value invalidates a police power regulation for, as he observed in

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73. *Id.* at 66. The Court continued to adhere to that view in *Penn Central*, 438 U.S. 104 (1978).

74. It takes precious little appreciation for the dynamics of real estate finance to grasp the fact that a temporary interference in the use of land may have far less impact on the aggregate value of a parcel of land than the diminution in value that was accepted as valid by the Supreme Court in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) and Andrus v. Allard, 444 U.S. 51 (1979). In fact, the diminution in value involved in William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (plaintiff alleged that the rezoning reduced the land value from $2,000,000 to $100,000) and Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) was so great that a mere temporary interruption in use pales in comparison. If the period of time of over-regulation was two years, then the actual economic injury to the landowner will be lost rentals for the period, (say, 15% x $1,000,000 x 2 years = $300,000) and, according to Brennan, compensable despite the fact that most courts would not be shocked by a 30% diminution in value. Use of contemporary economic theory to convert the loss of two years of rental income to a diminution in present value yields an impact that is far less than the injury suffered by the ordinary valid downzoning and suggests that compensation for "temporary takings" may be an illusory boon.

75. Agins v. City of Tiburon, 447 U.S. 255 (1980). *See, e.g.*, William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (diminution of 95%).

Penn Central, "this Court has . . . recognized, in wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values."[76] So apart from its easy acceptance of popular mythology about the *Pennsylvania Coal* decision, the Brennan dissent upsets settled constitutional doctrine—that police power regulations that restrict the value or use of property are the price we pay for a reasonably lawful and orderly society.

The introduction of the "temporary taking" concept also has ominous implications for the continuing vitality of environmental and "pause for planning" moratoria (a temporary prohibition of all land uses), which have previously enjoyed a sympathetic judicial reception.[77] The "temporary taking" concept is at variance with well-established jurisprudence with respect to such moratoria. Moratoria are generally regarded as a valid exercise of the police power if they are limited in their period of application.[78]

If a "temporary taking" is at least the deprivation of all beneficial use for a defined period of time, are development moratoria now to be "temporary takings?" They certainly look like a "temporary taking." So another unanticipated application of Brennan's proposed constitutional rule is that the payment of compensation for any temporary interference with the use of land would be required, a consequence that conflicts with years of established jurisprudence without explanation. If the Brennan dissent is to be the rule, then a way must be found to avoid tossing development moratoria on the judicial ash heap.

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76. 438 U.S. at 124.

77. *See* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975); Candelstick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Cappture Realty Corp. v. Board of Adjustment of Borough of Elmwood Park, 126 N.J. Super. 200, 313 A.2d 624 (1973), *aff'd,* 133 N.J. Super. 216, 336 A.2d 30 (1975).

78. *See* Donohoe Constr. Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir. 1977); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Collura v. Town of Arlington, 329 N.E.2d 733 (Mass. 1975); Cappture Realty Corp. v. Board of Adjustment of Borough of Elmwood Park, 126 N.J. Super. 200, 313 A.2d 624 (1973) and City of Dallas v. Crownrich, 506 S.W.2d 654 (Tex. Civ. App. 1974).

VI. Some Unanswered Questions About Compensable "Takings"

A. *The Ambiguities Inherent in the "Taking" Concept*

There are yet further difficulties with Justice Brennan's "temporary taking" idea. It rests on the assumption that it is easy to know a taking when you see one. The *San Diego Gas & Electric* dissent makes it all sound so simple. Once a "taking" has occurred, the Court just measures the compensation that accrues until the municipality repents and repeals or modifies the offending regulation.[79] Implicit in this idea is the assumption that it is by no means difficult to tell when a taking has occurred *or will occur*. The former is no easy task, but it is simplicity itself compared to peering into the swirling mists of the crystal ball to predict when a contemplated action will subsequently result in a "taking." Yet the Brennan dissent requires municipalities to make a crystal ball inquiry because they must guess, in advance, whether a court will decide that their land use actions are "takings."

As a starting point, must a plaintiff show that there was an intent to take, or will a "taking effect" do?[80] That is, must the public body have acquisition on its mind or will it be sufficient to show that the effect of the regulation was to make the land unusuable or nearly worthless? And if the test is whether acquisition is on the public mind, must there be an actual intent to acquire ultimately as in *Drakes Bay Land Co. v. United States* (deliberate delay to depress market value)[81] or *Benenson v. United States* (bureaucratic fumbling and indecision that chilled the marketability of the property)?[82] Or will it be sufficient to show that regulation was used in lieu of an acquisition that the public body could not afford and did not intend to undertake?[83]

If the local government really only has regulation on its mind, will it still be held monetarily liable for land use decisions that are

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79. Note that in none of the post-*San Diego Gas* decisions that have embraced the Brennan dissent have the courts attempted to formulate a method for determining the amount of compensation to be paid. *See supra* notes 3-7 and accompanying text.

80. In Sheerr v. Evesham Township, 184 N.J. Super. 11, 445 A.2d 46 (1982), the court held that the effect of the regulations was a "taking" and found official denials of any "taking intent" to be not worthy of belief.

81. 424 F.2d 574 (Ct. Cl. 1970), *remanded* 459 F.2d 504 (Ct. Cl. 1972).

82. 548 F.2d 934 (Ct. Cl. 1977).

83. *See* Arastra Ltd. Partnership v. Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated* 417 F. Supp. 1125 (N.D. Cal. 1976).

intended to be regulatory but which later turn out to have been acquisitory because a court decides that they were? Note, then, that one baneful result of accepting the idea that regulation may sometimes require compensation is that it can plunge the courts into an examination of the motivation of public officials in a class of cases in which it has hitherto been considered irrelevant.[84]

The problem of identifying a taking will not always be as clear-cut as the Court found it to be in *Agins*. Indeed, *Agins* contributed to the uncertainty because the Court said that "taking" analysis requires "a weighing of private and public interests."[85] If balancing is to be the touchstone of constitutionality, then the Supreme Court has invited the state and federal judiciaries to imbibe the same potion that has produced rampant second guessing of local governments in some states, most notably in Illinois.[86] If the question of whether there has been a taking is to depend on a weighing of private and public interests by the judiciary, then there will be no reliable way to predict whether a particular action will ultimately be held to be a "taking." It is, moreover, a judicial exercise which the Court recently adjured in *Larkin v. Grendel's Den, Inc.*[87]

So we do not know how much use can remain to the landowner and still have regulation branded as a "taking." The princi-

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84. City of Fairfield v. Superior Court of Solano County, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975); County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975). *Cf.* Ensign Bickford Realty Corp. v. City Council of City of Livermore, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977) (motive may be considered only when racial discrimination claimed).

85. 477 U.S. at 261.

86. *See, e.g.*, Oak Lawn Trust & Sav. Bank v. City of Palos Heights, 115 Ill. App. 3d 887, 450 N.E.2d 788 (1983) (single family zoning of school building bought by plaintiff at auction was invalid despite presence of single family homes across the street in all four directions and plaintiff permitted to use building for medical offices); Gust v. Village of Westchester, 110 Ill. App. 3d 425, 442 N.E.2d 525 (1982) (municipal rezoning of four single family lots adjacent to commercially zoned shopping center to permit expansion of a supermarket that was across the street from single family was unreasonable in part because "Illinois courts have adopted the modern view that aesthetic factors such as the aesthetic enjoyment of one's home, do have a significant bearing on zoning." *Id.* at ___, 442 N.E.2d at 529); Oak Park Trust & Sav. Bank v. Village of Palos Park, 106 Ill. App. 3d 394, 435 N.E.2d 1265 (1982) (single family zoning of 19.6 acre tract invalid even though predominant nearby land use was single family homes and a forest preserve); and Beaver v. Village of Bolingbrook, 12 Ill. App. 3d 924, 298 N.E.2d 761 (1973) (single family zoning invalid and commercial use invalid even though all surrounding property was single family and nearest commercial zoning was one mile away). For a current comment on the disarray in the Illinois decisions, see Smith, *The Uncertain State of Zoning Law in Illinois*, 60 CHI.[-]KENT L. REV. 93 (1984).

87. 456 U.S. 413 (1982).

pal decisions dealing with wetland and flood plain regulation have all upheld restrictions that leave the landowners with no uses other than those that are compatable with the character of the land as a wetland or a flood plain.[88] And there have been a few cases upholding restrictions on property rights to protect a view,[89] or even to prevent disturbance of a wildlife habitat.[90] Surely such regulations deprive a landowner of "most" of the beneficial use of the land, but courts have generally upheld them against "taking" attacks. The Brennan rule would undercut these decisions as well.

Does the question of whether there has been a taking turn on whether the dominant purpose of the regulation is to prevent harm or to confer a public benefit? Brennan seemed to reject that analysis in *Penn Central.*[91] In any event, it is not an assessment that can be made reliably.[92] If the regulation, no matter how severe, "substantially advances legitimate governmental goals" can it ever be a "taking?"[93]

Under the Brennan approach, taking analysis requires viewing regulation as a continuum of governmental actions that ultimately crosses an invisible line that divides compensable from non-compensable actions. Such reasoning blurs the clearly distinguishing hallmark of the "taking" case that sets it off from substantive due process challenges. "Taking" cases are those in which the public objective is proper and lawful but government has simply chosen the wrong tool with which to achieve its objective. In a substantive due process case either the objective is challenged because it serves no legitimate public purpose (for example, the Palm Beach, Florida, ordinance that prohibited shirtless jogging by men)[94] or be-

88. Brecciaroli v. Connecticut Comm'r of Envtl. Protection, 168 Conn. 349, 362 A.2d 948 (1975); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) *rev'd in part* by Burrows v. Keene, 121 N.H. 590, 432 A.2d 15 (1981); Spears v. Berle, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

89. *See, e.g.*, Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969); State of Washington Dept. of Ecology v. Pacesetter Constr. Co., 89 Wash. 2d 203, 571 P.2d 196 (1977).

90. Fish & Wildlife Dept. v. Land Conservation & Dev. Comm'n, 37 Or. App. 607, 588 P.2d 80 (1978); State v. Lake Lawrence Public Lands Protection Ass'n, 92 Wash. 2d 656, 601 P.2d 494 (1979).

91. 438 U.S. 104 (1978).

92. *See* Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981) *cert. denied sub. nom.*, Taylor v. Graham, 454 U.S. 1083 (1981), where the intermediate appellate court found a taking and the Florida Supreme Court declined to do so.

93. *See* Agins v. City of Tiburon, 447 U.S. at 261.

94. Palm Beach, Fla. Ordinance § 13-40 (1981). *See also* Deweese v. Town of Palm Beach, 688 F.2d 731 (11th Cir. 1982) in which the federal court held: in a challenge to the

cause, although the objective is legitimate, no reasonable person could believe that there was a rational connection between the regulation and achievement of that purpose. The Supreme Court may believe that substantive due process as a constitutional rationale died with *United States v. Carolene Products Co.*[95] or earlier, but in fact it is alive, well, and living in the state courts. Now that the Court has clouded the logical distinction between "taking" and substantive due process in *Agins*, acceptance of the Brennan dissent by state courts will create the risk that the question of whether there has been a "taking" will turn on the hazards of substantive due process analysis in the state courts.

If Justice Brennan assumed that "taking" cases would be comparatively rare, he was right only as to the federal courts. Land use disputes that raise "taking" claims are common in the state courts, where there is nothing resembling a uniform view with respect to how restrictive a regulation may be and still not amount to a "taking." Given the confusion between substantive due process and "taking" claims that flows from *Agins*, the state courts could easily drift into treating "taking" and substantive due process cases as conceptually identical and requiring the payment of compensation whenever they find a land use regulation to be constitutionally "invalid."

There is a further difficulty. Are only "temporary takings" compensable, or can regulation result in a compensable permanent "taking?" Justice Brennan disclaims any authority in the courts to require local governments to acquire title to land or an interest in it. But if the idea of compensation for a "temporary taking" is constitutionally permissible, why is it not equally permissible to say that the Constitution permits a "when you zoned it, you bought it" claim that requires payment for the fee or some permanent interest in the land?[96] The Brennan dissent assumes that repeal of the offending regulation will follow a judicial determination that it is a

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constitutionality of Ordinance § 13-40 that the trial court had improperly concluded that the town was collaterally estopped from defending the constitutionality of the ordinance, but in which the court also said a bit skeptically, "[w]e therefore remand the case to allow the town to expend more of its resources in an attempt to prove that this most unusual statute is constitutional." *Id.* at 732.

95. United States v. Carolene Products Co., 304 U.S. 144 (1938).

96. *See* Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981). For an application of the Brennan dissent to a temporary, technical title divestiture, see Zinn v. State, 112 Wis. 417, 334 N.W.2d 67 (1983).

"taking." The dissent does not deal with the question of what happens when it does not.

B. *The Measurement of Damages Problems*

Nor is the difficulty of determining whether a taking has occurred the only problem. Assume a regulation is held to be a "taking." When should the right to compensation for the taking begin? When the regulation was first adopted? When the landowner initially asks the public body for relief from the restrictions? When the public body refuses? When the complaint is filed? When the regulation is judicially determined to be a "taking?" In those cases where government has acquisition on its mind, it is at least possible to look for evidence that at some point in time the collective governmental mind was made up. But in those instances in which no acquisition is intended or contemplated, no such evidence exists and an artificial test will have to be devised. Justice Brennan seems to accept uncritically the idea that the "taking" occurs on the date the unconstitutional regulation is adopted.[97] Quite plainly, that bit of dicta has not been thought through carefully. How can a municipality know there is a claim it has done wrong when the injured party suffers in silence? This approach puts a premium on letting property owners sandbag the municipality by waiting to challenge the zoning restrictions until their temporary taking damages have become impressively large. If timely notice to local government of a claim makes good sense in sidewalk slip and fall cases, it ought to make good sense for constitutional torts as well.

And what is to be the measure of the compensation to be paid for the temporary "taking?" Is it to be the fair market value of the interest taken? That might be option or rental value. How about the landowner's lost opportunity cost? That seems somewhat more speculative, but as speculation it ranks right alongside Justice Brennan's idea of fair compensation.

> If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking' it is only fair that the public bear the cost of *benefits received* during the interim period between application of the regulation and the government entity's recission of it.[98]

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97. *San Diego Gas*, 450 U.S. at 653.
98. *Id.* at 656 (emphasis added).

That measure of value, apart from flying in the face of the principle that value to the condemnor is irrelevant, ought to give the courts and litigants many opportunities for the exercise of ingenuity in placing a dollar value on a temporary public benefit.

Brennan's option of repentance and repeal of the offending restriction is no answer, as is shown by his suggestion that the damages should be calculated from the time the restriction was first imposed. This notion raises all sorts of difficult problems obvious to those familiar with zoning administration. Suppose the restriction has been in effect for twenty years on vacant land, which no one ever thought of developing until the last year or two. Does the current owner succeed to the compensation rights of his predecessor? Would Justice Brennan really award compensation for a "temporary," twenty year taking? Or, if not, are the courts to venture into soothsaying by guessing when the zoning became unconstitutional or when the land could be developed, so that compensation may be limited to a realistic amount? Is silence in the face of onerous restrictions to be rewarded more generously than instant outrage?

In defense of awarding compensation, Justice Brennan has said,

> Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize over-zealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner?[99]

Presumably the underlying justification for this stricture is his belief that:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.[100]

This rationale might be persuasive if, but only if, decisions on "takings" were predictable according to rules which are clearly defined and well-settled on a nation-wide basis. As we demonstrate later on, it is painfully clear that precisely the opposite is the case.

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99. *Id.* at 661 n.26 (citation omitted).
100. *Id.*

Indeed Justice Brennan has elsewhere candidly conceded that:

> [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.[101]

The plain fact is that the police power regulation of land use is not reducible to a simple equation. The ever-changing face of our land condemns us to an ever-shifting standard of what will be determined to be constitutionally "overzealous." What the police officer needs to know about the Constitution is condensed onto his "Miranda card" which will fit comfortably in the officer's pocket. There is no "Miranda card" that can be read to local governmental bodies to enable them to decide whether proposed land use restrictions will pass constitutional muster. If there were, it would certainly not fit in the city attorney's pocket, and perhaps not in his briefcase. And no wonder, for the complex caveats that would be required bear little relationship to the comparative simplicities of *Miranda*. The deterrent theory that Brennan offers simply will not work in the face of the amorphous constitutional standards which control planning law. No amount of cautionary language can be helpful as long as the Supreme Court and the state courts provide no clear and generally acceptable test for determining when regulation has "gone too far."

There has never been a readily ascertainable way to tell when a regulation is or will be a "taking," and none is in prospect. If "takings" are to be compensable events, then local government must either err on the side of excessive timidity in land use regulation, or else be willing to risk an occasional "temporary taking" judgment as the price of effective land use regulation.

C. *The Diversity of Decisional Law*

We have noted that no clear opinion exists on the definition of a "taking." Difficulties in determining the meaning of a taking are compounded by decisional diversity in the state courts, by disagreement between the state courts and the Supreme Court on the application of constitutional limitations to land use controls, and

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101. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) *citing* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

by the Supreme Court's failure to adopt a "set" theory of the taking clause. These differences in judicial views aggravate the difficulties of local governments threatened with potential compensation awards for land use takings. They face compensation litigation in both federal and state courts, whose attitudes toward the taking clause may differ. Neither is a uniform national approach to the taking clause possible.

A superficial first glance might suggest that American zoning law does demonstrate a substantial degree of uniformity. After all, most of the 50 states adopted the Standard Zoning Enabling Act, or something resembling it, at one time or another. All but about half a dozen still operate under their original enabling legislation, a few with some considerable modification. If anyone is tempted to indulge such a notion, he should discard it immediately.

Zoning law in each of the major states[102] has a distinctive character of its own. In fact, there are no two states that are even rather similar, for the several state courts treat the various types of claims, particularly claims by developers, quite differently. Moreover, within each state judicial attitudes toward such claims have changed drastically over time and this evolution has proceeded at markedly different rates in different states. For example, in the 1950s and 1960s the courts in four leading states (California, Maryland, Massachusetts and New Jersey) accepted practically any municipal defense which seemed even remotely debatable as a sufficient justification for practically any zoning restriction, at least when the protection of residential areas was involved.[103]

Several states (particularly New Jersey and California, and probably also New York) have clearly moved into a period of more creative and meticulous judicial review in the 1970's.[104] At the

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102. About 80% of such law comes from about a dozen large states. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW, § 3.01 (1974).

103. *See, e.g.*, McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953) (upholding zoning of privately owned land along a beach for "beach recreation"); Arant v. Mayor & City Council of Baltimore, 212 Md. 301, 120 A.2d 363 (1957); Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 120 N.E.2d 916 (1954); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) (exclusion of any more apartments). The earlier New Jersey decisions upholding exclusionary residential land use policies were made obsolete by Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II) and Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (Mount Laurel I).

104. *See* Associated Homebuilders of Greater East Bay v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473 (1976); Southern Burlington County NAACP v. Township of Mount Lau-

other extreme, at least one state (Illinois) has happily continued handling zoning cases the way most courts did in the years immediately after *Euclid*. That is, the courts recognize that zoning is valid in principle, but they seem to indulge a presumption in favor of any developer with a plausible claim that the zoning deprives him of the "highest and best use" of his property.[105]

A number of other state courts have fluctuated back and forth rather violently in their attitude toward developers' claims. The most extreme case has been Michigan. In the first half of each of the decades of the 1950's and 1960's, the Michigan courts almost universally upheld developers. In the second half of each of those decades, the Michigan courts relied upon the presumption of validity and apparently really enforced it. To make the situation even more confusing, the group on the Michigan Supreme Court that was inclined to favor developers constituted a majority of the court for a year and a half in the mid 1970's, and the pendelum swung back to the developers during that period.[106] In other words, to

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rel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) (Mount Laurel I); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 682 (1975).

105. There are two rather distinct lines of cases in Illinois zoning law. One group of decisions carries the strong inference that if a developer challenges the validity of a zoning restriction as applied to his land, the presumption shifts in his favor wherever it appears that there is a substantial difference between the value of his land as zoned and its value according to his hopes. Normally developers do not sue unless there is such a difference—there are, after all, relatively few spite suits—and so one could reword this rule that "When a developer is in court the presumption is in his favor." Note also that this rule gives an obvious premium to those who propose those types of land use which are most different from, and more intensive than, what is visualized in the zoning. However, a second group of decisions deprecates mere loss of anticipated profit and more nearly corresponds to the nationwide rule. *Compare* Hutson v. County of Cook, 17 Ill. App. 3d 195, 308 N.E.2d 65 (1974) *with* Littlestone Co. v. County of Cook, 19 Ill. App. 3d 222, 311 N.E.2d 268 (1974). Both decisions involved R-3 single family zoning on the same highway at intersections only one-half mile apart. In neither case were there nearby commercial uses. In *Hutson* a shopping center was proposed; in *Littlestone* a hotel and five story office buildings. Hutson won; Littlestone lost. Score: Confusion 2, Predictability 0. Through the decades the Rhode Island court has seemed closest to the Illinois attitude, but a few recent cases involving environmental protection have raised a serious question about this. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.18 (1974).

106. Michigan's unrivalled preeminence as the most pro-developer state court in the early 1950's (*see, e.g.*, the remarkable decisions in Ritenour v. Dearborn Township, 326 Mich. 242, 40 N.W.2d 137 (1949) and Robyns v. City of Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954)) came to a sharp end in Robinson v. City of Bloomfield Hills, 350 Mich. 425, 86 N.W.2d 166 (1957). In that decision a large part of the court—obviously tired of having their docket overwhelmed by developers' zoning cases—announced a philosophy of judicial restraint. However, after a few years the strains resulting from this approach were too much for the court, and they reverted to the pro-developer attitude in a series of mobile-home

know how to evaluate an opinion from Michigan, one must know not only in which half of the decade it was decided but also which month and which year.

The point of all this is that the Supreme Court and the lower federal judiciary, are not really experienced in zoning and planning matters and will need to rely on what the state courts perceive to be land use regulation that "goes too far." So if the federal courts are to get into the "temporary taking" business they will have to know how much respect to accord to decisions from each state court. In order to do this, they will have to become intimately familiar with the fluctuating attitudes in the various state courts. Nothing in the Supreme Court opinions in the field in the last decade gives much hope that this will be realized—or suggests much familiarity with, or much interest in, the rapid and complex changes in land use law over the intervening half century.

The uncertain consequences for municipalities cannot be overstated. After all, municipalities cannot choose the forum in which they will be sued. If Justice Brennan's reasoning becomes generally accepted, municipalities face potential monetary liability in both federal and state courts on state as well as federal constitutional grounds. For if a "taking" requires compensation under the fifth and fourteenth amendments, a requirement of compensation may as easily be implied from virtually identical provisions of the several state constitutions.[107] Indeed, the risks will be magnified in

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cases. See Knibbe v. City of Warren, 363 Mich. 283, 109 N.W.2d 766 (1961); Dequindre Dev. Co. v. Charter Township of Warren, 359 Mich. 634, 103 N.W.2d 600 (1960) (both with strong dissents), and compare Lacy v. City of Warren, 7 Mich. App. 105, 151 N.W.2d 245 (1967), involving the same area as *Dequindre*. Reversing themselves again, the Michigan court apparently definitely decided to enter the modern world in Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687 (1965), in effect reaffirming *Robinson*.

The third-period criteria thus prevailing were restated elaborately in Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974). Only a year and a half later, at a time when there were two vacancies on the court, a plurality of the judges shifted Michigan back clearly to a second-period (pro-developer) stance in Sabo v. Township of Monroe, 394 Mich. 531, 232 N.W.2d 584 (1975). Under *Sabo* the test is not whether the existing regulations provide for a "reasonable return" on the land, but rather whether the plaintiff developer's proposal is reasonable "under all the circumstances." *Id.* at ___, 232 N.W.2d at 586. This remained the law in Michigan for nearly another year and a half, when the full court discarded it and again reinstated the third-period attitude in Kirk v. Township of Tyrone, 398 Mich. 429, 247 N.W.2d 848 (1976).

107. The Brennan dissent has already begun to prompt such decisions. *See* Burrows v. Keene, 121 N.H. 590, 432 A.2d 15 (1981) and Suess Builders v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982).

those states with "taking or damaging" constitutional provisions.[108] If one accepts Justice Brennan's command that planners must know the Constitution, then planners (both lay and professional) must assume the burden of knowing both federal and state constitutional doctrine in order to avoid "taking" transgressions.

D. *Federal—State Disagreement*

The problem of what planners and planning lawyers must know about the constitutional limits of land use regulation is made doubly difficult because the state courts also vary considerably from the United States Supreme Court in their interpretation of constitutional limitations, even when the constitutional language is the same. In recent years, the state courts have been consciously deciding major questions of public law on the basis of state constitutional law, quite clearly in order to insulate their decisions from review by the Supreme Court. (Leading state judges are often privately quite frank on this point.) Ironically, it was Justice Brennan, in a now classic article, who argued for different and more stringent state interpretations:

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[109]

State courts have not been slow to take Justice Brennan at his word. In several types of land use cases, state courts have adopted more restrictive interpretations of state constitutions in order to protect the individual liberties Justice Brennan identified as appropriate for a more stringent application of state constitutional provisions.[110]

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108. *See, e.g.*, City of Austin v. Teague, 556 S.W.2d 400 (Tex. Civ. App. 1977), *aff'd*, 570 S.W.2d 389 (Tex. 1978); and San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266 (Tex. Civ. App. 1975).

109. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

110. In Vermont, the state supreme court has been quietly developing a body of state constitutional doctrine that expands the rights guaranteed by the U.S. Constitution. *See*

A leading example is the treatment of zoning restrictions affecting unrelated families and unconventional "family" groups, such as homes for the mentally retarded and disabled. The Supreme Court, in *Village of Belle Terre v. Boraas*,[111] a cursory decision by Justice Douglas, upheld a zoning ordinance prohibiting unrelated families of more than two persons from living together in a house in a single family district. The decision drew a strong dissent that argued that important federal constitutional guarantees were violated. The rationale of *Belle Terre* was quite explicit: Zoning may be used to reserve areas for occupancy by conventional families. Many state courts disagree. Applying state court notions of due process and equal protection, or rights of privacy found in state constitutions, some state courts have held that unrelated and unconventional families deserve the protection of the state constitution, the Supreme Court notwithstanding.[112]

Exclusionary suburban zoning is another area in which individual liberties are implicated and in which the Supreme Court and several state courts diverge sharply. The Supreme Court, in a case from a Chicago suburb, placed a heavy burden on litigants challenging exclusionary suburban zoning as racially discriminatory. Without proof of discriminatory racial intent, difficult in an age in which racial discrimination is easily hidden, a claim of racial discrimination under the federal constitution cannot be supported.[113] Neither does the Supreme Court recognize discrimination against low income households as a suspect classification which triggers rigorous equal protection review of low income housing restrictions.[114]

Watkin, *Vermont Court Drawing a Line Around Rights*, Rutland Herald, Nov. 13, 1983, at 1. Justice Hill of the Vermont Supreme Court is quoted in the article as saying: "We in Vermont are in the forefront on this. I think we have more cases than other states. A body of Vermont constitutional law is being created and we are saying for the first time in many years that our state constitution means something." The author of the article asserts: "Although Hill and Billings [former Chief Justice of the Vermont Supreme Court] do not say publicly that their motivation is a direct response to the Burger Court's chipping away at individual rights, both have said privately they are worried by recent rulings of that Court." *Id.*

111. 416 U.S. 1 (1974).

112. *See* City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980); State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

113. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). For a discussion of this case, see Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977).

114. *See* James v. Valtierra, 402 U.S. 137 (1971). In a landlord-tenant law matter, the Court declined to treat housing as a fundamental federal constitutional right. Lindsay v.

Major state courts disagree sharply. In *Southern Burlington County NAACP v. Township of Mount Laurel,*[115] the New Jersey Supreme Court rested its invalidation of an exclusionary suburban zoning ordinance that restricted the housing opportunities of low and moderate income groups on state constitutional principles that derived from an equal protection guarantee that the court inferred from the New Jersey Constitution. Other state courts, though less elegant in their analysis, have applied state due process and equal protection limitations to invalidate suburban exclusionary zoning restrictions.[116]

Nor have the Supreme Court justices been able to agree, even when they apply federal constitutional limitations protecting individual liberties to strike down zoning regulations. Recent Court opinions have applied the free speech clause of the federal constitution to land use regulations affecting adult businesses and billboard controls. The two major opinions in which free speech limitations were applied enjoyed the support of a majority of the Court as to the result only, and not as to the rationale.[117] In the billboard case, the Court was so badly divided that Justice Rehnquist called the collection of opinions a "Tower of Babel."[118] State court cases, reflecting these divisions of opinion on the nation's highest tribunal, differ in their interpretation of what the justices really meant.[119]

Finally, the state courts do not invariably emulate the Su-

Normet, 405 U.S. 56 (1972).

115. 67 N.J. 151, 336 A.2d 713, *appeal dismissed, cert. denied,* 423 U.S. 808 (1975) (Mount Laurel I). *See also* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II).

116. Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971); Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977). *Compare* Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

117. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50, *reh'g denied,* 429 U.S. 873 (1976).

118. 453 U.S. at 569. The subsequent decision in City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984), clarified some of the confusion produced by *Metromedia* and refused to find fault with a content neutral prohibition of signs on posts, utility poles, etc., on the ground that it was a reasonable regulation with respect to time, place, and manner.

119. *Compare* City of Lakewood v. Colfax Unlimited Ass'n., 634 P.2d 52 (Colo. 1981) (applying *Metromedia* to invalidate sign ordinance), *with* State v. Hopf, 323 N.W.2d 746 (Minn. 1982) (validating sign ordinance seemingly invalid under *Metromedia*).

preme Court on its long-standing deference to legislative decisions. For decades, federal equal protection doctrine has been highly tolerant of governmental action when applied to legislative classifications affecting economic interests.[120] If landowner A sues in federal court claiming he has been unfairly treated by a local zoning ordinance as compared with landowner B, a federal court will simply yawn. State courts are different. They regularly review with some rigor the zoning classifications adopted in zoning ordinances. State court review of federal and state constitutional issues in land use cases necessarily depends on context—who wins depends on the circumstances of each case. There is no nationwide equal protection doctrine in these cases on which local zoning officials can depend.

In the application of the taking clause to land use regulations there is a disagreement between the Supreme Court and its state counterparts, and the Supreme Court has not spoken with clarity. The leading Supreme Court case is *Penn Central Transportation Co. v. City of New York*,[121] upholding the city's historic landmark designation ordinance. The Court's opinion, written by Justice Brennan, is hardly a model of judicial clarity. Many important questions went unanswered, or were analyzed in language that lacked precision. May a municipality restrict a property owner's use of his land to confer a benefit on the general public rather than to prevent a harm? Justice Brennan indicated that it probably can, but careful readers are left in doubt. How much of a diminution in property value is necessary before the Court will find a taking? Contrary to what he said in his *San Diego Gas* dissent, Justice Brennan apparently tells us that the diminution must be substantial, that the property owner must be left with no reasonable use of his land. But again, we are not sure, and Justice Rehnquist in his dissent argued forcefully that the law was the other way.[122]

State court decisions on these important components of a taking claim also vary. Indeed, both the Supreme Court and the state courts have made it clear that there is no "set formula" for applying the taking limitation. How can a planner know the constitution if state and federal courts leave to case-by-case analysis their application of the taking clause on which Justice Brennan's compen-

120. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144 (1938); Williamson v. Lee Optical Inc., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963).

121. 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978).

122. 438 U.S. at 138 (Rehnquist, J., dissenting).

sation principle so clearly depends?

VII. The Separation of Power Problem

There is a further vice to the Brennan "temporary taking" idea that strikes at the vitals of fundamental separation of powers theory. If Brennan's constitutional rule is given effect, then the courts will be *obligated* to order compensation in every case of regulatory invalidity. This judicial transmogrification of regulatory enactments into exercises of the power of eminent domain will upset, in perhaps the most sensitive area of all, the delicate balance between co-equal branches of government that has served well for 200 years. For if there is any power which is clearly not judicial, it is control over the budgeting of expenditures by government. Any decision that would shift the power to make such decisions to the court should give pause to even the most enthusiastic proponent of judicial activism.[123]

When a local government decides to acquire property by the exercise of the power of eminent domain, it has made a budgetary decision on how it will allocate its financial resources. When a local government decides to regulate, it makes no such decision (unless, of course, enforcement will impose some new costs). Thus, a judicial determination that a regulation is so restrictive that compensation is required can be, and almost certainly will be, very bad budgetary news. Worse, the notion that the judicial arm can order compensation to be paid intrudes the courts deeply into the sphere of the local legislative body because then it is the court, and not the city council, that makes the decision to exercise the power of eminent domain. Given a choice of acquisition or no regulation, the council might elect not to regulate. But the *San Diego Gas* dissent takes that option from municipalities. True, the council can repeal the offending regulation, but by then it is too late to avoid the financial consequences. By then the courts will have already made the council's budgetary decision for it.

The Minnesota Supreme Court arrived at a less fiscally dangerous solution to the problem. If a local zoning restriction is found invalid, as applied to a particular tract of land, the municipality has two choices: It may accept the decision and let the pro-

123. The point is well made in National Wildlife Federation v. United States, 626 F.2d 917 (D.C. Cir. 1980).

posed development proceed, or it may pay compensation and acquire the land.[124] The option *should* be left with the municipality, but the Brennan dissent leaves no room for such a sensible option.

Concurring in *San Diego Gas,* Justice Rehnquist said, "[i]f I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan."[125] But in *National League of Cities v. Usery*[126] he was eloquent in his concern about the costs to state and local government of the attempt by Congress to impose federal minimum wage and hour standards on state and local government employees. How do you square his concern in *Usery* about the fiscal impact of regulation with agreement with a doctrine that could impose horrendous costs on local government? At a time when municipalities are squeezed between rising costs and a hardening taxpayer resistance to higher taxes, the financial consequences of the intrusion of the judiciary into municipal spending decisions could easily range from disturbing to catastrophic. Surely that is not a consequence of the Brennan dissent with which Justice Rehnquist "could agree."

Justice Brennan could hardly have picked a worse time to intrude the courts into municipal fiscal policy. As we have noted earlier, the present system of financing local government produces periodic fiscal crises and occasional reports of imminent collapse. Everyone is devoted to local responsibility and local government, though in different ways, but any judicial policy which may lead to its financial breakdown should give everyone pause.

VIII. The Role of Public Policy in Constitutional Law

Probably no assumption of Justice Brennan's is less amaranthine than his suggestion that public policy must give way to constitutional imperatives. Brennan said, "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches."[127]

"Policy judgments"? So soon has Brennan forgotten the way

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124. McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) (airport zoning).

125. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 633-34 (1981) (Rehnquist, J., concurring).

126. 426 U.S. 833 (1976).

127. *San Diego Gas,* 450 U.S. at 661.

he commenced his decision in *Penn Central Transportation Co. v. New York City:*

> Over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. "[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."[128]

In that case involving that most difficult "taking" issue, designation of a major privately owned structure as a landmark, Brennan started off by sketching a sitting duck by noting the incalculable consequences to states and cities in the country should the New York City Landmarks Law be invalidated. So? If it is a "taking," what difference does the popularity of landmark laws make? Brennan could just as well have observed in a footnote: "After all, if a policeman must know the Constitution, then why not a preservationist?"

The idea that policy and the Constitution must *not* be balanced has always been an enthralling flame to orthodox law teachers. That it has been repudiated in each generation during our two centuries does not seem to deter them. As recently as 1974 in a zoning case, the more remarkable because it was the first time since 1928 that the Supreme Court had taken a zoning matter, Justice Douglas uttered a profound constitutional edict:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . . The police power is . . .

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128. 438 U.S. 104, 107-08 (1978) (footnotes omitted).

> ample to law out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[129]

That state courts did not discern that same constitutional mandate would not, we are confident, have troubled Justice Douglas.

Policy is inappropriate? Consider the extended battle over one-man, one-vote, finally resolved in *Baker v. Carr*[130] in a convoluted and repetitive explanation of why *Colegrove v. Green*[131] and "subsequent *per curiam* cases" were no longer valid. It does not require a Ph.D. in political science to realize that in *Baker*, the Supreme Court finally became fed up with the intractable unwillingness of state legislators to correct their myopic vision of what was fair legislative representation. Or consider again *National League of Cities v. Usery*[132] where Justice Rehnquist invalidated the attempt to extend the 1938 Fair Labor Standards Act to states and their agencies, and elaborated for three pages with a recital of the added costs that extending the Act to states and their agencies would impose upon state and local governments. Was that not essentially a determination that there is a constitutional guarantee that the Congress is not to make state government too expensive? And let us not forget *Brown v. Board of Education*,[133] which relied on social science data in reversing *Plessy v. Ferguson*.[134] And on and on. Policy is the stuff of the Constitution. Brennan knows this, high school civic teachers know this, and we trust it will continue to be the rule in American constitutional law.

IX. Possible Future Scenarios

If the Brennan dissent becomes the majority view, what happens then? Are we merely a collection of Cassandras prophesying dire consequences?[135]

Legal rules do not thrive in a vacuum. They grow and gain meaning as they are interpreted by the actors in the legal system

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129. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).
130. 369 U.S. 186 (1962).
131. 328 U.S. 549 (1946).
132. 426 U.S. 833 (1976).
133. 347 U.S. 483 (1954).
134. 163 U.S. 537 (1896).
135. Bear in mind that Cassandra's curse was not that her prophecies were wrong, but that they were accurate but doomed never to be believed.

on whom their implementation depends. Who are the likely actors in the legal process should Justice Brennan's compensation for temporary taking rule become law? The courts play an obvious role. They interpret and apply the taking clause and other constitutional limitations that give rise to potential liability claims. So do local governments and their officials. They adopt and implement the local land use controls that give rise to litigation. The role of the bar also is critical. Lawyers advise clients and decide when and whether to sue.

How will these actors in the land use game react to the Brennan rule? Given the rules of the game that govern judicial consideration of the Brennan principle, we can expect quick and combative confrontation followed by an accommodation that can only weaken the land use process.

Combative confrontation? Consider the options open to the lawyer whose client presents a potential taking claim for which compensation can be awarded. The chances of success must be weighed, taking account of the unsettled state of taking law and the varying dispositions of the judges who hear land use cases. The litigating lawyer also can take advantage in either federal or state court of the cause of action against municipalities for damages that is now available under section 1983.[136] This cause of action carries a potential award of attorney's fees, to the prevailing party, and even when the plaintiff loses, he might recover fees if the court determines that he litigated a question of salient public importance.[137] Lawsuits presenting taking claims in federal court will multiply. Experience with litigation under section 1983 in other areas of the law bears out this prediction.[138] The federal courts will see an influx of land use cases and so will local governments and their attorneys. How will the courts and local government react?

Let us take the federal courts first. Federal judges are not an insensitive lot. They know that the land use process presents formidable and difficult political choices to those who run it. Unless they are willing to "chill" local land use regulation with decisions awarding substantial damages to plaintiffs, they are likely to strike

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136. 42 U.S.C. § 1983 (1981). *See* Martinez v. California, 444 U.S. 277 (1980).

137. 42 U.S.C. § 1988 (1981).

138. See unpublished opinions of Kocoras, J., in Linhart v. Glatfelter (No. 83 C1292, N.D. Ill., March 30, 1984), and Rentner v. Burnham (No. 82 C1175, N.D. Ill., March 27, 1984) in which the district judge is severely critical of the inconsequential nature of an increasing number of § 1983 actions.

an accommodation. They will balance the claims of plaintiff landowners for redress and the claims of municipal defendants for a protected freedom to run the system without fear of debilitating compensation awards.

The most likely judicial course will be to deny compensation, except in the most extreme cases, through decisions that moot the confrontation by avoiding decisions on constitutional grounds. Federal judges have many opportunities here. They can abstain from taking a case, claiming that state court resolution of the issues should come first. They can find non-constitutional grounds that will effectively dispose of the dispute. The principle, that courts will avoid constitutional issues except when absolutely necessary, is well-established and provides strong support for this judicial approach.[139] The state court judiciary will know that if a police power regulation "goes too far," then the municipality will have to pay money damages. Therefore, it can be predicted that there will be a notable reluctance on the part of the courts to invalidate zoning decisions of local authorities, and we may slip back to Norman Williams's inauspicious Third Period of zoning law, with the courts upholding almost anything. Many state judges were once city attorneys, and as such they have lived with shortened budgets and failed tax referendums. They will not be eager to invalidate local zoning decisions if the consequence will be a serious impairment of the municipal fisc. Such a prospect is not pleasing at a time when the courts appear to be questioning seriously many local practices. More significantly, if the objective of the "temporary taking" rule is to aid the developer, the cure may prove to be worse than the malady.

Judicial avoidance of constitutional issues in land use cases can only weaken the land use system. Cases arise in which local governments implementing land use controls need discipline. The law cannot develop properly unless the courts face and resolve the major constitutional questions. Avoidance of constitutional issues by the federal or state courts can only create more uncertainty for local governments and landowners than already exists. Certainly that is not a desirable or even an expected outcome of the principles set forth in Justice Brennan's dissent.

An even more dismal scenario is the possibility that the views

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139. J. NOWAK, R. ROTUNDA, and J. YOUNG, CONSTITUTIONAL LAW 93-95 (2d ed. 1983).

of the Brennan minority may become the law and the award of compensation to frustrated plaintiffs would become common. Then we might paint a picture similar to that described by Justice Rehnquist in *National League of Cities v. Usery:*

> Judged solely in terms of increased costs in dollars, these allegations show a significant impact on the functioning of the governmental bodies involved. The Metropolitan Government of Nashville and Davidson County, Tenn., for example, asserted that the Act will increase its costs of providing essential police and fire protection, without any increase in service or in current salary levels, by $938,000 per year. Cape Girardeau, Mo., estimated that its annual budget for fire protection may have to be increased by anywhere from $250,000 to $400,000 over the current figure of $350,000. The State of Arizona alleged that the annual additional expenditures which will be required if it is to continue to provide essential state services may total $2.5 million. The State of California, which must devote significant portions of its budget to fire-suppression endeavors, estimated that application of the Act to its employment practices will necessitate an increase in its budget of between $8 million and $16 million.[140]

If that is the stuff on which constitutional adjudication is to turn, then what might be said of the million dollar judgments that have been asked of municipalities in section 1983 cases? How badly will budgets be impaired by such judgment debts? From what service will the cuts be made to pay them? In defense, must the city council lose its nerve and turn to mush every time a disappointed developer threatens a lawsuit with the possibility of money damages as a consequence? And what kind of advice can the city attorney give them? Little of substance, as we suggested above.

Moreover, Justice Brennan's quite apparent judicial philosophy that economic costs to individuals should be distributed as a fair share cost on the public at large attempts to engraft a theory of "liability as a deterrent" on the taking clause. Clearly then, the Brennan opinion does not rest simply on a desire to achieve a "spreading of economic costs." It is at least equally prompted by his theory that the prospect of liability "might also encourage municipalities to err on the constitutional side of police power regulations . . . ."[141]

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140. 426 U.S. 833, 846 (1976).
141. 450 U.S. at 661 n.26.

How will local government react to the imposition of potential liability as a deterrent? Accommodation can be expected here as well. Local governments will be wary. They will fear that an assertive judicial role in the application of the Brennan ruling may bankrupt local governments. Local officials may believe that the federal courts will be accommodating, but they will not be able to take chances. Even the slim possibility of liability may leave local government limp. But Brennan says, in effect, awarding damages will sober them up soon enough. It is possible that, disregarding their responsibility to the public to sometimes say "No," local office holders will give in when their duty is to stand firm. But who can say with confidence that they will take a chance when the price of being wrong may be high?

Local governments will be able to avoid potential liability in only one way. They will have to accommodate their planning and land use decisions to the threat of litigation imposing liability for land use actions. That accommodation can take only one form. Local governments will be reluctant to adopt and execute those land use decisions necessary to plan and direct properly the growth of their municipalities. While the risk of liability may be intended to serve as a deterrent to unconstitutional regulation, it may just as easily deter the adoption of constitutional but controversial land use restrictions. It would have been a bold and oracular official who could have predicted with confidence that the Supreme Court of Wisconsin would sustain the wetlands regulations at issue in *Just v. Marinette County*.[142] The deterrent theory that Brennan offers simply will not work in the face of the amorphous constitutional standards that control planning law because it will produce timid implementation and an unwillingness to innovate that will weaken and substantially curtail the effectiveness of the land use control system.

X. Alternatives

The authors of this essay are unanimous in their belief that widespread adoption of the Brennan doctrine would be a disaster—quite possibly, a disaster of unimaginable proportions. They are not—perhaps because of their extensive, but widely different, experience—unanimous on the proper approach to improving the system. As we have made clear above, we believe generally that

142. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

reform should move more in the direction of strengthening the legal position of neighbors, and particularly "third-party non-beneficiaries." We tend to take different positions with respect to remedying the grievances, real and alleged, of developers. Some of us feel that something needs to be done in this respect, though we vary in our estimates of how important this is in the overall picture; others of us tend to be "police-power hawks."

It is not the purpose of this Manifesto to prescribe an alternative system. The literature on the subject is already voluminous.[143] There are, however, other possible approaches available that stop short of the damage remedy. The most desirable would require some serious legislative reconsideration. The mind of man is not so feeble that it would be impossible to think of adequate remedies for the developers' just complaints. As one of many possible examples, a modification of the Illinois system might be appropriate—perhaps in the form of legislative direction that, if the zoning of a given tract of land is twice found to be invalid or overly restrictive, then the court should direct a remedy giving the developer whatever he has asked for, whatever its impact.[144] In other words, the second time around the town would stand a chance of losing control of both location and intensity of development.[145]

Some commentators in the field have long advocated that a more desirable approach would be a legislative system in which police power restrictions are combined with partial compensation for those few situations where land use regulations are and should be so extremely restrictive that they effectively preclude or minimize development.[146] The increasing governmental focus on protecting

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143. *See Windfalls for Wipeouts*, (D. Hagman & D. Mayzinski, eds. 1978); Hagman, *Compensable Regulation: A Way of Dealing With Wipeouts from Land Use Controls?*, 54 J. URBAN L. 45 (1976); Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIG. 73 (1965); Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

144. The New Jersey Supreme Court has approved the use of a "builder's remedy" in exclusionary zoning cases. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II).

145. In Illinois the municipality does not get two chances to be wrong because, upon a finding of unconstitutionality, the courts are permitted to enter a decree that enjoins the municipality from interfering with the plaintiff's proposed use. *See* Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 407 (1960).

146. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 302-09 (1973); Krasnowiecki & Strong, *Compensable Regulations for Open Space*, 24 J. AM. INST. PLAN. 87 (1963); WINDFALLS FOR WIPEOUTS, *supra* n.143 at ch. 11. There is a provision in the ALI MODEL LAND DEVELOPMENT CODE § 9-112(3), authorizing a court to order a stay to allow a municipality to determine whether it wishes to pay compensation when a taking may have

and preserving environmental quality has produced land use restrictions that an earlier era would have condemned as confiscatory. Obvious candidates for initial experimentation with such a system would include the compulsory termination of non-conforming uses of substantial size, various kinds of rather extreme aesthetic restrictions, and environmental restrictions which preclude virtually all development and require land to be left in its natural condition.

At least one of our number attributes a significant share of the problem to a lack of judicial confidence that local zoning decisions with respect to particular sites can reliably be assumed to have been fair and supported by substantial evidence. A remedy for this problem that has gained some acceptance is for the courts to examine the evidence heard by the local government bodies. The courts in six states have discarded the "legislative" characterization of rezoning decisions and insisted that they are quasi-judicial.[147] The consequence is that on judicial review the question of whether the local decision as to a particular piece of land is arbitrary turns on the substantiality of the evidence heard by the decision-makers.

XI. Some Concluding Thoughts

This essay cannot close without acknowledging a pervasive sin of municipalities which some advocates believe the Brennan doctrine will cure. That is the practice, one might almost say the art, of delay, delay, equivocation and never-ending "negotiation" that has characterized too many land use regulators.[148] These actions are ubiquitous, vicious and devoid of any resemblance of procedural due process. Often the municipality prefers that the complainant seek relief from the courts. If he prevails, the municipal officials can say "blame the judge, don't blame us," in response to their constituents. Moreover, many local governments seem to rel-

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occurred. *See also* § 5-102 (acquisition of nonconforming uses) and § 5-106 (land acquisition to achieve planning objectives).

147. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Cooper v. Board of Comm'rs of Ada County, 101 Idaho 407, 614 P.2d 947 (1980); Golden v. City of Overland Park, 224 Kan. 591, 584 P.2d 130 (1978); Lowe v. City of Missoula, 165 Mont. 38, 525 P.2d 551 (1974); Fasano v. Board of County Comm'rs of Washington County, 264 Or. 574, 507 P.2d 23 (1973); Fleming v. City of Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972); *see also* 2 A. Rathkopf & D. Rathkopf, The Law of Planning and Zoning 27-29 (4th ed. 1980).

148. The baneful effects are documented in B. Freiden, The Environmental Protection Hustle (1979).

ish prolonged administrative turmoil before reaching a decision from which judicial relief may be sought.

It does not follow, however, that it is reasonable to expect that such vexatious conduct can be cured by a doctrine that holds out the prospect of serious fiscal consequences but fails to give the municipality reasonably predictable standards for avoiding error. If each case of a "taking" is an ad hoc determination with little predictability, as the justices have admitted, what kind of a standard is that by which to rectify a municipal malpractice? The Brennan doctrine would punish the well-intentioned local legislature as well as the odious one.

In conclusion, we would point out that other distinguished judges have been clearly indicating their disagreement with the Brennan doctrine, and their agreement generally with the approach set forth in this essay. As indicated above, the Minnesota Supreme Court—which for a long time has been perhaps one of our most respected state courts—has explicitly adopted the rule that, in cases where the zoning of a tract has been declared invalid, it is up to the municipality to choose between (a) allowing the development to proceed, and (b) making payment and thus acquiring the land.[149] In New York, former Chief Judge Charles Breitel has persuasively maintained that the Holmes language in *Pennsylvania Coal* should be interpreted metaphorically, and that a clear distinction should be preserved between invalid regulation and governmental "takings."[150] Justice Hans Linde of the Oregon Supreme Court, a distinguished judge in the state which has what may be the most advanced land use jurisprudence in this country, has recently summarized the taking problem as follows:

> The issue in this case does not arise from regulation of the private use of property. That happens to many forms of business enterprise and private investment, not peculiarly to investment in real property, where it perhaps stirs special atavistic memories of the feudal and pioneering past.
>
> And land use control is not the only kind of regulation

149. *See* McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) and Aptos Seascape Corp. v. County of Santa Clara, 138 Cal. App. 3rd 484, 188 Cal. Rptr. 191 (1982), in which a taking claim was dismissed on condition that the county grant the plaintiff compensatory densities or transferable development rights in return for precluding development of ecologically sensitive land.

150. Fred F. French v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

> directed to specific identifiable property. The generality of a rule often safeguards against biased and unequal political decisions but that alone does not turn a more narrowly focused ruling into a taking. A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant.
>
> A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomic to maintain a hotel or residential building, with consequent financial loss. Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for "just compensation."
>
> . . . .
>
> Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land.[151]

Our conclusion, then, is that any change which results in an across-the-board shift of power away from local government to landowners and developers is highly suspect. The land development industry may need a more receptive judicial attitude in some states, but if so that is no warrant for a drastic change in the constitutional rules which would greatly increase the advantage that they frequently have now over neighbors and "third-party nonbeneficiaries." Above all, the worst possible solution would be a rigorous constitutional mandate for a particular remedy in all cases. Such a solution would be disastrous social policy and bad law.

We have become accustomed, on ceremonial public occasions such as ABA meetings, to hearing Justices of the Supreme Court, and other learned legal luminaries, bemoan the ever more burdensome decisional docket of the Court. But, to borrow a land use law concept, the hardship is at least in part self-inflicted by the proclivity of the Court for discovering new legal theories upon which we may sue government and each other. Justice Brennan's "temporary taking" idea, if adopted by the Court, would be the wellspring

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151. Suess Builders Co. v. City of Beaverton, 294 Or. 254, ___, 656 P.2d 306, 309 (1982) (footnotes omitted).

of yet one more deluge of new case filings. And one needs no crystal ball to predict that having loosed the monster, the Court would use the excuse of its burdensome docket for leaving to the state and lower federal judiciary the task of getting the beast leashed and brought to heel.

By this Manifesto we hope to have made persuasively the case for relegating compensation for regulatory "takings," whether temporary or permanent, to that limbo which is reserved for ideas whose capacity for mischief significantly exceeds their social utility. Less ambitiously, perhaps we have at least provided the bench and bar with a brief opposing the theory that regulation which "goes too far" constitutionally requires compensation.