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THOUGHTS ON *THE WHITE RIVER JUNCTION*
MANIFESTO: A REPLY TO THE "GANG OF
FIVE'S" VIEWS ON JUST
COMPENSATION FOR REGULATORY
TAKING OF PROPERTY

*Michael M. Berger and Gideon Kanner**

I. INTRODUCTION

Sometime last year, two law professors and three lawyers had breakfast at a Howard Johnson's Restaurant in White River Junction, Vermont, and decided to write an article on the law of remedies for oppressive land regulation.¹

Perhaps they should have had an Alka Seltzer instead.

What disturbed their digestion was the cogent analysis of Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*,² and the fact that his belief that compensation is an apt remedy for regulatory takings is striking a responsive chord in many state

* The authors are, respectively, a member of the law firm of Fadem, Berger & Norton, Santa Monica, California, and Professor of Law, Loyola Law School, Los Angeles, California. Professor Kanner is also Editor and Publisher of *Just Compensation*. Believing, with Justice Douglas, that people with "axes to grind" should so note when they enter the scholarly lists, so their readers know through what spectacles their advisors view the problem, Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-30 (1965), the authors note the following. Mr. Berger's practice consists of representing property owners in real property litigation. A large portion of that litigation is against government agencies and an increasing amount of it deals with the consequences of excessive land use regulation. Professor Kanner teaches courses in land use and eminent domain. He is occasionally engaged by property owners to represent them in litigation in those fields. The authors' views on the reasons and need for a compensatory component in remedies for takings are a matter of record: Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253, 292-99 (1975); Berger, *The State's Police Power Is Not (Yet) the Power of a Police State*, 35 LAND USE L. & ZONING DIG., May 1983, at 6-8; Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861, 885-87 (1975); Kanner, *The Editor's Page*, 19 JUST COMPENSATION, Nov. 1975, at 11-12.

This effort is undertaken as a polemical reply to a polemic. As such, it at times argues a bit more forcefully than standard law review fare. It draws from briefs filed by both authors in the United States Supreme Court.

1. Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) [hereinafter cited as *The Manifesto*].

2. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting on behalf of four justices). See also

and lower federal courts.³ *The Manifesto* argues that no compensation for regulatory takings should ever be available.

And so, in purported reply to Justice Brennan, the "Gang of Five"⁴ wrote a curiously entitled, heavily polemical piece devoted primarily to remedies for uncompensated takings. However, in an anti-intellectual *tour de force*, they completely ignored a half-century of United States Supreme Court case law on the very topic they undertook to discuss. Suffice it to say here that, beginning in 1932 with *Hurley v. Kincaid*⁵ and through the 1984 decision in *Ruckelshaus v. Monsanto Co.*,⁶ the high Court has on seven occasions held that the primary remedy for uncompensated takings is just compensation rather than specific relief—a result required by both the traditional rules of equity and sound public policy.⁷ None of these cases sullied the pages of *The Manifesto*. Since *The Manifesto* burst into print, the Court has said so once again—this time in the

id. at 633-34 (Rehnquist, J., concurring in the judgment of dismissal, but expressing essential agreement with Justice Brennan's analysis of the merits).

3. *The Manifesto*, *supra* note 1, at 193. Actually, acceptance of Justice Brennan's analysis is more widespread than depicted in *The Manifesto*. Six federal courts of appeals, as well as the United States Claims Court and numerous state supreme courts, have adopted Justice Brennan's theory. *Bank of America v. Summerland County Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985); *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 n.2 (8th Cir. 1985); *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 398 (6th Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 455 (1985); *Hamilton Bank v. Williamson County Reg'l Plan. Comm'n*, 729 F.2d 402, 408 (6th Cir. 1984), *rev'd on other grounds*, 105 S. Ct. 3108 (1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983); *Barbian v. Panagis*, 694 F.2d 476, 482 n.5 (7th Cir. 1982); *In re Aircrash in Bali*, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160, 165 (1985); *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Burrows v. City of Keene*, 121 N.H. 590, 599, 432 A.2d 15, 20 (1981); *Ripley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982); *Annicelli v. Town of S. Kingston*, 463 A.2d 133, 140 (R.I. 1983); *Zinn v. State*, 112 Wis. 2d 417, 427-29, 334 N.W.2d 67, 72-73 (1983). *See also Pioneer Sand & Gravel v. Municipality of Anchorage*, 627 P.2d 651, 652-53 (Alaska 1981) (reserving judgment on proper remedy in light of *San Diego Gas*, but allowing inverse condemnation action to proceed to trial); *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 61-62, 445 A.2d 46, 72-73 (1982).

4. Given the polemical nature of *The Manifesto* and this reply, we trust that the readers will indulge us when we refer to the authors of *The Manifesto* as the Gang of Five; if nothing else, it is a good deal shorter than repeatedly saying "Messrs. Williams, Smith, Siemon, Mandelker and Babcock." It appears, moreover, that we are not the first with the printed use of that sobriquet. *See* 9 ZONING & PLAN. REP., Feb. 1986, at 12.

5. 285 U.S. 95 (1932).

6. 104 S. Ct. 2862 (1984).

7. For a more complete discussion, see *infra* notes 68-111 and accompanying text. *See also Kanner, Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 INST. ON PLAN., ZONING & EMINENT DOMAIN 177, 197-206.

context of land use regulation.⁸ It would thus appear that there is a good deal less to *The Manifesto* than meets the eye. That it was hatched over breakfast at Howard Johnson's is symbolic: *The Manifesto* is to legal scholarship what a HOJO's breakfast is to haute cuisine.

What is it that got these five world class land use lawyers so exercised as to produce this gallimaufry⁹ of bile and diatribe that literally ignores the decisions of the United States Supreme Court dealing with the very subject they decided to examine and criticize?

It is simply this: Justice Brennan (and perhaps a majority of the Court) expressed the view that, when a government agency regulates the use of private property so harshly as to effect a de facto taking of the property (or an interest in it), a remedy in damages is compelled by the Constitution's "just compensation" clause.¹⁰ If the offending entity chooses to rescind the regulation after a court has found it to be a taking, then the government is liable only for those interim damages which occurred during the time the regulation temporarily took the property.¹¹

In launching its attack on Justice Brennan's analysis, the tract produced by the Gang of Five is disingenuous at best. It purports to deny, under the cloak of collective authorship, what its authors know and have said as individuals.¹² It argues that "developers"¹³ generally get what

8. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459-60 (1985).

9. The most likely reason the Gang of Five could find no way to work the word "gallimaufry" into its article, see *The Manifesto*, *supra* note 1, at 194 n.10, is that the word's singularly appropriate use would be to describe the mixture they had just concocted.

10. *San Diego Gas*, 450 U.S. at 660 (Brennan, J., dissenting). As Professor Tribe explains, there is in fact no practical difference between physically seizing property and preventing its owner from using it:

Thus a clear case is one that intuitively seems like a taking in the layman's sense of that term: a physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property. *Moreover, forcing someone to stop doing things with his property—telling him "you can keep it, but you can't use it"—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else.* Thus, a "taking" occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed.

L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 460 (1978) (emphasis added) (footnotes omitted).

Indeed, in some cases, the owner literally may be better off if the property were confiscated. Freezing the ability to use property, while leaving title in its owner, leaves the owner liable for property taxes and carrying costs, as well as possible torts and nuisances. See *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1955); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

11. *San Diego Gas*, 450 U.S. at 658 (Brennan, J., dissenting).

12. See, for example, the views expressed, *inter alia*, in the following: R. BABCOCK, *THE ZONING GAME* (1966); R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985); C. SIEMON, W. LARSEN & D. PORTER, *VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE*

they want, need no further protection, and can safely rely on state judicial systems to provide prompt and specific relief in those rare cases when assistance is needed.¹⁴

Part of *The Manifesto's* problem may stem from the pro-government leanings of its authors. Curiously, they kept their biographical footnote to such a minimum that people who do not know them (and, contrary to their apparent belief, there may be a few) have no way of assessing their biases.¹⁵ To relieve the suspense for the uninitiated, the private practitioners (Messrs. Babcock, Smith and Siemon), while occasionally representing property owners, tend to toil in government vineyards.¹⁶ Messrs. Babcock, Smith and Siemon all share the background of membership in the Chicago law firm of Ross & Hardies (although Mr. Siemon has recently founded another firm and Mr. Babcock has retired) which has been at the forefront of opposing compensation for land owners abused

DEVELOPMENT EXPECTATIONS (1982); N. WILLIAMS, AMERICAN LAND PLANNING LAW (five volumes, various dates). Specific examples will be noted in the course of this article. Particularly, see *infra* note 46.

13. It is interesting how the use of labels can flavor a work. By indiscriminately calling all victims of overreaching regulation "developers" rather than property owners, *The Manifesto* seeks to present a picture of wealthy speculators trying to put one over on unsuspecting communities and their guileless neighbors.

As must be apparent, however, the people involved are hardly a uniform group. Some, concededly, are developers. Some are even speculators. Others are ordinary folk who simply want to use what they own. Some are elderly. See, e.g., *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985). Some are widows. See, e.g., *Kinzli v. City of Santa Cruz*, 539 F. Supp. 887 (N.D. Cal. 1982). Some are handicapped. See R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 185 (1985) (discussing *Hernandez v. Lafayette*, 643 F.2d 1188 (5th Cir. 1981), which involved a blind and crippled music teacher). Some even want to put in low income housing. See, e.g., *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). The latter would benefit those "third party non-beneficiaries" the Gang of Five professes to be concerned about. *The Manifesto*, *supra* note 1, at 241. The people whose rights are invaded are far from homogeneous. Indeed Messrs. Babcock and Siemon themselves have provided a graphic depiction of how oppressive regulations can and do impact onerously on ordinary people whose "sin" is that they bought a lot on which they sought to build a family home. See R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 235-54 (1985). But beyond that, we challenge *The Manifesto's* implicit notion that litigants have to be pure of heart before they can assert their constitutional rights in an effective fashion. The notion that building homes is somehow inherently wicked, or even suspect, is preposterous.

14. *The Manifesto*, *supra* note 1, at 197-99. Professor Delogu sees a different trend: "With a handful of exceptions reviewing courts in recent years have leaned over backwards to sustain municipal land use controls even when municipal motives and the results produced by particular ordinances were highly questionable." Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 277 (1984).

15. See Douglas, *supra* note *, at 228-30.

16. Some of their more recent exploits are chronicled in R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985).

by oppressive regulations.¹⁷ Professor Mandelker has worked for government agencies, most notably in his role as architect of the State of Hawaii's coastal zone management program. He characterizes himself as a "police power hawk."¹⁸ Professor Williams served for many years on the New York City Planning Commission, as Vice Chairman of a Regional Planning Board and member of a Board of Zoning Adjustment in New Jersey. Plainly, these are people whose interests and sympathies lie with the regulators. In *The Manifesto* they are polemicists, not scholars.¹⁹

We hope that this discussion will, in Justice Douglas' words, allow readers of *The Manifesto* to recognize that it is in essence a brief by "special pleaders who fail to disclose that they are not [acting as] scholars but rather [as] people with axes to grind."²⁰ It is entitled to no more deference than any other brief by a special interest group; indeed, it may be entitled to less because of its total disregard of the very law which it purports to discuss.

This article presents a differing view. It comes from California, the crucible of experimentation. California would seem to be "The Ideal" from *The Manifesto*'s viewpoint: the California Supreme Court has expressly adopted a policy that land use planners must be given free reign to "innovate" without fear of financial consequences when they trench on the rights of citizens in the process of advancing their notions of public welfare.²¹

As a consequence, California planners have been most innovative

17. See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973). This endeavor has led to sharp criticism. See, e.g., Walker & Heiman, *A Quiet Revolution for Whom?*, 71 *ANNALS OF ASS'N OF AM. GEOGRAPHERS* 67 (1981).

18. D. MANDELKER, *LAND USE LAW* at v (1982).

19. Their non-disclosure of their perspective is reminiscent of the ploy attempted by George Spater—then General Counsel of American Airlines, later its president—who wrote an article on aircraft noise and identified himself only as a "member of the bar." Spater, *Noise and the Law*, 63 *MICH. L. REV.* 1373 (1965). He suggested that people should accept noise as the price of progress. *Time* magazine later exposed Mr. Spater's bias. *TIME*, Sept. 10, 1965, at 37-38.

20. Douglas, *supra* note *, at 228-29.

21. *Agin v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980):

The expanding developments of our cities and suburban areas coupled with a growing awareness of the necessity to preserve our natural resources, including the land around us, has resulted in changing attitudes toward the regulation of land use. . . .

. . . Community planners must be permitted the flexibility which their work requires. . . .

. . . "[The] threat of unanticipated financial liability will intimidate legislative bodies and will discourage the implementation of strict or innovative planning meas-

indeed. When they lacked funds with which to buy parks, they began zoning undeveloped land for park or open space usage only.²² They invented the newspeak concept of "scenic viewshed," and banned construction which would interfere with it, even though they have been known to order the wholesale chopping down of trees in order to protect it,²³ thereby providing us with a latter day version of the Vietnam War officer who would destroy a village in order to save it. They have conditioned office construction on provision of child care, public art, jogging tracks, low income housing, bookmobiles and public transit.²⁴ They have made rent control an art form which includes prohibition of demolition and involuntary servitude for landlords.²⁵

The extent of these practices has not gone unnoticed by the individual members of the Gang of Five. Professor Williams, in his acclaimed treatise, aptly capsulized the legal situation in California:

The *striking* feature of California zoning law is that the courts in that state have quite *consistently* been *far rougher* on the property rights of developers than those in *any other state*. In a fairly long series of cases, the California court has upheld restrictions on property rights which *would not be upheld in many other states, and (in some instances) probably not in any other*. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; the same *spirit pervades the*

ures in favor of measures which are less stringent, more traditional, and fiscally safe."

....

In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

Id. at 275-77, 598 P.2d at 29-31, 157 Cal. Rptr. at 376-78 (citations omitted).

22. See, e.g., *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975); Williams, *Planning Law in the 1980s: What Do We Know About It?*, in ZONING AND PLANNING LAW HANDBOOK 465, 481 (1984). As part of a settlement which paid the property owners \$7,500,000.00, the *Arastra* opinion was vacated. 417 F. Supp. 1125 (N.D. Cal. 1976). The background is provided in Berwanger, *Recent Developments in Judicial Relief for Owners of Land Limited to Public Open Space*, 52 L.A. B.J. 196, 197 n.4 (1976).

23. See R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 242 (1985).

24. See San Francisco Downtown Plan; San Francisco Office/Housing Production Program; Transit Impact Development Fee Ordinance, SAN FRANCISCO AD. CODE ch. 38 (1983); Los Angeles Preliminary Transit Corridor Specific Plan; Monterey Ord. No. 2416 C.S.; Santa Monica General Plan: Land Use and Circulation Elements; Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 3 (1982).

25. See, e.g., *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984), *appeal dismissed*, 105 S. Ct. 1740 (1985); *Sterling v. Santa Monica Rent Control Bd.*, 168 Cal. App. 3d 176, 214 Cal. Rptr. 71 (1985); *Oceanside Mobilehome Park Owners' Ass'n v. City of Oceanside*, 157 Cal. App. 3d 887, 204 Cal. Rptr. 239 (1984).

*body of California zoning law generally.*²⁶

Messrs. Babcock and Siemon were more earthy, but no less accurate, when they recently concluded:

California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat.²⁷

So this view comes not from the bucolic rapture of White River Junction, Vermont, but from the crucible of innovative experimentation in California. If anything demonstrates the world which would exist if *The Manifesto's* views were accepted, it is California. And if anything represents a system of bureaucratic despotism, aided and abetted by "courts [which] have elevated governmental arrogance to a fine art,"²⁸ it is also California.

Thus, one needs to ponder [but not too hard] just what the Brave New World of the Gang of Five would look like if the United States Supreme Court were to take their rather strange argument seriously.²⁹ It just might look like California where, in land use law, governmental whimsy is considered an objective standard.³⁰

26. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.03, at 115-16 (1974) (emphasis added). Professor Callies (another Ross & Hardies alumnus) has been equally outspoken. See Callies, *The Taking Issue Revisited*, 37 LAND USE L. & ZONING DIG., July 1985, at 6-7; Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 URB. LAW. 723, 725 (1981).

27. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 293 (1985).

28. *Id.* at 253.

29. Although they acknowledge the pervasive existence of extremely serious problems, *The Manifesto*, *supra* note 1, at 242, they conclude their article by saying that they have no solution to offer. *Id.* at 243. Yet, they also plump for "a modification of the Illinois system." *Id.* at 241. Just what that modification would be, they tell us not. That presents something of a problem, because they are plainly not enamored of the Illinois system. For example, they deplore the Illinois practice of "rampant second guessing of local governments," *id.* at 220, thus leaving only doubt as to what they *do* mean to spring on the battered world of land use law. Their casually tossed-off *possible* solution "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," *id.* at 241, reminds one of those apocryphal tort jurisdictions in which each dog is said to be entitled to one free bite. How it would make for either fairness or sound public policy to unleash a duly twice-bitten developer to maximize his profits at the expense of all community values encompassed in the very idea of zoning, and thus deemed conducive to local general welfare, they likewise tell us not. In short, *The Manifesto's* views on this point appear to be internally inconsistent. Yet, coming as they do from some of the most knowledgeable professionals in the land use field, this could not have been inadvertent. Rather, it suggests that the true purpose of *The Manifesto* is to obscure the remedial process, not to illuminate it.

30. As a case of *res ipsa loquitur*, we quote—without comment—the following justification

The view from the crucible validates Justice Brennan's premise and demonstrates the need for his proposed solution.

II. THE UNDERLYING PROBLEMS

A. *The Chaotic State of the Law*

The constitutional aspect of land use law is in such a state of chaos that commentators have been falling over each other for years to see who could invent the most dramatic description of it.³¹ There are two interrelated questions at the root of this confusion:

- (1) When does regulation of private property become so severe that it moves beyond the boundary of uncompensated police power action and becomes a taking (i.e., a de facto exercise of the eminent domain power) which requires compensation?; and
- (2) When a regulatory taking has occurred, what is the aggrieved property owner's remedy?

The flood of scholarly commentary on these issues continues unabated.³² So does litigation. As there are two issues, so there are two reasons for this unsettled state of affairs.

With respect to defining a taking, the United States Supreme Court

by a California appellate court in approving an "anti-'monotony'" ordinance: "The legislative intent is obvious: the Pacifica City Council wishes to avoid 'ticky-tacky' development of the sort described by songwriter Malvina Reynolds in the song, 'Little Boxes.' No further objective criteria are required, just as none are required under the general welfare ordinance." *Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439, 441 (1985).

31. See, e.g., 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 5.05a, at 4 (Supp. 1985) ("trackless waste"); Cabaniss, *Inverse Condemnation in Texas—Exploring the Serbonian Bog*, 44 TEX. L. REV. 1584, 1584 n.1 (1966) ("great Serbonian bog where armies whole have sunk"); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 ("crazy quilt pattern"); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1170 (1967) ("liberally salted with paradox"); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) ("welter of confusing and apparently incompatible results"); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1970) ("conclusionary terminology, circular reasoning, and empty rhetoric").

32. In addition to the commentaries cited in Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 40-41 n.7 (1985), and Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 INST. ON PLAN., ZONING AND EMINENT DOMAIN 177, 177-78 n.2, see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Interference with the Use of Land*, 1985 INST. ON PLAN., ZONING AND EMINENT DOMAIN ch. 7; Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); *Mulligan, Loretto v. Teleprompter Manhattan CATV Corporation: Another Excursion into the Takings Dilemma*, 17 URB. LAW. 109 (1984).

has thrown up its hands. It has repeatedly confessed its inability to establish any easily workable formula for determining what governmental acts constitute a taking and said that each case must be decided on an ad hoc basis on its own facts.³³ While such fact-intensive examination has the virtue of flexibility, it also has led to a situation in which predictability has been so sacrificed that neither private nor public parties are able to ascertain what their rights are without first litigating through the highest appellate level.³⁴ This wastes the parties' and courts' resources, and in some parts of the country has given rise to absurd legal situations.³⁵

The present state of the law thus only provides incentives to litigation, as both sides to this durable controversy press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each dispute. While the flexibility employed by the Supreme Court thus far has much to commend it, the nation now desperately needs definitive guidance as to where flexibility ends and precedent begins. The Court's recent emphasis on procedural prerequisites³⁶ has exacerbated the problem, because people whose civil rights in property are not enforceable in

33. *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2874 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

34. Perhaps more importantly in a conceptual sense, a supposed "property" system in which the ostensible owner cannot tell what rights he "owns" until he tries to exercise them, and even then only after ruinously costly (and often pointless) administrative proceedings with a multi-tier appellate process and, after that, litigation, is an illusion. Only the most wealthy (and the most determined) persons can even try to seek protection of their constitutional rights. See *infra* note 57; R. BABCOCK, *THE ZONING GAME* 54 (1966). As the Court astutely observed in *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945), in the final analysis "property rights" are those economic advantages which the law protects. Disabling one from perceiving what the law will actually protect, effectively destroys the very idea of property. The *Willow River* concept of legally protected economic advantage is thus de facto transmogrified into a system in which its legal status flows not from neutral legal principles, but from the practically unreviewable whim of a local (often parochially-minded and politically inspired) regulatory body.

35. For example, the California Supreme Court has held that there are to be no damages for regulatory takings, *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), while the Ninth Circuit Court of Appeals (which includes California) holds this to be wrong. *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983); *In re Aircrash in Bali*, 684 F.2d 1301, 1311 n.7 (9th Cir. 1982).

In New England, the opposite judicial configuration prevails. There, the First Circuit—constituting a minority of one among the circuits—hews to the California no-compensation approach, *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F.2d 33 (1st Cir. 1980), while New Hampshire, a state within the First Circuit, rejects such a doctrine "out of hand," *Burrows v. City of Keene*, 121 N.H. 590, 599, 432 A.2d 15, 20 (1981), as does Rhode Island, *Annicelli v. Town of S. Kingston*, 463 A.2d 135, 139 (R.I. 1983).

36. See *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

the state courts have no alternative but to turn to the federal judiciary³⁷ and are thus compelled to jump through the newly invented procedural hoops.

But resort to the federal judiciary is no guarantee of reaching the merits of the controversy either. The uncertain parameters of the abstention doctrine leave much room for the argument that federal litigation ought to await the outcome of state litigation.³⁸ While some courts have refused to abstain,³⁹ others have viewed abstention as the preferred course of action.⁴⁰

In California's federal appellate court, the Ninth Circuit, the situation borders on the bizarre. Whether abstention is applicable appears to depend entirely on the identity of the three-judge panel assigned to the case.⁴¹ Moreover, notwithstanding the Ninth Circuit's candid recogni-

37. This is in keeping with the historical function of the federal courts. In James Madison's blunt words: "[A] review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of Federal laws." *Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (quoting James Madison). For similar expressions, see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

38. Compare Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 512-15 (1981) (arguing that abstention ought to be the rule in land use cases) with Hagman & Berger, *Development of Land Use Control in California*, in 8 CALIFORNIA REAL ESTATE LAW & PRACTICE § 250.03, at 250-26 (1985) (noting decisions in which abstention was denied). See generally Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Interference with the Use of Land*, 1985 INST. ON PLAN., ZONING AND EMINENT DOMAIN § 7.06.

39. *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984); *City of Moore v. Atchison, T. & S.F. Ry.*, 699 F.2d 507 (10th Cir. 1983); *Heritage Farms, Inc. v. Solebury Township*, 671 F.2d 743 (3d Cir.), cert. denied, 456 U.S. 990 (1982); *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982); *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603 (4th Cir. 1977), cert. denied, 438 U.S. 905 (1978); *Hotel Coamo Springs, Inc. v. Hernandez Colon*, 426 F. Supp. 664 (D.P.R. 1976); *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709 (D.N.J. 1976); *Rasmussen v. City of Lake Forest*, 404 F. Supp. 148 (N.D. Ill. 1975); *M.J. Brock & Sons, Inc. v. City of Davis*, 401 F. Supp. 354 (N.D. Cal. 1975); *Lerner v. Town of Islip*, 272 F. Supp. 664 (E.D.N.Y. 1967).

40. *West v. Village of Morrisville*, 728 F.2d 130 (2d Cir. 1984); *Caleb Stowe Assocs. v. County of Albemarle*, 724 F.2d 1079 (4th Cir. 1984); *Fralin & Waldron, Inc. v. City of Martinsville*, 493 F.2d 481 (4th Cir. 1974); *Hill v. City of El Paso*, 437 F.2d 352 (5th Cir. 1971).

41. In the following cases, abstention was approved: *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985); *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), cert. denied, 105 S. Ct. 1179 (1985); *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983); *Isthmus Landowners Ass'n v. California*, 601 F.2d 1087 (9th Cir. 1979); *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838 (9th Cir. 1979); *Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978); *Newport Invs., Inc. v. City of Laguna Beach*, 564 F.2d 893 (9th Cir. 1977); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976).

In the following cases, abstention did not occur: *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 579 (9th Cir. 1983); *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *rev'd on other*

tion that California's law regarding regulatory takings is not only settled but wrong,⁴² that court recently approved another abstention on the ground that the California Supreme Court ought to be given one more chance to clean up its own act.⁴³ The United States Supreme Court has refused to provide guidance in the operation of this judicially created doctrine, thus leaving all parties in the dark as to the appropriate forum for litigation.

The Supreme Court's lack of guidance in this field, and its apparent determination to adhere to its "I know it when I see it" philosophy, is not dissimilar to its former treatment of obscenity cases.⁴⁴ Unfortunately, unlike obscenity, the Court has decided only a scant handful of regulatory taking cases, and the factual and legal contexts of these decisions are quite diverse. Accordingly, as a practical matter, one finds it virtually impossible to extract from those cases any reliable legal doctrine of sufficient substance to guide landowners and governmental entities in their dealings with each other in the context of novel regulations which these days tend to proliferate at an astounding rate.⁴⁵ Thus, it is no simple task to advise one's client what the probable outcome of inverse condemnation litigation will be and how to evaluate the probabilities of success or failure.

This basic problem may be confusing and vexing, but another area of uncertainty has developed, or, perhaps more accurately, been manufactured by the land use bar. It relates to the second issue: remedies. Starting with the premise that a given course of governmental regulatory conduct gives rise to a "taking," the question becomes what are the aggrieved landowner's remedies? Is he entitled to just compensation, or is the constitutional prohibition against uncompensated takings satisfied when the offending regulation is declared invalid? Or, taking still another approach, are both remedies appropriate—either together or in the alternative?

The law developed at levels below the United States Supreme Court

grounds sub nom. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984); *Herrington v. County of Sonoma*, 706 F.2d 938 (9th Cir. 1983); *Shamrock Dev. Co. v. City of Concord*, 656 F.2d 1380 (9th Cir. 1981).

42. See cases cited *supra* note 35.

43. *Bank of America Nat'l Trust & Sav. Ass'n v. Summerland County Water Dist.*, 767 F.2d 544, 547 (9th Cir. 1985). To anyone familiar with law west of the Rockies, it is clear that the California Supreme Court will not change its mind until directly ordered to do so. See *infra* note 245.

44. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

45. See, e.g., Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861, 885-86 (1975). Cf. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980).

(which has historically opted for compensation) is muddled. One can find authority for virtually any solution.

With the publication of Justice Brennan's nominally dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, a ray of light seemed to emerge. As noted earlier,⁴⁶ lower courts (both state and federal) have begun applying Justice Brennan's theory as though it had been embodied in an opinion of the Court, evidently encouraged by Justice Rehnquist's agreement with the merits of the Brennan view,⁴⁷ and consequent intimation of the view to a majority of justices.

B. *How the Land Use Control System Works*

The Manifesto presents, as purported "factual" background, a description of how the land use control system operates,⁴⁸ concluding that, in practice, "developers tend to be favored."⁴⁹ That presentation is flawed, provincial, one-sided, anachronistic and hopelessly incomplete.

Conspicuously absent from *The Manifesto's* version of the facts is any acknowledgment of the Balkanization of regulatory authority which has become the hallmark of the existing system.⁵⁰ Notwithstanding all that *The Manifesto* says about the actions and motivations of a local municipality, this is often only the beginning of the journey toward development. It is quite far from the end.

Indeed, it is not inappropriate to liken a present day entrepreneur setting out to develop land to a wagon train setting out across the wild

46. See *supra* note 3. See also R. BABCOCK, *THE ZONING GAME* (1966). Mr. Babcock concluded that "[f]ew would dispute that the landowner is entitled to say to the municipality: if you prohibit all private use of my property, you must pay." *Id.* at 138. In a recent update (co-authored with Mr. Siemon) Mr. Babcock proudly noted that his earlier book "suggested the need to consider damages as a form of relief before Justice William Brennan let loose with his blast in *San Diego*." R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED 2* (1985). It would thus appear that Mr. Babcock is now being disputed by—who else?—Mr. Babcock.

47. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981) (Rehnquist, J., concurring).

48. *The Manifesto*, *supra* note 1, at 199-208.

49. *Id.* at 203.

50. Professor Williams has called this "[t]he most significant recent development affecting land use controls." Williams, *Planning Law in the 1980s: What Do We Know About It?*, in 1984 ZONING AND PLANNING LAW HANDBOOK 465, 488. Nonetheless, *The Manifesto* is premised on the assumption that "[m]ost land use controls are still adopted and imposed at the local level." *The Manifesto*, *supra* note 1, at 203. There is no point in quibbling with the characterization of "most," or engaging in some sort of nose counting to see where the "most" controls (in terms of numbers rather than impact) come from. As the following discussion shows, the system is highly and substantially fragmented. Many of the fragments exist at what might be called "the local level," which has received harsh and amply justified criticism. See, e.g., Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261 (1984); Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

West. At every pass, gully and butte, bands of desperados and Indian war parties were free to take potshots at the wagon train, usually with impunity. Perhaps, on rare occasions, the United States Cavalry might ride out of the sunset, but not with such reliability as to diminish the hazard of the journey. And so it is with land development today: From every governmental office, bureau, department, board or commission, bureaucrats (often responding to no more than selfish demands of established neighborhood groups or single issue environmentalist constituencies) issue a series of decrees that can, and often do, transform a desirable and well thought out plan of land development into an economically infeasible fiasco. On rare occasions a court will come to the property owner's aid on particularly outrageous facts, but not with such reliability as to diminish the horrendous risk of such enterprises.⁵¹

Contrary to the picture painted by *The Manifesto*, a property owner is no longer confronted merely with obtaining approval from one readily identifiable local regulatory entity operating under a single set of clear, coherent regulations. The historical dominance of this area of the law by zoning ordinances of towns and counties governing their own territories has been overlaid by a bureaucratic layer cake that ranges all the way from regional and state bodies, such as the California Coastal Commission,⁵² to bistate entities, such as the Tahoe Regional Planning Agency,⁵³

51. As long as a land user can be subjected to outrages which ignore economic reality, see, e.g., *Avco Community Developers, Inc. v. South Coast Reg'l Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976); *Urban Renewal Agency v. California Coastal Zone Conservation Comm'n*, 15 Cal. 3d 577, 542 P.2d 645, 125 Cal. Rptr. 485 (1975); *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, cert. denied, 449 U.S. 901 (1980); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), cert. denied, 436 U.S. 918 (1978), he would be a fool not to account for the risk and insist on a commensurate return. The ensuing cost, of course, is passed on to the consuming public. One result is that the purchase of a family home is rapidly slipping beyond the grasp of even the middle class. See REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 177-83 (J. Foote ed. 1982); Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 3 (1982); Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 61 (1980); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 462 (1981); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. 435 (1983). One study indicates that in the San Francisco Bay area, 18-20% of the cost of housing is attributable to land use controls, such as growth limitations and moratoria. L. Katz & K. Rosen, *The Effects of Land Use Controls on Housing Prices* 47 (Sept. 1980) (unpublished paper) (working Paper 80-13, Center for Real Estate and Urban Economics).

52. For a discussion of the antics of this agency and the tenderness with which it has been treated by the courts, see Berger, *You Can't Win Them All—Or Can You?*, 54 CAL. ST. B.J. 16 (1979). See also R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 235-54 (1985).

53. This agency has been called by one court a "centaur of legislation." *Jacobson v. Tahoe Reg'l Plan. Agency*, 566 F.2d 1353, 1359 n.8 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom. Lake Country Estates v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391 (1979). See generally

and federal agencies.⁵⁴ Along with these regulatory super-agencies, the land use regulatory process has also been honeycombed from beneath, as it were, by a multitude of mini-authorities, such as local wetlands and historical conservation districts.⁵⁵ Mixed together in a regulatory goulash, the output of these diverse agencies, pursuing their fragmented and often parochial interests,⁵⁶ is enough to bring many developers to their knees.⁵⁷

Thus, the dated idea peddled in *The Manifesto* that the land use control system generally consists of an individual developer dealing with a city council and having his way with the council because of the envisioned tax benefits to be provided by the proposed project is often false. As a prevailing picture, it is an image generated in the era of the whale-bone corset and the hand cranked automobile. Today, it is just as outdated in many parts of the country.

The upshot of all this is that the stakes are high, and the land devel-

California *ex rel.* Van De Kamp v. Tahoe Reg'l Plan. Agency, 766 F.2d 1308 (9th Cir. 1985); League to Save Lake Tahoe v. Tahoe Reg'l Plan. Agency, 507 F.2d 517 (9th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency, 611 F. Supp. 110 (D. Nev. 1985).

54. See generally Hagman & Berger, *Federal Impact on Land Use Planning*, in 8 CALIFORNIA REAL ESTATE LAW & PRACTICE § 251 (1985); Hagman & Berger, *State and Regional Planning*, in 8 CALIFORNIA REAL ESTATE LAW & PRACTICE § 252 (1985).

55. Professor Mandelker has referred to such districts as a "horde" and noted that a metropolitan area with a population of more than one million people can have 400 or so special purpose government agencies. D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 19 (1966).

56. Two noted commentators termed the result "a synergistic nightmare, a paralyzing mishmash" and a "bubbling cacophony of multitudinous edicts." Hagman & Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, in 40 THE REAL ESTATE APPRAISER 5, at 7 (1974).

57. For example, such giants as Sohio, Dow Chemical Co. and Walt Disney were forced to abandon their plans for major projects in California, *not* because their projects were substantively adjudged to be illegal, environmentally "bad," or violative of sound planning precepts, but simply because not even these enterprises—for all their Croesus-like resources—could bear the economic burdens of interminable regulatory maneuverings which, after years of effort and the expenditure of millions of dollars, produced neither approval nor disapproval. Indeed, all of their past efforts only produced the prospect of further consumption of time and money in pursuit of increased demands from hydra-headed regulatory agencies, and beyond that, litigation.

Dow Chemical's aborted half-billion dollar project in rural Solano County is a paradigm. After two years of effort, only 4 of 65 permit applications had even been acted on. When even corporate giants cannot afford to spend decades processing permit applications, what hope can an ordinary property owner have? As a former city planner (now a planning professor) put it: "Most people find it difficult or impossible to devote a year or more to filling out forms, submitting plans, attending meetings and public hearings, negotiating approvals, and finally living with the conditions and improvements imposed." Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 3 (1982).

opment business is a notoriously risky one. It should hardly be surprising that the existing situation provides enormous incentives for land developers to act in a self-serving manner. As Professor Hagman summarized it:

We are told that society must come to view land as a resource rather than as a commodity. . . . But when land is treated as a commodity, the image we are intended to have is that of the developer buying low, corrupting local government officials, building quickly, cheaply and badly, moving on, and leaving the community with a soon-to-develop slum. Meanwhile, he has made a large profit. However, this rapacious developer may defend his activities by pointing out that while the profit was great, the risk was also high. He can demonstrate that the development industry is a high-risk industry—many large and small developers go bankrupt yearly. Not infrequently today that is so because of what David Craig calls the iron whim of the public, namely, governments change their mind. Therefore, once the developer is in he strives to complete—rapaciously if necessary—and get out.

The point is, why should the development industry be such a high-risk industry? If land is a resource of fundamental importance, why do we not lower the risk as we do in the case of provision of electricity, or gas, or other public utility operations—or for that matter, lower the risk as we do in the case of banking or other quasi-public utilities where bankruptcies are so rare as to make national news when one occurs. Why should we allow a local community to throw a moratorium on a developer that causes bankruptcy or wastes resources simply because a moratorium may be “constitutional”? It may be constitutional; it may not be right. It may not lead that developer to socially conscious development the next time he tries to develop in some other community, that is, if he is still in business.

One concerned about rapacious development might pause to consider whether such development is partially only a self-help wipeout-avoidance technique induced by the developer's need to minimize arbitrary and capricious governmental decision-making. An anti-wipeout system is a risk-removal device. To the extent risks are removed, the rapacious developer no longer deserves [or requires] so high a windfall. He need no longer be as rapacious about land development. He can “afford” to treat land as a resource, and thus it is preserved as a

resource.⁵⁸

Thus, a property owner seeking to develop his land becomes an involuntary participant in a monumental crap game, with no one quite sure about the limits of the various entities' regulatory powers or the economic consequences of overstepping those limits.

When dealing with these entities—or, indeed, even dealing with only one of them, as *The Manifesto* presumes—one must acknowledge that local land regulating entities are political creatures rather than disinterested guardians of good planning. More than that, they are becoming more sophisticated as they receive advice from those such as the Gang of Five.⁵⁹

There may have been a day when some entities responded to the political clout of the business community by approving virtually anything that developers wanted, irrespective of the community's feelings or good planning.⁶⁰ Today, however, the folks in city hall have discovered that there is a mother lode of votes to be mined among the articulate members of the middle and upper classes who are increasingly expressing concern over what they perceive as environmental degradation. And so, local regulators are turning on property owners and developers in the name of environmentalism.⁶¹ The irresistible political impulse, then, is to

58. Hagman, *Windfalls for Wipeouts*, in *THE GOOD EARTH OF AMERICA: PLANNING OUR LAND USE* 118-19 (1974).

59. Rarely nowadays does one encounter regulatory entities which place bluntly unconstitutional motivations "on the record" for all to see, as they did in *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958). As a recent, and exhaustive, study concludes:

In summary on this point, "no growth" or "slow growth" strategies aimed at preserving the status quo are impermissible and widespread but difficult to unmask. Municipal planners and lawyers have become adept at couching the community's real objectives in more appropriate language—in a consideration of factors to which courts historically have accorded municipalities wide discretion presupposing good faith and adherence to broad constitutional norms and limitations on the exercise of police power. But municipalities pursuing their hidden agendas are not operating within these principles. There is no good faith, no forbearance out of respect for the constitution or a larger sense of the term "general welfare." There is only parochialism—in appropriate legal language, an abdication of larger responsibilities, and a misuse of police power.

Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 *ME. L. REV.* 261, 288 (1984).

60. *The Manifesto* speaks as though this is still the operative fact, *The Manifesto*, *supra* note 1, at 203-04, even though (at least some of) its authors know otherwise. See, e.g., R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985); C. SIEMON, W. LARSEN & D. PORTER, *VESTED RIGHTS* (1982).

61. Opponents of development often wrap their opposition in the robes of environmental protection, even though their actual motives are sometimes less lofty. As Professor Frieden put it:

By far the most frequent objections that growth opponents raise have to do with

make highly visible and politically popular regulatory decisions. After all, when an entity tells an individual property owner that he must leave his land vacant for public recreational use (or view, or buffer), or that he may only develop it if he provides some public service or dedicates part of the property to public use, it does not take a computer to calculate which side the greater number of votes is on.⁶²

Beyond that, it is past dispute that there are regulatory entities at all levels and in all states which simply refuse to recognize the constitutional rights of property owners.⁶³ Even the Gang of Five acknowledges this. As *The Manifesto* points out:

Brennan's assumption that local government is often arbitrary in dealing with the developers is by no means groundless. No one 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.⁶⁴

environmental impacts. These range from harm to wildlife to destruction of natural resources to increases in air pollution. Yet to label all protest as environmentalism would be a mistake. Many growth opponents use environmental arguments to mask other motives, such as fears of property tax increases or anxieties about keeping their community exclusive. Environmental rhetoric has become a valued currency for public debate, with much greater voter appeal than arguments that appear more narrowly self-interested. As a result people who are not environmentalists in any sense often borrow it for their own purposes.

B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 8 (1979). See also W. TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM* (1982); Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 41 (1985); Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 285 (1984); Hagman, *An Environmental Masquerade*, L.A. Times, June 14, 1981, § 8, at 25; Tucker, *Environmentalism and the Leisure Class*, HARPER'S, Dec. 1977, at 49.

62. In Mr. Babcock's words: "It is a rare municipal legislature that will reject what it believes to be the wishes of the neighbors." R. BABCOCK, *THE ZONING GAME* 141 (1966). See also Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 3 (1982); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 463 (1982).

63. It may have been an aging French monarch who popularized the expression "l'état, c'est moi," but he has his modern counterparts. As a former city planner put it:

City planners also act irresponsibly, if not unethically, when they recommend legislation or base city planning decisions on ordinances which they favor, but which they know will likely be overturned if appealed to the courts. It is not uncommon for city and county planners, with characteristic certainty that their ends justify the means, to take advantage of the fact that it is almost always too time-consuming and expensive for private land developers to challenge laws and administrative decisions in court, even if they are of dubious legality.

Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 3 (1982).

64. *The Manifesto*, *supra* note 1, at 201-02. If there are that many "horror stor[ies]" extant, then the situation obviously differs from the simplistic pattern presented so one-sidedly in *The Manifesto*.

And speaking of horror stories, Messrs. Babcock and Siemon describe a beaut in their recent book. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985). It seems there was a developer who set out to construct an environmentally sensitive and architectur-

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. 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 relish *prolonged administrative turmoil* before reaching a decision from which judicial relief may be sought.⁶⁵

Thus, the land use regulatory system is not the simple one described by *The Manifesto*, in which individual local agencies, "developers," and neighbors clash over what to do with land owned by the "developers."

Rather, as *The Manifesto's* authors well know,⁶⁶ it is a system in which a person who wants to use his land may be confronted with a bewildering array of regulations by a variety of agencies (each with its own goals and constituency), rules that change in mid-process and agencies that attempt to compensate for depleted municipal budgets by at-

ally superior development of 5000 homes on the northern California coast. He studied wind currents, migration of sea creatures, wildflowers, trees, geology, etc. He employed planners and architects who prepared stunning designs. He established strict covenants and design controls to make sure his plan endured. As the first homes were built, they began a consistent pattern of winning awards from architects, as did the overall layout from planners. *Id.* at 237. Then came the California Coastal Zone Conservation Commission, a regulatory agency newly created by initiative legislation. The Commission needed to flex some muscle to show "developers" who was in charge. The head of the Commission thereupon set out to bust this environmentally sensitive and architecturally superlative project on the theory that, "[if] he could lick Sea Ranch, he could beat any proposal." *Id.* at 242. And what did the California courts do about it? Absolutely nothing. They upheld the Commission.

65. *The Manifesto*, *supra* note 1, 242-43 (emphasis added). See also R. BABCOCK, *THE ZONING GAME* 52-53 (1966). On this point, there is agreement with the Gang of Five. For further discussion, see Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 51-52 (1980) and authorities cited therein. However, with *that* as the factual background, there is plainly a need for prompt, effective, and meaningful relief. *The Manifesto* offers none.

Beyond that, *The Manifesto* engages in blatant game playing. Its portrayal of the application of land use rules as being premised on a situation "absent extraordinary delay," *id.* at 215, 217, rings hollow in light of this concession that delay is "pervasive."

66. See R. BABCOCK, *THE ZONING GAME* (1966); R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985); C. SIEMON, W. LARSEN & D. PORTER, *VESTED RIGHTS* (1982).

taching "conditions" to development permission that require private citizens to shoulder public burdens.

It is against this background that the remedy issue needs to be examined.

In that light, it may now be best to address the reasons why property owners today seek relief in the form of damages when, in earlier times, they did not. In *none* of the classic Supreme Court cases discussed in the next section of this Article did the sometimes gravely damaged landowners seek damages. Rather, being practical people, they sought to impose no burdens on the public purse, and asked only to be left alone to use their property free of what they conceived to be excessive regulation. Why then has this attitude changed? Surely, no epidemic of avarice has suddenly erupted among members of America's land owning populace—at least no more than there always was. What has happened is that mushrooming, onerous regulations, combined with growing judicial deference to the regulators, have at long last begun to produce situations where remedies without a monetary component are increasingly useless.⁶⁷

But what was true throughout America's earlier history is still true today: Given any sort of reasonable choice, landowners would continue to opt in favor of using, enjoying and improving their land. If nothing else, those are far more satisfying and profitable endeavors than costly and uncertain litigation that, at best, leads to receipt of the often harshly restricted "fair market value" of their land, which would be the measure of their recovery in inverse condemnation cases and leaves them uncompensated for a host of "consequential" losses, to say nothing of their lost profits. In short, when landowners seek inverse condemnation damages, it is because they have been driven to this measure of last resort, *not* because they like the idea.

III. JUST COMPENSATION AS THE PRIMARY REMEDY IN TAKING CASES

Conspicuous in its absence from *The Manifesto* is *any mention* of a consistent line of United States Supreme Court decisions during the last half-century in which the Court concluded that the primary remedy in "taking cases" (both physical and regulatory) is just compensation. The sophistry and intellectual bankruptcy of such argument by evasion should be apparent.⁶⁸

67. See *infra* notes 215-41 and accompanying text.

68. The Gang of Five *cannot* be unaware of these cases. At a minimum, they say they

Moreover, the need for compensation as an available remedy comports with reality, something of which the Gang of Five prides itself in having a grasp.⁶⁹

Just as the Supreme Court has recognized the need for flexibility in making determinations of whether takings have occurred, so too there is a need for flexibility in providing remedies. Sometimes, invalidation of the taking may be sufficient; at other times, however, just compensation may be the only remedy that will make the owner whole. Often a combination of the two will do the job best.⁷⁰ Indeed, compensation may be desirable from the government's point of view where major policies are the goal of the challenged regulations.⁷¹

Thus, the absolutist dogma embraced and huckstered by the Gang of Five, forbidding payment of just compensation in all cases of regulatory takings, irrespective of circumstances or of the gravity of the economic impact on the aggrieved owner, warrants rejection. This conclusion is both pragmatic and finds support in the Supreme Court's

have read Professor Kanner's article which discusses most of them extensively. Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, in 1980 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 177, 197-206, cited in *The Manifesto*, *supra* note 1, at 209 n.53. Professor Mandelker's earlier effort, Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981), is afflicted by this same vice: He cites Professor Kanner's article, but ignores—one can only presume knowingly, given his wealth of experience in this field—all of that same United States Supreme Court case law while purporting to discourse on the law of taking remedies. He also fails to take into account, in his analysis of remedies, the definitive holding in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), the leading United States Supreme Court decision on the issue of specific versus monetary remedies against the government. Astonishingly, *The Manifesto* offers only a partial citation to Professor Kanner's article (mentioning only the author, title and year, but not the publication) leaving the reader at a loss as to how to locate it and see for himself what Professor Kanner had to say. How the Gang of Five got the editors of the *Vermont Law Review* to go along with that ploy is a mystery.

69. Cf. *The Manifesto*, *supra* note 1, at 197, 204.

70. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657-60 (1981) (Brennan, J., dissenting); *Gordon v. City of Warren*, 579 F.2d 386 (5th Cir. 1978); *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709 (D.N.J. 1976); *Keystone Assocs. v. State*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (1972), *aff'd*, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

71. Historically, beginning at least with *Hurley v. Kincaid*, 285 U.S. 95 (1932), in every case involving the question of remedies for uncompensated takings to which the United States was a party, the government argued that just compensation ought to be the remedy, so as to avoid judicial interference with important government programs and policies. The government has again resumed urging this position (after increasingly equivocal departures from it in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) and *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985)), in its *amicus curiae* brief in *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015, now pending before the United States Supreme Court.

unbroken chain of decisions dealing with remedies for takings.⁷²

It is difficult to see how the Court could have been clearer when it unequivocally held in *Ruckelshaus v. Monsanto Co.*:⁷³ "Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."⁷⁴

It is equally well-settled that only in those rare cases where a government official attempts to act, but the act is wholly extralegal (i.e., the claimed power to act does not stem either directly from the Constitution or from legislation), that injunctive relief becomes available to restrain a *prospective* taking.⁷⁵ Of course, where a taking (i.e., deprivation of the owner's property interest, not necessarily accretion of any formal interest to the taker)⁷⁶ has actually occurred, it has been held from the Nation's outset that government, as a creature of the Constitution, cannot even form the intent (much less act on it) to deprive an individual of property without just compensation.⁷⁷

To the above, one must add the recent teaching of *Ruckelshaus* and

72. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455 (1985); *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688-89 (1981); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-53 (1950); *Hurley v. Kincaid*, 285 U.S. 95 (1932). See *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187, 2194 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985).

73. 104 S. Ct. 2862 (1984).

74. *Id.* at 2880. A seemingly inconsistent assertion appears in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 n.12 (1958). However, the only authority cited there in support is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which dealt with a *prospective*, wholly extralegal seizure by an official, rather than an already accomplished taking by exercise of governmental powers. To the extent the terse footnote assertion in *Central Eureka* is inconsistent with the fully considered holding in *Ruckelshaus*, the *Central Eureka* footnote must be deemed overruled *sub silentio* by the more recent holding. However, the two expressions need not necessarily be viewed as inconsistent when the distinction between the respective types of takings (prospective and accomplished) is kept in mind. Moreover, the *Central Eureka* footnote addresses "arbitrary governmental action" rather than a taking; the two, of course, may, but need not, be the same.

75. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-91 (1949).

76. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

77. *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11, 18 (1815); *United States v. Certain Property Located in the Borough of Manhattan*, 388 F.2d 596, 598 (2d Cir. 1967). See *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). As Justice Stewart aptly capsulized it, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

*Hawaii Housing Authority v. Midkiff*⁷⁸ that, in inverse as well as direct taking cases, the police power and taking power are conterminous.⁷⁹ That perforce means that, when a governmental entity regulates to promote police power objectives of public health, safety, welfare or morals, it thereby establishes a legitimate objective that is entitled to the same degree of judicial deference as the avowed pursuit of the eminent domain power for a public purpose. As the judicial role in "second-guessing the legislature" is held by these authorities to be extremely narrow, it follows that a regulatory taking in pursuit of police power objectives is in every constitutional sense a taking for public use, for which compensation is mandated by the fifth amendment and binding on the states through the due process clause of the fourteenth amendment.⁸⁰ Put another way, when regulators take the position that their regulation promotes the public good and therefore is entitled to judicial deference for testing its validity, they cannot simultaneously assert, when their regulation effects a taking, that the regulation suddenly becomes unimportant. They cannot then ask the courts to disregard the teachings of *Midkiff* and *Ruckelshaus*, to eschew deference to the legislature, and routinely to invalidate the regulation as a first, not last, resort, merely to spare the regulators the need of obeying the "just compensation" command of the fifth amendment. Such an argument is self-contradictory; it just will not wash. "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used."⁸¹

Both in terms of holding and rationale, *Hurley v. Kincaid*⁸² is well nigh dispositive. The Court's reasoning in rejecting the owner's attempt to secure a nonmonetary remedy is clear. Of particular interest is the Court's premise that the statute there in issue was basically valid.⁸³ Once validity is established, the question becomes whether the owner's constitutional rights are protected when just compensation is provided, or whether the whole law must fall because of lack of compensation. Justice Brandeis' answer to that question in *Hurley* is clear: The owner's grievance in such cases is *not* that the government has taken his land, but

78. 104 S. Ct. 2321 (1984).

79. *Ruckelshaus*, 104 S. Ct. at 2862; *Midkiff*, 104 S. Ct. at 2328-29. See *infra* notes 144-91 and accompanying text.

80. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980).

81. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

82. 285 U.S. 95 (1932).

83. *Id.* at 103. While in *Hurley* this was conceded by respondent Kincaid, it is basic that validity of a law cannot be made dependent on a citizen's concession.

rather that it was taken without compensation.⁸⁴ In other words, it is the lack of compensation that offends the Constitution, not the taking, for the latter is an inherent power of government⁸⁵ that exists independent of the Constitution which only imposes conditions on its exercise.⁸⁶ It follows, therefore, that, if compensation is provided by the courts, whether at the government's or the owner's behest, the flaw in the governmental action is cured and there is no illegality.⁸⁷ For it is the courts—not the legislature—that have primacy in fixing and awarding “just compensation.”⁸⁸ Nor did *Hurley* stop there; it went on to note:

Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary to prevent an irreparable injury.⁸⁹

That observation, of course, puts its finger on the heart of the pertinent policy considerations: It would be improvident to require the courts, *as a constitutional imperative*, to strike down legitimate governmental regulatory schemes merely because they impact on one affected property owner, depriving him of a “stick” in his property rights “bundle.” *The Regional Rail Reorganization Act Cases*⁹⁰ provide an excellent example of the hazards inherent in such a theory. Had it been applied there (as indeed it was by the trial court, only to be reversed by the Supreme Court),⁹¹ the upshot would have been destruction by the stroke of a judicial pen of a comprehensive, urgently needed congressional plan. It would have left the most densely populated regions of the country without a rail transportation system, with eight major railroads in fragmented, individual bankruptcy proceedings, and without a coherent system whereby to consolidate and make optimally useful all of their combined resources still needed to maintain an indispensable national rail transportation system. The same is true of the Iranian seizure case,

84. *Id.*

85. *Kohl v. United States*, 91 U.S. (1 Otto) 367 (1876).

86. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

87. *See Hurley*, 285 U.S. at 104; *Berman v. Parker*, 348 U.S. 26, 33, 36 (1959). The court recently reiterated this conclusion in *United States v. Riverside Bayview Homes*, 106 S. Ct. 455 (1985): “This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.” *Id.* at 459-60 (citation omitted).

88. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

89. 285 U.S. at 104 n.3.

90. 419 U.S. 102 (1974).

91. *Id.* at 107-08.

Dames & Moore v. Regan.⁹² Had the invalidation only, no-compensation approach been applied there, the result would have been drastic disruption of the executive power to conduct foreign relations, with severe consequences to the affected citizens. Instead, by opting for the availability of a compensation remedy, the Court preserved both the governmental policies and the rights of the adversely affected individuals. While individual land use cases do not generally present a potential for such far-reaching consequences, they still should not serve as vehicles for the formulation of a dogmatic constitutional imperative which in the future would compel judicial destruction of regulatory schemes that may be important to national survival.⁹³

As Chief Justice Marshall enduringly put it:

The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. *This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.* This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.⁹⁴

The *Manifesto* dogma that would have the courts invalidate legislative enactments on an ongoing basis, as the *primary* remedy, ignores the socio-political gravity of judicial intervention in the workings of a tripartite government. When the judiciary invalidates a legislative enactment, it is a measure of last—not first—resort. The judicial power to invalidate

92. 453 U.S. 654 (1981).

93. Surely, it takes no vivid imagination to visualize governmental responses to the difficult problems of security, energy, deficit control and inflation, for example, that may encroach on the constitutionally protected property rights of some individuals. Should that occur, which would be better public policy: To require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition, *see* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting), or to declare such programs completely invalid with possibly calamitous consequences? *See Hurley*, 285 U.S. at 104 n.3. As the Court of Claims astutely noted in *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), where the convergent pressures of desired governmental objectives and governmental unwillingness to pay for what it wants converge to catch the innocent landowner in the middle, the recourse of inverse condemnation "has saved the day in many another sticky situation." *Id.* at 587.

94. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis added and omitted).

is an historically rooted power of "strict necessity,"⁹⁵ and is to be invoked only when "unavoidable."⁹⁶

Thus, *The Manifesto's* view of what it terms "the separation of power problem"⁹⁷ is backwards. It urges that permitting the judiciary to enforce the Constitution's just compensation guarantee "strikes at the vitals of fundamental separation of powers theory."⁹⁸

Really? Have we come so far in seeking to protect government from the consequences of its own overreaching that quondam constitutional scholars can overlook *Marbury v. Madison*?⁹⁹ *Marbury* plainly teaches that a primary function of the judiciary in our governmental system is to ensure that the other branches do not overstep their constitutional bounds.¹⁰⁰ When they do, it is the judiciary's duty to enforce the Constitution's precepts, one of which is that property not be taken without compensation. But it is not the proper function of the judiciary to be telling legislatures, particularly *on an ongoing basis*, which laws *not* to enact. This is *a fortiori* so in the context of zoning which, though designated as a "legislative act" in most states, is in reality a process of limiting uses of a host of patches of land. How embroiling the judiciary in this process on a continuing basis would be protective of separation of powers is obscure.

The Manifesto engages in sophistry when it intones: "[I]f there is any power which is clearly not judicial, it is control over the budgeting of expenditures by government."¹⁰¹

Of course, the judiciary does not draft governmental budgets. But

95. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947); *Spector Motor Serv. Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

96. *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946). See *Rescue Army v. Municipal Court*, 331 U.S. 549, 571-72 (1947).

97. *The Manifesto*, *supra* note 1, at 233-34.

98. *Id.* at 233.

99. 5 U.S. (1 Cranch) 137, 177 (1803).

100. It is indeed a constitution we are expounding, a document to assure continuity as well as flexibility, boundaries of power as well as freedom of choice. Congress and the President must have enough authority under the Constitution to govern effectively, and they must be able to exercise their own political judgment in selecting among the alternative means available for dealing with the emergent problems of each new age. But it has never been supposed that elected officials had untrammelled discretion. The Constitution sets limits on their ambit of choice, and some of its limits can be enforced by the Courts. For until the people change it, the Constitution is a document intended to assure them that their representatives function within the borders of their offices, and do not roam at will among the pastures of power; that certain essential values in our public life be preserved, not ignored; and, in government's choice among the instruments of action, that those be selected which advance the cause of human freedom and those eschewed which threaten it.

Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 579 (1958).

101. *The Manifesto*, *supra* note 1, at 233.

the idea that its decisions *do* not (indeed *cannot*) have budgetary implications is almost too absurd to consider. Can it be that *any* time a court awards damages against a government agency in *any* kind of case, the Gang of Five would find that undue meddling in governmental affairs? Are we to take it that government agencies are immune from monetary damage awards because that would affect "budgeting of expenditures"?¹⁰²

In the eminent domain field, the courts have *never* felt constrained by what governmental budget makers thought a project could cost. Indeed, in this area the judiciary is preeminent, because it is interpreting the meaning of a constitutional term (i.e., just compensation). For example, in 1888, Congress directed the Secretary of War to acquire a lock and dam for no more than \$161,733.13.¹⁰³ That certainly sounds like the kind of budgetary decision the Gang of Five feels should be left to the nonjudicial departments of government, without judicial interference. The Supreme Court had a different view. It lost no time explaining what the separation of powers doctrine *really* means:

By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.¹⁰⁴

The judiciary cannot make decisions having budgetary impact? Nonsense. Just ask any prison warden who wound up in federal court after having been found running a prison under inhuman conditions. Better yet, take a look at how little deference *California* courts can show to legislative budgeting powers in cases in which property rights are not

102. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

103. Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 411. That budgetary item, we note, was precise to the penny.

104. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). *Accord* *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923); *United States v. Blankinship*, 543 F.2d 1272, 1276 (9th Cir. 1976); *Miller v. United States*, 620 F.2d 812, 837-38 (Ct. Cl. 1980).

involved.¹⁰⁵

The Manifesto's Orwellian interpretation of the separation of powers doctrine stands that doctrine on its head and is unworthy of consideration. Indeed, if the Gang of Five is serious about preserving the sanctity of legislative discretion and the traditional deference to it that the judiciary offers, then its members ought to be urging compensation as the preferred remedy. For the compensation remedy *does* defer to legislative discretion. It permits the legislature to choose the course it deems best. Justice Brennan's theory, so harshly attacked by the Gang of Five, gives the option to local legislatures whether to keep, modify or abandon the constitutionally overreaching regulation. It requires only *pro tanto* compensation when pursuit of that course impinges on private rights so harshly that the taking threshold is crossed. Invalidation, by contrast, takes a meat-ax to legislative programs, destroying them altogether, irrespective of the wishes of the legislature to retain them, irrespective of their efficacy and wisdom, and irrespective of a fragile political consensus that may have led to their enactment, and which may not be available after remand.

The doctrine advanced by the Gang of Five ignores the grave strain that judicial invalidation of legislation imposes on the social fabric. When the judiciary imposes constraints on what the legislature may or may not enact—not in the historical context of major, earthshaking policy decisions that have confronted the nation on occasion and thereby legitimately claimed the Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case-by-case adjudications of purely local, usually political decisions involving what, in policy terms, are but insignificant patches of land—it creates tensions we are better off without. *The Manifesto's* approach would make the judiciary an ongoing supervisor of the local legislative branch;¹⁰⁶ it would make the Supreme Court the Supreme Board of Zoning Appeals, and constitute a throwback to the substantive due process heyday.

The foregoing is no hyperbole. Only a few states provide so-called site specific nonmonetary relief, that is, judicial relief in the form of a decree that commands the regulating entity to allow a specified improvement on the specific site (sometimes called a "builder's remedy").¹⁰⁷ The

105. See, e.g., *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984); *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

106. Please recall that effective injunctive relief requires judicial oversight and ongoing enforcement.

107. See, e.g., *Sinclair Pipeline Co. v. Village of Richton Park*, 19 Ill. 2d 370, 378-79, 167

vast majority of jurisdictions (in those cases where nonmonetary relief is granted) merely remand the matter back to the regulatory entity for further action,¹⁰⁸ thus inviting ongoing judicial involvement. Aside from the delay-laden inefficiency of such a procedure, it also opens up vast opportunities for either regulatory foot-dragging or outright bad faith, as acutely noted by Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*.¹⁰⁹

In sum, sound, time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis. Legislatures know best what their constituencies need and what they can and cannot afford.¹¹⁰ There seems to be no sound reason why the courts should be called upon to assume a paternalistic role in this peculiarly legislative area of fiscal decision making, telling local legislatures on an ongoing basis what they may or may not enact,¹¹¹ and protecting local governments from the predictable economic consequences of their own decisions for which they ask—nay, demand—great judicial deference.

IV. *THE MANIFESTO'S* ERRONEOUS PREMISES AND OVERBLOWN ASSUMPTIONS

The Manifesto gets off on the wrong foot almost immediately. Some of its underlying premises and assumptions are so erroneous or overstated that erroneous conclusions follow as a matter of course. A major

N.E.2d 406, 411 (1960). That may be the reason why Illinois practitioners (the locus of practice for three of the Gang of Five) have emerged in the forefront of commentators critical both of the compensation remedy and of Justice Brennan's view in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

108. See Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas In San Diego*, 57 IND. L.J. 45, 51 (1982); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 732-34 (1982).

109. 450 U.S. 621, 655-56 n.22 (1981) (Brennan, J., dissenting). The problem is far more pervasive than one might surmise from the entirely accurate, if somewhat flippant, remarks of a California city attorney quoted there. See *infra* notes 223-29 and accompanying text.

110. As the Court observed in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), where a community has been so shortsighted as to fail to acquire enough for its needs, as determined by it, that is no reason for the courts to step in and supply the desired additional increment of social benefit *gratis*, anymore than they supply any other community resources. *Accord* *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962) (community that constructs bridge or airport without adequate approaches is not entitled to acquire them at no cost by a claim that it is only "regulating").

111. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704-05 (1949), for a forceful exposition of the underlying "strongest reasons of public policy."

offender is the imputation to Justice Brennan of a series of supposed positions which nowhere appear in his *San Diego Gas & Electric Co. v. City of San Diego* opinion, but which are nonetheless assailed as though they had been espoused by him.

—Item: *The Manifesto* targets Justice Holmes as the misunderstood villain in the piece: “The taking clause is not precatory[, according to Justice Brennan,] 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.*”¹¹²

There are two things to bear in mind here. First, the Supreme Court has *always* said that the taking clause is not “precatory.”¹¹³ It is an express command that private property not be taken for public use unless just compensation is paid. Far from being “precatory,” the taking clause has been held to be self-executing, that is, if a taking occurs without payment, the victim may file suit to recover payment.¹¹⁴

Second, it is not “because *Justice Holmes said so.*” It is because *the Court* said so. Justice Holmes merely delivered the opinion of the Court’s eight to one majority in the celebrated *Pennsylvania Coal* decision.¹¹⁵

—Item: *The Manifesto* unduly denigrates the burdens placed on police officers by numerous Constitutional decisions of the Court, and sets up another straw man: “[Justice Brennan says that if] ‘a policeman must know the Constitution, then why not a planner?’ This is an obvious reference to the *Miranda* warning that must be given by police officers on making an arrest.”¹¹⁶

What an astonishing display of intellectual parochialism by land use lawyers! Were it not for the prominence of the Gang of Five, one might be tempted to disregard such a suggestion as either grossly uninformed or a dubious attempt at humor.¹¹⁷ But to the extent such an amazing

112. *The Manifesto*, *supra* note 1, at 195 (emphasis added).

113. See, e.g., *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187, 2194 (1984); *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

114. See, e.g., *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 15 (1933); *Rose v. State*, 19 Cal. 2d 713, 720-21, 123 P.2d 505, 510-11 (1942) (citing numerous cases from other states); 26 AM. JUR. 2D *Eminent Domain* § 7, at 646 & n.13 (1966); D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 525 (1966). See also Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 495 (1981).

115. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). For further discussion of this undue emphasis on Justice Holmes personally, see *infra* notes 182-91 and accompanying text.

116. *The Manifesto*, *supra* note 1, at 196 (footnote omitted).

117. That it is probably the former seems substantiated later in *The Manifesto* where it is said that “[w]hat the police officer needs to know about the Constitution is condensed onto his

statement was meant seriously, suffice it to observe that, in addition to remembering to read his "*Miranda* card" to a suspect, a policeman must also know the constitutional implications of detention and arrest and legitimate articulable bases therefor, search and seizure with and without warrants (including the enormous complexities in its application to motor vehicles), the permissible extent of the use of force in making the arrest, and—after the "*Miranda* card" has been duly read—what constitutes a proper waiver of the right to remain silent and the right to counsel.¹¹⁸ These are all topics whose constitutional contours may be unclear and which regularly inspire dissent even among the ablest jurists.¹¹⁹

Beyond that, this glib dismissal of a vast body of constitutional law under cover of the ubiquitous "*Miranda* card" ignores reality. The policeman, reacting instantly to deadly peril, all alone in a dark alley, often with limited legal education and experience, still must know *and obey* the

'*Miranda* card' which will fit comfortably in the officer's pocket." *The Manifesto*, *supra* note 1, at 225.

118. One might want to compare the Gang of Five's understanding of what a policeman must know with a recent, *one thousand page long* publication of the Maine Attorney General's office entitled *Law Officer's Enforcement Manual*. A recent review of the manual queried its utility to

ordinary officers who are trying to find their way through the maze of appellate court decisions and listing of factors which might or might not, under varying circumstances, authorize or prohibit them from making what are necessarily split-second decisions on the highways and byways. How, precisely, is the average sea-and-shore fisheries warden to benefit from a four-page discussion of the *Carroll* doctrine (searches of vehicles) nuanced à la Professor Tribe, when he must make a quick search of Clarence Moody's pickup truck on the basis of rumors around the wharf that Clarence has been less than scrupulous lately in the matter of short lobsters? After reading about the *Carroll* doctrine, and being reminded that it requires probable cause, the warden could then refer back to the *Manual* to the discussion of *Spinelli v. U.S.* to enlighten him on the subject of informant's information and probable cause.

R. MORGAN, *DISABLING AMERICA* 131 (1984) (citations omitted).

Mr. Morgan, not unreasonably, concludes that by the time the warden wades through all that, Clarence Moody's short lobsters are likely on their way to a metamorphosis into lobster salad for the tourists. *Id.* at 132. What was that about putting all the pertinent constitutional knowledge on a shirt pocket size card?

119. While many lengthy, learned and dissent-ridden Supreme Court opinions could be cited here, we prefer to make the point by quoting from the concurring opinion of Presiding Justice Gardner in *People ex rel. Younger v. Superior Court*, 86 Cal. App. 3d 180, 150 Cal. Rptr. 156 (1978):

Sometime ago, I wrote an opinion (*People v. Huffman*, 71 Cal. App. 3d 63 [139 Cal. Rptr. 264]) in which the defendant had complained that his attorney had not made enough "motions." Just off the top of my head, I made up a list of all of the motions I could think of. That list came to 17 motions. I was a piker. I recently saw an ad for a lecture course entitled "Motions in Criminal Practice" which listed 36 such motions and I note that list omits 7 which appeared on my list.

Id. at 213, 150 Cal. Rptr. at 177 (Gardner, J., concurring). *See also In re Lower*, 100 Cal. App. 3d 144, 149 n.3, 161 Cal. Rptr. 24, 27 n.3 (1979) (forty or fifty pretrial motions are apparently possible).

Constitution—and be accountable for refusing to do so. No respectable reason appears why the municipal land use establishment, replete with planners, legal counsel and expert consultants, fully advised of its responsibilities and acting at leisure (often taking years to reach a decision) should claim for itself a lesser standard of constitutional responsibility.

—Item: *The Manifesto* again overstates Justice Brennan's position (to provide its authors another straw target), this time on the effects of policy on constitutional interpretation: "Consideration of the effects on public policy[, according to Justice Brennan,] are not appropriate in matters of constitutional interpretation."¹²⁰

In fact, what Justice Brennan said was that *express* constitutional provisions cannot be evaded by considerations of policy.¹²¹ What the notion underlying Justice Brennan's statement means to us, for example, is that, when the thirteenth amendment *expressly* forbids slavery, that means that slavery is outlawed—period. It is not to be imported into the American economic system by assertions of policy that might under some circumstances favor the use of involuntary labor in some critical, but hazardous and underpaid jobs. Similarly, when the Constitution *expressly* says that private property is not to be taken without just compensation, and a taking has already occurred, the need to pay just compensation commensurate with the nature and extent of the taking would seem to follow as a constitutional imperative. It is difficult to understand how the Gang of Five sees it differently. It may be the result of their conveniently dropping the word "express" in the formulation of this "assumption" which they ascribe to Justice Brennan.

—Item: *The Manifesto* overstates Justice Brennan's position in order to give itself a target to shoot at: "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.'"¹²²

That is an incomplete quote from Justice Brennan's opinion. Contrary to the impression given by *The Manifesto*, the thought neither began nor ended that way. What Justice Brennan really said was (emphasizing the part omitted by the Gang of Five):

But contrary to appellant's claim that San Diego must formally condemn its property and pay full fair market value, nothing in the Just Compensation Clause empowers a court to order a

120. *The Manifesto*, *supra* note 1, at 197.

121. *San Diego Gas*, 450 U.S. at 661 (Brennan, J., dissenting).

122. *The Manifesto*, *supra* note 1, at 195 (quoting *San Diego Gas*, 450 U.S. at 658) (Brennan, J., dissenting)).

government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible and the government wants to halt the "taking."¹²³

Thus, contrary to what *The Manifesto* implies, Justice Brennan's position gives aid to the regulators by dismissing the extreme position of some property owners' advocates that a regulatory taking must *always* be treated as permanent and *automatically* results in the regulator acquiring title to the property upon payment of the full value of the fee simple interest. At the same time Justice Brennan's formulation recognizes, as the Gang of Five refuses to, that the Supreme Court has consistently said that compensation is the preferred remedy when a taking has already occurred.¹²⁴

—Item: *The Manifesto* manufactures out of whole cloth the idea that Justice Brennan has a formula for determining when a taking occurs: "[Justice Brennan believes that t]here is a readily ascertainable way—a clearly-defined formula—to tell when a land-use restriction is a 'taking.'"¹²⁵

What can one say, except that this attribution comes from *A Midsummer Night's Dream*? It certainly didn't come from Justice Brennan.¹²⁶

In fact, this assumption is demonstrably false.

First, Justice Brennan was the author of the Court's opinion in *Penn Central Transportation Co. v. City of New York*.¹²⁷ There, he acknowledged that "this 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."¹²⁸ Nowhere in *San Diego Gas* did he depart from that view. On the contrary, he collected (and quoted from) earlier Supreme Court

123. *San Diego Gas*, 450 U.S. at 658 (Brennan, J., dissenting) (emphasis added).

124. See cases cited *supra* note 72. The Gang of Five's ploy is later repeated when *The Manifesto* queries whether only *temporary* takings require compensation because "Justice Brennan disclaims any authority in the courts to require local governments to acquire title to land or an interest in it." *The Manifesto*, *supra* note 1, at 222. Plainly, Justice Brennan "disclaims" no such thing. Nor do the courts. That is what inverse condemnation law is all about. See, e.g., Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 495-99 (1981).

125. *The Manifesto*, *supra* note 1, at 197.

126. As with the entire laundry list of supposed assumptions of Justice Brennan created by the Gang of Five, this one is devoid of any citation to any writing of Justice Brennan from which it could be gleaned. See *The Manifesto*, *supra* note 1, at 197.

127. 438 U.S. 104 (1978).

128. *Id.* at 124.

opinions which denied the existence of any formula,¹²⁹ as well as Professor Haar's comparison of the search for a taking formula to "the physicist's hunt for the quark."¹³⁰

But beyond that, we demur. What if the formulation of dependable constitutional contours is difficult? Whether one likes it or not, that is "par for the course" in many areas of constitutional law. Do we have a "formula" for obscenity? For due process? For freedom of religion? For search and seizure? While greater clarity in the law is a prospect to be wished for as well as sought, the Gang of Five nowhere indicates why, in this area of the law alone, a search for a "pat" constitutional "formula" is mandatory, or why its absence is any more deplorable than in other areas of constitutional interpretation.¹³¹

—Item: *The Manifesto* chides the High Court for its general ignorance of zoning law, finding in that supposed ignorance the reason the court is moving in a direction the Gang of Five deplors: "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

129. *San Diego Gas*, 450 U.S. at 649 n.15 (citing *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Penn Cent.*, 438 U.S. at 124; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

130. *San Diego Gas*, 450 U.S. at 649 n.15 (quoting C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976), and citing other similar scholarly assessments).

131. The next assumption which *The Manifesto* attributes to Justice Brennan, that the non-existent formula is nationally recognized and can be nationally applied, *The Manifesto*, *supra* note 1, at 197, fares no better than its erroneous assumption that Justice Brennan believes there is such a standard. The fact is that there are now no standards. There is chaos. See cases collected in Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 44-46 (1985); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 INST. ON PLAN., ZONING & EMINENT DOMAIN 177, 206-09. Justice Brennan plainly recognized that. His *San Diego Gas* opinion is an effort to provide some coherent national guidance. For, while it may not be possible to establish a template which will easily reveal when regulatory takings occur, it is possible to establish some general, nationally applicable standards about how to determine whether a taking has occurred, as well as some definitive word on the appropriate scope of relief in land use cases. If done as a matter of United States constitutional law, some measure of order can be achieved. That would solve the Gang of Five's problems related to the differences in zoning law throughout the country. See *The Manifesto*, *supra* note 1, at 226, 228, 232. Clarification of elementary and underlying standards can smooth out some of the rough places. It is truly outrageous that the federal constitutional rights of citizens depend on whether they live in California or New Hampshire. Compare *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) with *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981). As a matter of constitutional policy, that is no more acceptable with respect to the rights of property owners in the 1980's than it was with respect to the rights of blacks living in, say, Rhode Island as opposed to Mississippi in the 1950's.

As for the Supreme Court's ability to bring about uniform treatment of constitutional provisions, see *The Manifesto*, *supra* note 1, at 197, we thought this point had been settled in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), or at least at Appomattox.

in the past six decades."¹³²

Perhaps. It was certainly strange to see the Court assert in *Williamson County Regional Planning Commission v. Hamilton Bank*¹³³ that an entire large subdivision could be "redone" by a variance (which is intrinsically a tool for fine tuning minor deviations from existing single lot zoning). On the other hand, it is equally possible that the members of the present Court *are* familiar with what has been happening to the *constitutional* aspects of zoning and land use law, and feel the time is ripe to step in and curb some abuses.

The plaint of the Gang of Five may derive from ignorance of the Supreme Court's *modus operandi*. Much as all who practice before the Supreme Court want the Court to render plenary decisions in their cases, the Court has historically operated in a different fashion. In order to ensure that it does not decide issues precipitously, the Court prefers to have issues thoroughly discussed by lower courts (state and federal) in the hope that either a consensus will emerge or, at least, all views will be aired so the wisdom of others may be of assistance.¹³⁴ Once it becomes apparent that this goal has been achieved, and repeated appeals and petitions for certiorari indicate either that consensus will not result or that it is resulting in an unconstitutional rule, the Supreme Court steps in. Thus, the Supreme Court's recent interest in land use cases may suggest increasing understanding rather than ignorance.

While we all may lament, from time to time, the apparent injustice in, or uneven application of, this practice,¹³⁵ that is the way the Court functions. Moreover, since—so far—such judicial caution has rebounded to the benefit of land use regulators sued for damages, the Gang of Five gives a new dimension to the word "chutzpah"¹³⁶ in complaining

132. *The Manifesto*, *supra* note 1, at 197.

133. 105 S. Ct. 3108 (1985).

134. See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 269 n.32 (5th ed. 1978); Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983).

135. See, e.g., Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 46-47 n.39 (1985); Kanner, *Comment*, 33 LAND USE L. & ZONING DIG., May 1981, at 8.

136. See Uelmen, *Plain Yiddish for Lawyers*, 71 A.B.A. J., June 1985, at 78. As Professor Delogu aptly expressed it:

When courts are reluctant to reach the merits of alleged exclusion, exclusion is thereby encouraged. If an act is challenged unsuccessfully due to the absence of standing, the general public, and often municipal officials, interpret the outcome as an approval of the act itself. The subtleties of judicial restraint, of merits not having been reached, of questions remaining open, are not grasped. More importantly, if the questioned action really is impermissible, the adverse consequences of exclusion are perpetuated still longer.

Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 70 (1980).

about it.

—Item: *The Manifesto* suggests that Justice Brennan views the function of the Court to be deciding on whose side of the scale to put the judicial thumb: “As the land-use-control system now works[, according to Justice Brennan], landowners and developers are most in need of help from the protective arm of the courts.”¹³⁷

Nowhere does this assumption appear in Justice Brennan’s opinion. Rather, Justice Brennan took a hard look at the guarantees in the Bill of Rights and acknowledged—as some “liberals” have had a difficult time doing¹³⁸—that property rights are protected by the Constitution in the same breath with rights of life and liberty, and all deserve judicial protection.¹³⁹

Thus, it was not because “developers”¹⁴⁰ were *most* in need of help, but because their rights were *equally* entitled to constitutional protection that inspired Justice Brennan’s opinion. It is simply outlandish to suggest that an American citizen who has been demonstrably deprived of his constitutionally protected rights must first somehow demonstrate that he needs relief “the most” before availing himself of the judicial process to vindicate those rights in an effective fashion.

—Item: *The Manifesto* argues by ignoring the plain meaning of words: “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.”¹⁴¹

First, this argument misreads Justice Brennan’s opinion. The opinion’s whole thrust was that, when a taking has occurred (even a temporary one), the Constitution demands compensation. In his words: “The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a ‘taking,’ and recover just compensation if it does so.”¹⁴²

Second, Professor Mandelker’s article hardly “demolished” the

137. *The Manifesto*, *supra* note 1, at 197.

138. Why some “liberals” believe they must be as pro-government in civil cases as they are anti-government in criminal cases remains a mystery.

139. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). See Berger, *The State’s Police Power Is Not (Yet) the Power of a Police State*, 35 LAND USE L. & ZONING DIG., May 1983, at 6 n.20.

140. See *supra* note 13.

141. *The Manifesto*, *supra* note 1, at 197 n.22 (citing Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981)).

142. *San Diego Gas*, 450 U.S. at 660 (Brennan, J., dissenting) (emphasis added).

compensation argument. Like *The Manifesto*, Professor Mandelker's article "argued" the issue by ignoring the Supreme Court's consistent holdings which are overwhelmingly contrary to his desired result.¹⁴³

These are not insignificant gaffes. They are faulty foundational assumptions. The multifarious assumptional errors of the Gang of Five taint their entire analysis.

V. THE POLICE POWER AND THE EMINENT DOMAIN POWER ARE COTERMINOUS

The fulcrum on which *The Manifesto* rests is the assertion that the police power and the eminent domain power can be neatly segregated into separate, hermetically sealed compartments and analyzed without reference to each other.¹⁴⁴ This foundational assumption can be made only by ignoring the modern essence of property rights and the last three decades of Supreme Court decisional law. It appears to be made on the basis of Professor Freund's nineteenth century concept that the police power was designed to regulate property which itself is the cause of some public detriment, as opposed to bettering the public condition, which could occur *only* through the use of eminent domain.¹⁴⁵

That view suffered a serious blow in *Euclid v. Ambler Realty Co.*,¹⁴⁶ where the Supreme Court concluded that prohibiting by zoning (i.e., the police power) a particular land use need not be a traditional nuisance, but merely a proper use "in the wrong place."¹⁴⁷ Of course, neither the *Euclid* Court nor Professor Freund contemplated the sort of massive, pervasive "regulations" of today that are candidly used *not* to prevent harm, but to better the public condition—the very concept that Professor Freund viewed as implicating a taking. Thus, before proceeding further with this discussion, it may be prudent to step back for a moment and recall the meaning of the terms "property" and "taken" as they have been construed in inverse condemnation law.

There is nothing mystical in the concept of "inverse condemnation," although most lawyers and judges encounter it infrequently.¹⁴⁸ It is sim-

143. See *supra* notes 68-111 and accompanying text, particularly note 68.

144. *The Manifesto*, *supra* note 1, at 209, 211.

145. See E. FREUND, *THE POLICE POWER* 546-47 (1904).

146. 272 U.S. 365 (1926).

147. *Id.* at 388.

148. This general lack of contact may explain how otherwise knowledgeable land use lawyers and professors can occasionally indulge in analysis which is so wide of the mark. For illustration, one need hardly look further than *The Manifesto*, in which the Gang of Five rails for more than fifty pages about how its members do not like Justice Brennan's analysis in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 621 (Brennan, J., dissenting), and

ply a shorthand description used by courts to describe an action brought by a property owner whose property has not been formally appropriated by an eminent domain action, but has been damaged or de facto taken by acts of a public entity.¹⁴⁹

Property is not a thing. Property is a right—or, more accurately, a group of rights. Law professors have long introduced first year law students to the concept by likening property to a bundle of sticks. Each stick represents a property right (e.g., use, possession, right to exclude others). The Supreme Court has recently seen the value in this form of analysis.¹⁵⁰

The bundle of sticks analysis represents a pragmatic approach. As the Supreme Court explained:

The critical terms are “property,” “taken” and “just compensation.” It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, it deals with what lawyers term the individual’s “interest” in the thing in question. That interest may comprise the group of rights for which the shorthand term is “a fee simple” or it may be the interest known as an “estate or tenancy for years,” as in

how they think his proposed remedy, which includes the possibility of compensation, is unnecessary, wrong, and contrary to other decisions of the Supreme Court. It was not written by untutored novices; yet *The Manifesto* ignores all of the Supreme Court’s decisions regarding taking remedies, as well as the leading decision on remedies against the government generally. See *supra* notes 68-111 and accompanying text.

149. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971), quoted with approval in *United States v. Clark*, 445 U.S. 253, 257 (1980). See Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 492 n.4 (1981).

150. See *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2878 (1984); *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 435 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). See also Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 48-49 (1985). Cf. Kanner, *When is “Property” not “Property Itself”?: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 64-68 (1969).

the present instance. *The constitutional provision is addressed to every sort of interest the citizen may possess.*¹⁵¹

It should be self-evident that, of all the rights arising from the concept of property, the right to *use* property in a lawful, reasonable, peaceful and profitable manner is the most fundamental. Without the right to use property, most of the concept of ownership becomes meaningless. One may find this elemental proposition stated in the most general of texts:

Property is composed of certain constituent elements, namely, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of use is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands. This right of free and untrammelled use for legitimate purposes is fundamental and within the protection of the United States Constitution.¹⁵²

Not surprisingly, the Supreme Court long ago reached the same conclusion: "Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."¹⁵³ The Court has adhered to this teaching throughout the ensuing years.¹⁵⁴

In a direct condemnation case, i.e., when the government agency forthrightly seeks to extinguish private property rights, it is generally a simple enough task to determine what governmental act caused the taking. The government tells you by filing an action.¹⁵⁵ But, by definition, the government files no action in an "inverse" case. Since the governmental entity has chosen—for reasons of its own—*not* to condemn the property formally, but to allow the taking to occur through its actions, those actions and their effect on the property need to be examined.¹⁵⁶

151. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (emphasis added) (footnote omitted).

152. 63A AM. JUR. 2D *Property* § 3, at 231 (1984).

153. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

154. *See* cases cited *supra* note 150. As the Court recently summarized in *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187 (1984): "We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth amendment . . ." *Id.* at 2196.

155. This does not solve all the problems, but it helps. *See Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187 (1984).

156. *See, e.g., United States v. Clarke*, 445 U.S. 253, 256-57 (1980); *United States v. Dickin-son*, 331 U.S. 745, 747-49 (1947); *Hurley v. Kincaid*, 285 U.S. 95, 104-05 (1932).

The acts which have been held to call for constitutional compensation are many and varied, as might be expected. Government works in many ways and, when it takes private property in the process, it must pay restitution. The method of taking is largely irrelevant. Taking may be accomplished by water,¹⁵⁷ noxious fumes,¹⁵⁸ projectiles fired overhead from naval guns,¹⁵⁹ aircraft noise,¹⁶⁰ slum clearance,¹⁶¹ land redistribution,¹⁶² disclosure of trade secrets¹⁶³ or restrictive land use controls.¹⁶⁴ If the effect of the governmental action is to take private property, the government is liable in inverse condemnation:

The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.¹⁶⁵

That brings us back to our point of departure for, as Professor Beuscher¹⁶⁶ sagely counseled: "The inverse condemnation cases should remind us that those writers who emphasize the separate air tight, non-overlapping character of the two basic powers—police power and eminent domain—have been too glib."¹⁶⁷

Commentaries other than *The Manifesto* have heeded Professor Beuscher's glibness warning. Professor Waite called the distinction between police power and eminent domain "illusory."¹⁶⁸ Professor Michelman called it "wordplay."¹⁶⁹ Professor Van Alstyne referred to it as "circular reasoning, and empty rhetoric."¹⁷⁰

157. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872).

158. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

159. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

160. *United States v. Causby*, 328 U.S. 256 (1946).

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

162. *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321 (1984).

163. *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984).

164. See cases cited *supra* note 3.

165. 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.09, at 6-55 (3d rev. ed. 1975) (footnote omitted).

166. Professor Beuscher was Professor Mandelker's acknowledged mentor.

167. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation* (1964), in J. BEUSCHER & R. WRIGHT, *LAND USE* 724 (1969).

168. Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 292 (1967).

169. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1186 (1967).

170. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemna-*

The pre-eminent text on eminent domain came closer to the mark when it concluded that, "the police power is but another name for the power of government."¹⁷¹ Recalling that the whole point of the Bill of Rights was to curb "the power of government,"¹⁷² the same text recognizes that a police power regulation may go so far as to extinguish important property rights and thus constitute a taking which requires compensation.¹⁷³

Thus, it seems more appropriate to view the police power and the eminent domain power not as separately existing entities, but as two points on a continuum which is the power of government. Indeed, the New York Court of Appeals has expressly acknowledged this:

Government interference with an owner's use of private property under the police power runs the gamut from outright condemnation for which compensation is expressly provided to the regulation of the general use of land remaining in private ownership so that the use might harmonize with other uses in the vicinity.¹⁷⁴

The United States Supreme Court has likewise repeatedly acknowledged the congruence of these "two" powers. In *Hawaii Housing Authority v. Midkiff*,¹⁷⁵ the Court equated the police and eminent domain powers when it held: "The 'public use' requirement [in eminent domain] is thus coterminous with the scope of a sovereign's police powers."¹⁷⁶ The *Midkiff* formulation was applied almost immediately in the context of inverse condemnation in *Ruckelshaus v. Monsanto Co.*¹⁷⁷

Midkiff merely updated the Court's thirty-year-old holding in *Berman v. Parker*.¹⁷⁸ Although the concept may have seemed novel some thirty years ago, the coextensiveness of the two powers in the Court's view was clear:

tion Criteria, 44 S. CAL. L. REV. 1, 2 (1971). See also Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253, 271-75 (1975).

171. 1 P. NICHOLS, *supra* note 165, § 1.42[7], at 1-208 to 1-209.

172. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971).

173. 1 P. NICHOLS, *supra* note 165, § 1.42[7], at 1-209.

174. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 128, 316 N.E.2d 305, 310, 359 N.Y.S.2d 7, 14 (1974). See also *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975) ("The empty formalism of 'police power' cannot be made the basis for denying compensation . . ."). For a more extended discussion, see Berger, *supra* note 170, at 271-75.

175. 104 S. Ct. 2321 (1984).

176. *Id.* at 2329.

177. 104 S. Ct. 2862 (1984).

178. 348 U.S. 26 (1954).

We deal, in other words, *with what traditionally has been known as the police power*. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.

. . . .

. . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, *there is nothing in the Fifth Amendment that stands in the way*.¹⁷⁹

. . . .

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.¹⁸⁰

All this is ignored in *The Manifesto*.¹⁸¹ Rather, apparently in the belief that the decisional law may best be analyzed as some sort of "cult of personality" instead of a developing tapestry created by many judicial hands, the Gang of Five focuses its attention on the perceived personal beliefs of Justice Holmes,¹⁸² the Court's spokesman in *Pennsylvania Coal Co. v. Mahon*.¹⁸³

179. *Id.* at 32-33 (emphasis added).

180. *Id.* at 36 (emphasis added).

181. Forgotten by the Gang of Five in its zeal to seal off regulatory acts from the consequences of the just compensation clause by implying that the eminent domain power must be consciously "exercised," *The Manifesto*, *supra* note 1, at 211-12, is that the eminent domain power need not be expressly invoked in order to be exercised. Governmental *actions* have routinely been held to be exercises of the power of eminent domain even though the power was not formally invoked. See the discussions in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2877-79 (1984); *United States v. Dow*, 357 U.S. 17, 21-22 (1958); *United States v. Dickinson*, 331 U.S. 745, 747-49 (1947).

182. *The Manifesto*, *supra* note 1, at 208-14.

183. 260 U.S. 393 (1922). This is merely a continuation of the Ross & Hardies attack on Justice Holmes and *Pennsylvania Coal*. The opening salvo was fired more than a decade ago by three other Ross & Hardies alumni: F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING*

The Manifesto concludes that, when Justice Holmes used the word "taking," he did not really mean what he said. He was not speaking literally, according to *The Manifesto*, but "metaphorically."¹⁸⁴ One marvels at how, in spite of spirited litigation, and a huge outpouring of commentaries by some of the finest legal minds, the existence of this "metaphorical use" went entirely without notice *for more than half a century*, and was suddenly revealed as a supposed "metaphor" *only* when the impact of growing, oppressive regulations made it clear that regulatory takings were reaching such a level that compensation was the only fair remedy.¹⁸⁵

There are two responses to this line of argument.

First, who cares what Justice Holmes may have believed *as an indi-*

ISSUE 238-53 (1973). It obviously failed to persuade the Court, which has continued to rely on *Pennsylvania Coal* in every regulatory taking case decided since *The Taking Issue* was published.

184. *The Manifesto*, *supra* note 1, at 210.

185. The blunt fact is that the "metaphor" business was made out of whole cloth by Judge Breitel in *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5, 9 (1976). Much could be said about his erroneous analysis of that plainly expropriative case. At a minimum, the City of New York understood that it took control of the property there involved by transforming a private park into a public one (i.e., requiring that it be thrown open to the general public—compare *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)), and attempted to provide compensation in the form of transferable development rights, which were held to be an improper medium of compensation. Judge Breitel's "metaphor" analysis, which was further expounded on in *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978), cannot be taken seriously because of the bizarre economics to which he resorted in order to deny victory to the property owner—a victory it was plainly entitled to under the common sense rule that a property owner may not be compelled to hold his property so as to suffer an ongoing deficit. *See, e.g.*, *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm'n*, 518 F.2d 459, 464 (D.C. Cir. 1975); *cf. Maher v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975). To evade this inexorable economic logic, Judge Breitel simply redefined the concept of a deficit out of existence by indulging in wordplay about privately and publicly created increments of value, and asserting that one is not entitled to a return to the extent it flows from such publicly created components of value. Of course, under such "reasoning," a public utility, for example, would not be entitled to a return because virtually all value of its facilities flows from the public demand for electricity. *See Kanner, Inverse Condemnation Remedies in an Era of Uncertainty*, in 1980 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN 177, 193 n.50. Moreover, Judge Breitel ultimately confessed that he was bending his constitutional analysis—in a way he would not otherwise have done—in order to protect New York City's treasury at a time when it was on the verge of bankruptcy (due to the City's notoriously profligate mismanagement of its municipal affairs). *Penn Cent.*, 42 N.Y.2d at 337, 366 N.E.2d at 1278, 397 N.Y.S.2d at 922. How such thinly disguised gamesmanship can be taken seriously in a supposedly scholarly work is difficult to fathom, yet the Gang of Five swallows it whole and proclaims it intellectually delicious. *The Manifesto*, *supra* note 1, at 212. To his credit, Justice Brennan did not. He forthrightly charged the New York Court of Appeals, which concurred in the Breitel analysis, with tampering with the language of *Pennsylvania Coal*. *San Diego Gas*, 450 U.S. at 649 n. 14 (Brennan, J., dissenting).

vidual? While it is true that judges are not fungible, surmise of their individual beliefs would seem to be useful only in evaluating current issues on the cutting edge of the law when the law is unclear and one is trying to fathom where it is headed.¹⁸⁶

Except for that rare instance, however, majority opinions of the *Court* are the opinions of the *Court*—not of the individual author. Particularly where there are separate concurring and dissenting opinions, such opinions are painstakingly arrived at through a strenuous give and take process. They mean what they say.¹⁸⁷

Thus, whether Justice Holmes (as an individual) may have liked to use the term “taking” in a “metaphorical” sense (or metaphysical or metamorphic, for that matter) is irrelevant. What matters is what the *Court* intended and what the *Court* has since said—repeatedly.

Second, to determine what the *Court* intended, we have a wealth of information in the form of later opinions. Those opinions, some of which are described above, make it clear that the Gang of Five’s posthumous Holmesian psychoanalysis errs in at least the following respects:

- (1) The police power and the eminent domain power are not rigidly separate;¹⁸⁸
- (2) When a taking is a *fait accompli*, compensation is constitutionally mandated;¹⁸⁹ and
- (3) The preferred remedy for a governmental enactment which would be unconstitutional if there were no compensation is to order compensation.¹⁹⁰

The Manifesto ignores pre- and post-*Pennsylvania Coal* holdings of the *Court* in its effort to “psych out” Justice Holmes. It proceeds on the assumption that constitutional decisions can be made by label affixation. If *that* is where we are, we might as well leave the job to Mr. Dooley,

186. See Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 60-64 (1985).

187. This may be even *more* true of *Pennsylvania Coal*, as the lone dissent was authored by Justice Holmes’ usual ally, Justice Brandeis. One suspects that a thorough private debate preceded their public disagreement.

188. Compare *The Manifesto*, *supra* note 1, at 209 with *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321, 2328-29 (1984) and *Berman v. Parker*, 348 U.S. 26, 33-36 (1954).

189. Compare *The Manifesto*, *supra* note 1, at 210 n.57 with *Kirby Forest Indus., Inc. v. United States*, 104 S. Ct. 2187 (1984); *United States v. Clarke*, 445 U.S. 253, 257 (1980); and *Jacobs v. United States*, 290 U.S. 13, 16 (1933).

190. Compare *The Manifesto*, *supra* note 1, at 211 n.57 with *United States v. Riverside Bayview Homes, Inc.*, 105 S. Ct. 455 (1985); *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984); *Dames & Moore v. Regan*, 453 U.S. 654, 688-89 (1981); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-30 (1974); *City of Fresno v. California*, 372 U.S. 627 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-53 (1950); and *Hurley v. Kincaid*, 285 U.S. 95, 103-04 (1932).

whose philosophy (devoid of the pretense of scholarship) makes as much sense as that of the Gang of Five: "[T]h' constitootion iv th' United States is applicable on'y in such cases as it is applied to on account iv its applicability."¹⁹¹

VI. MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY VIOLATING THE RIGHTS OF INDIVIDUAL CITIZENS

The Manifesto poses the following rhetorical question, as though recognition of a legitimate governmental goal legitimizes whatever solution is chosen: "If the regulation, no matter how severe, 'substantially advances legitimate governmental goals' can it ever be a 'taking?'"¹⁹²

The answer is obviously yes. The Supreme Court has repeatedly and consistently so held.¹⁹³ Moreover, it is only logical: When "severe" regulation destroys private rights to "advance[] legitimate governmental goals" it thereby clearly satisfies the "public use" aspect of the resulting taking.

Notwithstanding the opinion of the Gang of Five, determination of the existence of a legitimate governmental objective is the first step in the analysis, not the last. Once it is concluded that the government's goal was legitimate, the means chosen to achieve the objective are subjected to constitutional scrutiny.

For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁹⁴ the Court was faced with a statute designed to facilitate communication via cable television. The State of New York required landlords to permit the installation of cables on their property, and announced that \$1 was normally just compensation for any taking effected by this action.¹⁹⁵ The City of New York urged, and the state courts agreed, that the objective was a legitimate police power activity in the nature of regulation, and thus beyond constitutional challenge.¹⁹⁶

The Supreme Court reversed, concluding that recognition of a valid police power objective was only half the case. The other half of the case dealt with the means chosen to attain it:

The Court of Appeals determined that § 828 serves the legiti-

191. F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW xxi (1968).

192. *The Manifesto*, *supra* note 1, at 221.

193. *See* cases cited *supra* notes 188-90.

194. 458 U.S. 419 (1982).

195. *Id.* at 424-25.

196. 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981), *rev'd*, 458 U.S. 419 (1982). *See supra* note 185. *Loretto* dramatically illustrates just how far the New York Court of Appeals was prepared to go to avoid payment of just compensation, even for physical seizures.

mate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*¹⁹⁷

In *Loretto*, the Court concluded that even the valid exercise of the police power to address a legitimate governmental concern required compensation to property owners whose rights were taken.¹⁹⁸

The same conclusion appears in *Kaiser Aetna v. United States*.¹⁹⁹ There, the Army Corp of Engineers decreed that a private marina must be open to the public. That the Supreme Court disagreed is old news. What is pertinent, however, is the Court's analysis of the relationship between legitimate objectives and compensation:

In light of its expansive authority under the Commerce Clause, there is *no question* but that congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is *an entirely separate question*.²⁰⁰

The issue was also dealt with in *United States v. Security Industrial Bank*.²⁰¹ There, debtors attempted to evade liens properly filed against their properties by urging retroactive application of bankruptcy legislation. The United States intervened on behalf of the debtors to support retroactivity on the basis that it was "rational" and up to Congress to pass such laws.²⁰² The Supreme Court was unmoved:

It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority under Art. I, § 8, cl. 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations. Such agreement does not, however, obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property

197. 458 U.S. at 425 (emphasis added) (citations omitted).

198. *Id.* at 441.

199. 444 U.S. 164 (1979).

200. *Id.* at 174 (emphasis added) (citations omitted) (footnote omitted).

201. 459 U.S. 70 (1982).

202. *Id.* at 74.

without compensation. Thus, *however* "rational" the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment.²⁰³

In a similar vein, of course, are cases such as *Ruckelshaus v. Monsanto Co.*,²⁰⁴ *Dames & Moore v. Regan*,²⁰⁵ and the *Regional Rail Reorganization Act Cases*.²⁰⁶ In each of these cases, the Court was faced with the claim that Congress, in pursuit of legitimate goals,²⁰⁷ had taken private property in violation of the Constitution. In each, the Court directed the property owners to the United States Claims Court to determine whether these legitimate exercises of legislative power required compensation.

Thus, what the Gang of Five overlooks is that it is not writing on a clean slate, free to create a new world in its image, free of any constraints. The slate already contains much writing on it. Among the things written are that property may be privately owned and is constitutionally protected. As the Court held in *Hawaii Housing Authority v. Midkiff*,²⁰⁸ states are free to engage in land reform, but when private property is taken in the process, compensation is mandatory.²⁰⁹ It is this rule that differentiates land reform in the United States from that practiced elsewhere in the world.²¹⁰

There are thus *two* questions which must be addressed in this type of case:

- (1) Is the governmental objective within the ambit of the police power?; and
- (2) If so, does the proposed solution violate the constitutional rights of some citizens?

203. *Id.* at 74-75 (emphasis added) (citations omitted).

204. 104 S. Ct. 2862 (1984).

205. 453 U.S. 654 (1981).

206. 419 U.S. 102 (1974).

207. Respectively, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the provision of rail service to the Northeast United States.

208. 104 S. Ct. 2321 (1984). *See also* *Berman v. Parker*, 348 U.S. 26, 33-36 (1954).

209. 104 S. Ct. at 2331-32.

210. Indeed, when a United States citizen's property is confiscated by foreign governments, our leaders wax indignant and do not hesitate to recommend prompt and vigorous action. As the Commission on International Trade and Investment Policy implored in a report to the President: "Expropriation without prompt, adequate, and effective compensation should be vigorously opposed, and the President should have the authority to deny trade preferences as well as to cut off assistance if particular disputes cannot be equitably resolved and the host country refused to submit the issue to international arbitration." COMMISSION ON INT'L TRADE & INV. POLICY, REPORT TO THE PRESIDENT, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 15 (July 1971).

The Gang of Five addresses only the first issue. But that is plainly insufficient. Regardless of the propriety of the governmental goal, the route to its solution must conform to the Constitution, not circumvent it.²¹¹ The fact that it may cost money does not address the constitutional problem. As the Court put it in *Watson v. Memphis*:²¹² “[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”²¹³

VII. INVALIDATION—BY ITSELF—AS AN ILLUSORY REMEDY

The Gang of Five disclaims any proposal for a remedy.²¹⁴ However, because *The Manifesto* adamantly argues against any form of compensatory remedy, the prime candidate is invalidation. And, indeed, the tenor of *The Manifesto* is to urge invalidation as the primary, if not exclusive, relief.²¹⁵

Invalidation is a remedy which sounds plausible when stated, but provides no relief in actuality. The remedy makes it *appear* that something has happened; and, the architects of this remedy may even *believe* they are supplying relief. But no relief is given; the cure has all the substance of smoke.

A. Tardy Closure of the Barn Door

Invalidation *can* only provide meaningful relief if a court reviews a regulatory act *before* the regulation adversely affects the individual rights of property owners. Moreover, invalidation in advance of regulation would give the regulating entity an appropriate option: It could either abandon the regulatory scheme before it inflicts injury or, if the ends are of sufficient importance, modify the regulation to provide for compensation.

However, if a court reviews a regulation *after* it has already had the effect of taking private property rights and inflicting economic losses, invalidation, standing alone, is largely ineffective. The entity has *completed* a violation of the constitutional protection against uncompensated tak-

211. Significantly, the closest the Supreme Court came to agreeing with *The Manifesto's* position was in *Berman v. Parker*, 348 U.S. 26 (1954), where it pointed out that “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to an end.” *Id.* at 33. Of course, the employment of this reasoning requires that the property owners must receive just compensation under the fifth amendment. *Id.* at 36.

212. 373 U.S. 526 (1963).

213. *Id.* at 537.

214. *The Manifesto*, *supra* note 1, at 240-41.

215. *Id.* at 208-14.

ings; moreover, serious damages may have already been suffered. That violation is not cured when a court merely *informs* the entity of its past violation and forbids it in the future. Only compensation can cure the *completed* violation and provide recompense for the damages, which are now irretrievably in the past.

Contrary to the arguments of the Gang of Five, which are reminiscent of the California position established by *Agins v. City of Tiburon*,²¹⁶ a property owner who obtains compensation does not "transmute an excessive use of the police power into a lawful taking."²¹⁷ He only recovers compensation for the extinguishment of his property rights, i.e., a taking which has already happened. It is the governmental entity which has, through an excessive use of the police power, created such a "transmut[ation]" in which a de facto taking of property rights is a *fait accompli*. As the Court put it in *International Paper Co. v. United States*:²¹⁸ "The government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late."²¹⁹

Invalidation after the fact—unaccompanied by *any* compensation—is little solace.²²⁰ As Professor Tribe recently noted in a discussion of *San Diego Gas & Electric Co. v. City of San Diego*:²²¹

On the merits, Justice Brennan concluded quite reasonably that, although nothing in the Compensation Clause empowers a court to compel the government to exercise its power of eminent domain where the regulatory "taking" is temporary and

216. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

217. *Id.* at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375.

218. 282 U.S. 399 (1931).

219. *Id.* at 406. Justice Brennan cogently noted in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), that the "remedy" of invalidation provides no redress for years of non-use and provides no incentive to government agencies to act otherwise. *Id.* at 656 (Brennan, J., dissenting). See also Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 507-11 (1977).

220. We wonder what the reaction of at least Professors Mandelker and Williams would be if the Regents of their respective Universities were to fire them for unconstitutional reasons, and after a half dozen years of litigation, the courts decreed their "remedy" to be an invalidation of the Regents' resolutions and a remand for another hearing before the Regents, all without compensation for their interim loss of salaries, retirement fund contributions, health, life and disability insurance premiums, loss of seniority, and loss of sabbatical rights. Do you suppose, readers, that the Professors would deem *that* a perfectly adequate remedy, just as they do in the case of "developers"? Would they deem their misadventures to be "mere inconvenience" that time would take care of and which thus warrants no monetary relief? Would the fact that endowed professorial chairs have perpetual life (like real property) have any bearing on the matter? See *infra* note 275 and accompanying text.

221. 450 U.S. 621 (1981).

reversible and the government would rather end the "taking" than purchase the property, *the government must compensate* the property owner for whatever taking occurred between the enactment and the repeal of the offending regulation.²²²

B. *Games the Government Plays*

Using mere invalidation as a remedy is an invitation to abuse. The major problem is that the only "relief" granted the property owner is the right to have the regulating entity draft a new regulation.²²³ The courts cannot *direct* the entity to adopt any particular regulation. The upshot of this is that the property owner is at the mercy of the regulator. Mr. Babcock noted this problem eloquently nearly two decades ago in *The Zoning Game* :

[I]f the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself. Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend another two years and thousands of dollars litigating *that* classification.²²⁴

222. L. TRIBE, CONSTITUTIONAL CHOICES 385-86 n.23 (1985) (emphasis added).

To the same effect, though predating *San Diego Gas*, are WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 296-97 (D. Hagman & D. Miscyniski eds. 1985), and Ellickson, *supra* note 219, at 507-11.

223. See, e.g., D. MANDELKER, ENVIRONMENT AND EQUITY 71 (1981); Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45, 51 (1982); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 732-34 (1982). That Illinois may be a voice in the wilderness crying to the contrary, see *supra* note 107 and accompanying text, does not gainsay the near universality of this rule.

224. R. BABCOCK, THE ZONING GAME 13 (1966) (emphasis in original). One reason for such municipal actions is what Professor Delogu calls, "the hidden agenda—the impermissible motives and objectives which to a greater or lesser degree permeate the enactment and administration of almost all local land use controls." Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 278 (1984). He notes, as an example, minimum lot size requirements:

The irony of the situation is that the last thing most of these towns really want is extensive grid-patterned development which actually meets the minimum lot size re-

In the two decades since Mr. Babcock wrote that paragraph, the only changes have been a hefty escalation of costs and a dramatic increase in the time and use of court resources needed to litigate. As Messrs. Babcock and Siemon reported in a current update of that book:

One common practice, if the municipality lost the decision, was to rezone the property . . . and in effect invite [the property owner] to bring another lawsuit. If, for example, the plaintiff wanted C-commercial for property zoned single-family (R-1), the municipality would reclassify the land to duplex (R-2).²²⁵

Thus, the supposedly victorious property owner, who has succeeded in having a court invalidate an unconstitutional regulation, finds that his reward is an invitation to become a yo-yo. In response to the judgment, the entity simply enacts another unconstitutional regulation. The game can continue until the property owner exhausts his patience, his sanity, his wealth, his time on earth, or all four.²²⁶ Time is on the regulator's side.²²⁷ When the property owner finally succumbs, the entity—even though it has lost every judicial round—emerges victorious. Its disincenitive to unconstitutional conduct is nonexistent. The property owner's relief is likewise.²²⁸

quirements. Such development would be costly to service and would almost certainly destroy or damage the land characteristics sought to be preserved. What the town is counting on is that its minimum lot size requirements will prove to be so costly to developers that all or nearly all development activity will be abandoned. That is exclusion, not reasonable regulation.

Delogu, *The Misuse of Local Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 36 (1980).

225. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 288 (1985). A former Los Angeles City Planner concurs in this analysis:

Local planning officials sometimes substitute deliberately unacceptable conditions for the outright denial which they expect or want to avoid for some reason. If a special condition is overturned on appeal, it is possible to modify the requirement only slightly and thereby force another round of time-consuming, costly, and fruitless litigation. Interim zoning or a moratorium on zone changes can be employed as a tactic of deliberate delay, rather than for the stated purpose of providing time for legitimate study.

Branch, *Sins of City Planners*, 42 PUB. AD. REV. 1, 4 (1982).

226. As Professor Mandelker has noted: "Delay, cost inflation and sheer weariness may accomplish what the zoning ordinance did not achieve. The frustrated landowner may give up." D. MANDELKER, *ENVIRONMENT AND EQUITY* 71 (1981).

A distressing, yet increasingly familiar, pattern has developed wherein property is lost through foreclosure when planning delays disrupt the right to use land to generate income. See cases cited *infra* note 255.

227. Government goes on forever. However, as Lord Keynes noted with understatement, "In the long run, we're all dead." Mortals have to deal with that reality.

228. Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 69-70 (1983). See Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST.

Plainly, this is a game a property owner cannot win. It is a game he should not have to play. It is so cynical, unfair and surreal that, to the extent it is tolerated by the courts, it quite properly puts the legal system into disrepute.²²⁹

It is because of such serious problems and opportunities for abuses which open up if the monetary compensation option is eliminated, that one reads with concern Justice Stevens' concurring opinion in *Williamson County Regional Planning Commission v. Hamilton Bank*.²³⁰ He evidently takes the view that loss of use of one's property and the damages that result, are the natural consequence of delays inherent in litigation, for which he would not award compensation. His view is premised on a hope—not always borne out by experience²³¹—that planners and regulators “generally make a good-faith effort to advance the public interest.”²³² This view may be naive; if nothing else, the many commentaries cited in this article make a persuasive case that often municipal planning decisions are motivated by exclusionary motives and other hidden agendas which are considerably less than in “good faith.” Moreover, Justice Stevens' views would give rise to new problems.

Even assuming the soundness of Justice Stevens' hope of municipal good faith, engrafting that hope onto the body of constitutional doctrine

L.Q. 491, 505 (1981) (“If a municipality resists compliance—an event which sadly occurs all too often—the landowner's court victory will be frustrated.”).

229. The California Supreme Court disclaims any intent to encourage such behavior. *See, e.g., Building Indus. Ass'n v. City of Oxnard*, 40 Cal. 3d 1, 4 n.2, 706 P.2d 285, 287 n.2, 218 Cal. Rptr. 672, 674 n.2 (1985). But it does not discourage it either. Moreover, its actions speak louder than words. Until municipal gamesmanship is forcefully discouraged, the games will continue.

Professor Epstein put his finger on the problem recently when he noted the inexorable tendency to evade restraints by finding indirect avenues by which the same end may be accomplished:

Any theory of constitutional review that covers one form of government behavior while excluding the others invites enormous slippage at the margins. Those who are in control of the state will find in the unregulated forms of conduct effective substitutes for those initiatives called into question under the takings clause. Instead of providing a bulwark against the excesses of government power, a narrow construction of the eminent domain clause simply encourages government officials to redirect their behavior to those forms of exploitation that are beyond constitutional review. No comprehensive theory of government control can tolerate such loopholes for legislative action. As the literal application of the eminent domain clause is consistent with its purpose, there is no warrant for confining its application to isolated takings.

R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 95-96 (1985).

230. 105 S. Ct. 3108, 3125 (1985) (Stevens, J., concurring). For further analysis of Justice Stevens' position, see Berger, *Anarchy Reigns Supreme*, 29 J. URB. & CONTEMP. L. 39, 61-63 (1985).

231. *See supra* notes 223-29 and accompanying text.

232. 105 S. Ct. at 3127 (Stevens, J., concurring).

would require wholesale revisions of established legal precepts. First, as the Supreme Court recently held in *Owen v. City of Independence*,²³³ whether government entities act in good or bad faith is irrelevant. The pertinent question is whether they violated the plaintiff's constitutional rights.²³⁴ Second, if good faith of the regulators is the premise of Justice Stevens' test, then surely that would require inquiry into the motives of local legislative bodies, something which the law does not presently permit.²³⁵ Third, the Supreme Court has repeatedly held that regulatory actions may require compensation notwithstanding (indeed, perhaps because of) legitimate governmental intentions.²³⁶

To accept Justice Stevens' ruminations in *Hamilton Bank*, all these settled areas of law would need to be swept aside. We doubt that even the most ardent "police power hawks" would welcome such a development, particularly inquiries into the subjective *bona fides* of the conduct of planners.

Moreover, it is difficult to see why a property owner should be deprived of compensation for economic injury already suffered any more than Chief Owen should have been deprived of his back pay and benefits lost during the time he had to litigate to vindicate his rights, as against the city's claim that it was acting in good faith.²³⁷ If anything, the property owner in this type of case seems *a fortiori* entitled to compensation because, by denying him reasonable use of his land and *de facto* converting it to community "open space" or "agricultural preserve" or the like, the constitutional wrong against him simultaneously confers a tangible benefit on the community, which thus "enjoys the benefits of the government's activities."²³⁸ In land use cases particularly, the community enjoys a substantial and often economic *quid pro quo* for its payment.

Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been

233. 445 U.S. 622 (1980).

234. *Id.* at 651-52. As Justice Stewart put it in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (emphasis in original).

235. See, e.g., *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 945, 162 Cal. Rptr. 210, 216 (1980); *The Manifesto*, *supra* note 1, at 220. We note that even the thought of opening this can of worms is decryed by the Gang of Five as a "baneful result." *Id.*

236. See *supra* notes 192-213 and accompanying text.

237. See 445 U.S. at 652 & n.35. See also *supra* note 220.

238. 445 U.S. at 655.

violated.²³⁹

Thus, to the extent that Justice Brennan's *San Diego Gas* dissent and Justice Stevens' *Hamilton Bank* concurrence may be viewed as ideas run up the judicial flagpole for commentary, Justice Brennan's view seems more in line with both the real world of land use control, with *stare decisis*, and with basic fairness. Justice Stevens' views, on the other hand, would not only involve considerable destabilization of the law, but would also open up an entirely new set of incentives to delays in litigation, and would unfairly deny effective relief to seriously damaged parties whose constitutional rights have been violated.

C. *A Course of Conduct Cannot Be "Invalidated"*

Another problem with the invalidation remedy is that often the problem is not a discrete regulation, but a course of conduct, involving moratoria, delays, broken promises, unreasonable demands for "dedication" of property or "donation" of money in lieu thereof, chilling publicity, bad faith and the like.²⁴⁰

Invalidation cannot be an appropriate remedy in these situations. How does one "invalidate" delay, unfavorable publicity or bad faith? How does one "invalidate" a course of conduct extending over a period of years, during which the carrying costs of the property continue while the benefits of ownership are destroyed?

In such situations, something other than, or in addition to, invalida-

239. *Id.* (citations omitted). The view expressed in the quoted *Owen* passage is *a fortiori* applicable to regulatory takings for yet another reason. Because of the nature of the land use regulation process (to say nothing of the procedural prerequisites created by the Court in *Agins* and *Hamilton Bank*) zoning officials are clearly put on notice by the property owner's applications, protests, appearances before planning and zoning bodies, zoning appeals, and particularly variance applications (remember, variances have to be based on hardship), that the regulations may be economically draconian in their impact. See *infra* notes 298-303 and accompanying text. Thus when they engage in constitutional wrongdoing, they do so with notice to a far greater extent than that given after the fact by Chief Owen, see 445 U.S. at 629, or that afforded to public officials in the far more typical § 1983 cases in which compensatory (or even punitive) damages are awarded as a matter of course.

240. See, e.g., *Jones v. People*, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978); *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, cert. denied, 449 U.S. 901 (1980); *Briggs v. State ex rel. Dep't of Parks & Recreation*, 98 Cal. App. 3d 190, 159 Cal. Rptr. 390 (1979), appeal dismissed and cert. denied, 447 U.S. 917 (1980); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), disapproved in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff'd on other grounds, 447 U.S. 255 (1980) (disapproved because *Eldridge* authorized recovery of compensation).

For further discussion, see Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URB. L. 861, 886 (1975); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 726 (1982).

tion must be available. That is the historical position of equity jurisprudence: Damages are awarded in addition to injunctive relief whenever necessary to grant the aggrieved party fair and complete relief.²⁴¹

VIII. THE INIQUITY AND THE INEQUITY OF A SCHEME WHICH REFUSES TO INCLUDE COMPENSATION AS A REMEDY

For some time now, California's citizens have been guinea pigs in an experiment which demonstrates the results of permitting constitutional violations to be committed without effecting substantive relief. While painful to its California victims, the experience could be worthwhile in the long run if it serves to demonstrate that constitutional rights *cannot* be fully protected if the "remedy" for their violation is severely circumscribed.

California, as it has been operating for the last decade or two, would appear to represent the closest thing to nirvana for planners, regulators and their legal apologists.²⁴² The judiciary has accomplished in California what the Gang of Five hopes to see the United States Supreme Court adopt if the Court can be persuaded to jettison Justice Brennan's views in *San Diego Gas & Electric Co. v. City of San Diego*.²⁴³ The California Supreme Court has expressly adopted a policy that land use planners must have unfettered power to "innovate" without fear of financial consequences,²⁴⁴ even if they destroy the rights of innocent citizens in the process of advancing the planners' perception of the greater public good.²⁴⁵

241. In his earlier article, Professor Mandelker attempted to stand that settled rule on its head simply by asserting the contrary (i.e., that in regulatory taking cases, the usual equitable injunction/damages hierarchy is reversed). Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 492 (1981). He ignored, in the process, not only *Hurley v. Kincaid*, 285 U.S. 95 (1932), and its progeny, *see supra* notes 68-111 and accompanying text, but also the general law of remedies which he purported to discuss. *Cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). He likewise failed to deal with the familiar rule that damages are a supplementary component of injunctive relief whenever required to make the aggrieved party whole. *See, e.g.*, 27 AM. JUR. 2D *Equity* §§ 102, 115, at 624, 641-42.

242. Probably the only type of system to surpass it was described by Professor Callies after a visit to the People's Republic of China: "China is a planners' paradise. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. Once a plan is made, it is the law of the land . . ." Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 URB. LAW. 781, 845 (1982).

243. 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

244. *See Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

245. The California Supreme Court's dedication to its rule in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), is apparent from its treatment of simultaneous petitions to review the court of appeal

By decisions such as *HFH, Ltd. v. Superior Court*,²⁴⁶ *Selby Realty Co. v. City of San Buenaventura*,²⁴⁷ *Agins v. City of Tiburon*,²⁴⁸ and *Avco Community Developers, Inc. v. South Coast Regional Commission*,²⁴⁹ the California Supreme Court has given government agencies the power to enforce virtually any land use regulations and disregard individual rights²⁵⁰ fundamental to our society,²⁵¹ without concern for judicial redress. The California courts of appeal have enforced, built upon and expanded this philosophy of disparaging the rights of property owners.²⁵²

decisions in *Gilliland v. County of Los Angeles*, 126 Cal. App. 3d 610, 179 Cal. Rptr. 73 (1981), *appeal dismissed*, 456 U.S. 967 (1982), and *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627 (1981), *ordered depublished*, 127 Cal. App. 3d 398 (1982). Both cases involved governmental denial of use of different parts of the same parcel of property—part of the property was within the City's jurisdiction, part was within the County's. Both cases were brought in state court seeking relief under 42 U.S.C. § 1983 (1982). Decisions affirming dismissal of the cases were issued almost simultaneously by two different court of appeal panels. The manner in which the appellate panels dealt with the cases was startlingly different:

(1) In *County of Los Angeles*, the court of appeal indicated it would abide by the California Supreme Court's view of federal constitutional law, even though it was contrary to that of the United States Supreme Court. 126 Cal. App. 3d at 617, 179 Cal. Rptr. at 78.

(2) In *City of Palmdale*, by contrast, the court of appeal examined California law in light of the opinions issued by the United States Supreme Court in *San Diego Gas* and concluded that "*California's position flatly contradicts clear precedent of United States Supreme Court cases.*" 179 Cal. Rptr. at 631 (emphasis added).

The California Supreme Court simultaneously considered whether to review these two decisions. It declined review in both. However, in so doing, it ordered the *Palmdale* opinion deleted from the official reports, CAL. CT. R. 976(c)(2), thus making the critical analysis non-citable, CAL. CT. R. 977(a), and leaving as California's rule a holding that *even in Federal Civil Rights Act cases California will not follow federal law.*

246. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) (no inverse condemnation cause of action for harsh regulation), *cert. denied*, 425 U.S. 904 (1976).

247. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973) (general planning cannot constitute a taking of property even if land use is denied on the basis thereof).

248. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) (no right to compensation even if a regulation effects a taking), *aff'd on other grounds*, 447 U.S. 225 (1980).

249. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976) (there is almost no such thing as a vested right to use property), *appeal dismissed and cert. denied*, 429 U.S. 1083 (1977).

250. More than a decade ago, the United States Supreme Court held that rights in property are as much personal, civil rights as the right to speak or the right to travel. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

251. As the United States Supreme Court aptly noted recently, of all rights associated with a property interest, "the right of use of property is perhaps of the highest order." *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984).

252. *See, e.g., Whaler's Village Club v. California Coastal Comm'n*, 172 Cal. App. 3d 62, 218 Cal. Rptr. 122 (1985); *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); *Remmenga v. California Coastal Comm'n*, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628, *appeal dismissed*, 106 S. Ct. 241 (1985); *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, *cert. denied*, 449 U.S. 901 (1980); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820, *cert. denied*, 436 U.S. 918 (1978).

Egregious examples are not hard to come by. For example, in *Briggs v. State ex rel. Dep't of Parks & Recreation*, 98 Cal. App. 3d 190, 159 Cal. Rptr. 390 (1979), *appeal dismissed and*

If, by chance, an agency so oversteps the bounds such that minimal "relief" is granted (in the form of invalidation of the regulation many years after the damage has been inflicted), California agencies know that such relief is illusory to the property owner and harmless to themselves. In his *San Diego Gas* dissent, Justice Brennan quoted the advice of a prominent California city attorney (author of a widely used California land use treatise) to his colleagues as follows:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C. 3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

....

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck."²⁵³

Government agencies in California have received the message. They rest secure in the knowledge that property owners can be abused with

cert. denied, 447 U.S. 917 (1980), the court held that the aggrieved landowner's sole remedy was a petition for a writ of mandate which had to be filed within 60 days after the Coastal Commission's permit denial, *id.* at 196 n.3, 159 Cal. Rptr. 392 n.3, *even though*, as the trial court found, the impact of the Commission's combined activities did not effect a taking until about one and one-half years later. *Id.* at 200, 159 Cal. Rptr. at 395. In other words, the owner's "remedy" was said to be a suit some one and one-half years *before* her cause of action accrued. In the process, the court also managed to rely on Professor Van Alstyne's commentaries in a way directly contrary to his views, *id.* at 204, 159 Cal. Rptr. at 397, and the court hewed to this Orwellian position even after Professor Van Alstyne protested. Supplement to Petition for Rehearing, *Briggs v. State ex rel. Dep't of Parks & Recreation*, 98 Cal. App. 3d 190, 159 Cal. Rptr. 390 (1979), *appeal dismissed and cert. denied*, 447 U.S. 917 (1980). *See also Helix Land Co. v. City of San Diego*, 82 Cal. App. 3d 932, 939-40, 147 Cal. Rptr. 683, 686-87 (1978) (held: land subject to salt water intrusion, located in the path of effluent of the Tijuana River flowing from Mexico, carrying raw sewage and chemicals, was properly zoned "agricultural," even though this resulted in deprivation of *all* economic use of the property); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 736, 755, 141 Cal. Rptr. 820, 831-32 (1977) (held: landowner was required to exhaust its administrative remedies before a then nonexistent governmental body, even though the Attorney General advised after the fact, when the body came into existence, that no permits would be issued even if applied for).

253. 450 U.S. at 655-56 n.22 (quoting Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO L. REV. 192-93 (1975) (emphasis in original)).

impunity.²⁵⁴

In the course of implementing their "innovative" ideas, California planners have driven many California property owners into foreclosure.²⁵⁵

The upshot of all this, according to Messrs. Babcock and Siemon, is that, "[i]n California, the courts have elevated governmental arrogance to an art form."²⁵⁶ Indeed, the concept has been given a whole new dimension. Planners and government officials act as though *they* own the land which the person who paid for the land is seeking to use. When bureaucrats know there is no penalty—and a wrist slap by a court opinion which says they ought not to have done something is not, by itself, an effective remedy—there is an irresistible impulse to test limits, if not run amok. The inmates take over the asylum.

California is now "commonly regarded as the most restrictive state in the country with respect to the use of land."²⁵⁷ There are no remedies for property owners whose rights have been trampled in California's dash to achieve this dubious honor.²⁵⁸

In light of all that, it is incredible that *The Manifesto* expresses the belief that planners will plan better without the fear of compensatory damage judgments looming over them. In saying that, its authors ignore what they as individuals already know of the California experiment.²⁵⁹

254. Under California's system, government agencies know they have nothing to lose by issuing use-stultifying regulations. Under no circumstances will California courts do more than order the offender to stop. And even that minimal "relief" is rarely forthcoming. Indeed, one searches the reports of California Supreme Court cases in vain for *any* recent decision which invalidates a confiscatory zoning ordinance. To relieve the suspense, we will tell you that the last such case, *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963), was decided more than two decades ago. Thus, unlike the New York Court of Appeals, which denies damages but regularly invalidates overreaching governmental acts, the California courts "talk a good game" but do nothing to enforce constitutional rights which they disfavor, thereby encouraging further constitutional incursions by increasingly freewheeling regulators.

255. See, e.g., *Jacobson v. Tahoe Reg'l Plan. Agency*, 566 F.2d 1353, 1366-67 (9th Cir. 1977), *aff'd in part and rev'd in part*, 440 U.S. 391 (1979); *Hollister Park Inv. Co. v. Goleta County Water Dist.*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978); *Orsetti v. Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), *cert. denied*, 436 U.S. 918 (1978). Cf. *County of Los Angeles v. Berk*, 26 Cal. 3d 201, 605 P.2d 381, 161 Cal. Rptr. 742, *cert. denied*, 449 U.S. 836 (1980); *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

256. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 253 (1985).

257. Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 70 (1983).

258. Professor Callies, in an outspoken moment, said "[w]e all know the California courts won't let landowners/developers build anything!" Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 URB. LAW. 723, 724 n.6 (1981) (citations omitted).

259. See *infra* notes 260-65 and accompanying text.

Freedom from control has produced abuse of power rather than sensitivity.

The sophistry which underlies *The Manifesto* is revealed by examining comments made by individual members of the Gang of Five in describing life in California under its current legal rules. Messrs. Babcock, Siemon and Williams have described California land use law as:

- (1) Bizarre;²⁶⁰
- (2) Lacking in due process;²⁶¹
- (3) Notorious for its extreme regulations;²⁶²
- (4) Arrogant;²⁶³
- (5) Containing rules which would not be upheld in *any* other state;²⁶⁴ and
- (6) Creating an atmosphere in which a property owner might just as well slit his throat as try to obtain justice.²⁶⁵

And the legal doctrine which gave us *that* is what the Gang of Five say they want for the rest of the country.

They are advocating nonsense.

It is time to recognize California's land use regime for the failed experiment it is so the rest of the nation can be spared. California's fling with an unfettered land use bureaucracy, free to inflict whatever "innovative" restrictions it wishes and without concern for the Constitution or its enforcement, has failed to benefit California and has abused persons who did nothing but own property.

To refuse dogmatically to permit *any* compensation for serious, demonstrable losses bleeds meaning from the constitutional protection of the rights of property owners. As the United States Supreme Court held, a compensatory remedy must be an element of relief to give meaning to the constitutional right and to act as a disincentive to further wrongdoing.²⁶⁶

IX. THE ECONOMICS OF *THE MANIFESTO*: A PURSUIT OF THE FREE LUNCH

In bemoaning the fate that could befall municipal regulators if they

260. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 257 (1985).

261. *Id.* at 251.

262. *Id.* at 293.

263. *Id.* at 253.

264. 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 6.03, at 115-16 (1974).

265. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 293 (1985).

266. *Owen v. City of Independence*, 445 U.S. 622, 650-51 (1980).

are forced to foot the bill for their constitutional incursions,²⁶⁷ *The Manifesto* reads as though eliminating compensatory remedies will eliminate the cost of regulating property.²⁶⁸

As with the case of the magic "*Miranda* card," which supposedly has all the necessary constitutional wisdom written upon it and yet fits into a policeman's pocket,²⁶⁹ it is difficult to believe that the Gang of Five is serious. Are its members unaware of the concept of externalities?²⁷⁰

All *The Manifesto's* approach does is *shift* the cost, not eliminate it. As Professor Van Alstyne astutely put it: "The fundamental question that should be faced, and which deserves a rationally developed legislative response, is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements."²⁷¹

The existence of a cost associated with restrictive property regulation is indisputable. What the Gang of Five wants to do is insulate government agencies from distributing the cost of such programs throughout society and thus requiring the benefitted public to shoulder the burden.

The Manifesto attempts to deal with the economic problems of harsh regulation by wordplay. While calling the potential impact on government agencies "catastrophic,"²⁷² it views the impact on property owners of not being able to use their land as "mere diminution in . . . value"²⁷³ or "temporary interference in the use of land."²⁷⁴

267. See, e.g., *The Manifesto*, *supra* note 1, at 207, 233-34, 239-40.

268. One of the components of the economic "disaster" foreseen and deplored by the Gang of Five (antitrust liability), *id.* at 207, vanished when Congress bowed to pressure and passed the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (1984), permitting only injunctive relief. We are, nonetheless, left to wonder—if unlawful restraint of trade is so wicked as to warrant treble damages and such—why the government, Justice Brandeis' omnipresent teacher who sets an example by its conduct, should not be required to recompense the victims of its own antitrust activities even once. Double standard, anyone? Fortunately, Congress cannot yield to immoral lobbying and repeal the Constitution.

269. See *supra* notes 116-19 and accompanying text.

270. Surely, Professor Mandelker knows the concept. Mr. Berger, a student of his many years ago, recalls that he lectured about it. That he still recalls it is evident in D. MANDELKER, ENVIRONMENT AND EQUITY 7-14 (1981).

271. Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491, 543-44 (1969). To the same effect, see also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181 (1967).

272. *The Manifesto*, *supra* note 1, at 234.

273. *Id.* at 215. Someone probably ought to count the number of times the word "mere" appears in *The Manifesto*. By the way, the "mere diminution" in the cases cited in *The Manifesto* was 75% and 87.5%. *Id.* at 215 n.66 (citing *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)). Can it really be said with a straight face that such diminution is *de minimis* or that it leaves "reasonable" use to the owner? One

Remember that we are dealing with the fiscal consequences of *the same act*. The Gang of Five has thus devised an equation whereby what is "mere diminution" or "temporary interference" for an owner equals "catastrophe" for a governmental budget. Something *has* to be wrong with that.

The first part of the problem is *The Manifesto's* analysis of the effect of regulations on property owners. In this context, *The Manifesto* takes an Olympian, long range view, looking at property as something which goes on forever and can be used eventually—a sort of someday-your-prince-will-come approach. Thus, an interference which prevents use for a period of years is said to be a "mere inconvenience [which] . . . only destroys a part of one strand of the bundle of rights of property [and] . . . can hardly be said to be a 'taking' when viewed in the aggregate."²⁷⁵

With all respect to which such arguments are entitled, that is ethical, legal and economic hogwash. *The Manifesto* ignores a significant problem of impoverishing *people* by treating the issue as if it were a purely *in rem* problem.²⁷⁶ It is not. The Supreme Court, at least, holds that it is the rights of the *property owner*, not the rights of the *property*, that have significance.²⁷⁷

To account for those rights, one must abandon abstract calculations which obfuscate the problem by attempting to relate use prohibitions for periods of years to the perpetual life of the realty.²⁷⁸ Instead, one must examine the hardships placed on individuals by such actions. Sometimes delay in ability to use property leads to foreclosure.²⁷⁹ Sometimes the

could, with equal logic, refer in personal injury cases to "mere" bilateral amputation, or "mere" paraplegia.

274. *Id.* at 217. For additional comments on similarly imaginative uses of the belittling adjective "mere," see Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 797 n.169 (1973).

275. *Id.* One cannot help wondering whether the Gang of Five's reaction would be equally calm and detached if each of its members was deprived of the use of his home—"temporarily," of course—say, for seven or eight years.

276. No satisfactory explanation is offered (or even attempted) of how it makes *me* whole if my descendants, *see, e.g.*, *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1179 (1985), or my banker, *see, e.g.*, *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985), eventually get to use my property. Nor is there any explanation of how such a "remedy" benefits a lessee, whose leasehold inexorably ticks away while the regulators drag their municipal feet.

277. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights."); *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (The Constitution "deals with persons, not with tracts of land.").

278. *See, e.g., The Manifesto, supra* note 1, at 217 n.74; *supra* note 220.

279. *See* cases cited *supra* note 255.

owner dies.²⁸⁰ Given the reality of inflation, the cost of developing the property may increase. Real estate taxes continue to be demanded, often by the entity which is preventing the property from being used.²⁸¹

These are more than "mere" problems for the individuals involved. Indeed, others have noted the irony in arguments based on "equations" similar to *The Manifesto*'s: If the damage done to individuals is in fact *de minimis*, then the potential liability to the government agencies should be likewise. By the same token, if the governmental half of the "equation" is correct, and catastrophic judgments could be in the offing, then individual property owners have been suffering horrendous losses and the constitutional defalcations of regulatory agencies have been monumental in scope.²⁸² If so, all the more reason to interdict further constitutional

280. As noted by Judge Reinhardt in *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984) (Reinhardt, J., dissenting), *cert. denied*, 105 S. Ct. 1179 (1985):

The suit has already outlived the original plaintiff, Paul Kollsman. The Kollsman estate will be most fortunate indeed if it is able to resolve even the simple and unimportant state law aspect of this litigation by 1987—ten years after the time the original application was filed. The case will then return to the federal courts for resolution of the federal issues unless by that time the plaintiffs have abandoned their rights in despair.

Id. at 844 (Reinhardt, J., dissenting).

281. *See, e.g.*, *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969) (county denied *all* use of property for five years, while *raising* taxes each year). *The Manifesto* attempts to downplay the impact of development moratoria by calling them "pause[s] for planning" and noting that they are generally approved "if they are limited in their period of application." *The Manifesto*, *supra* note 1, at 218. But truly short-lived planning moratoria are rarely enacted. More commonly, they drag on for years. Indeed, the famous (or infamous) Ramapo ordinance made possible a delay of as much as 18 years. *See Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). The California Supreme Court sees nothing wrong with a five year moratorium. *State v. Superior Court*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974). "Limited" seems to be in the eye of the beholder. *Cf. Delogu, The Misuse of Local Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 35, 65 (1980); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 504 (1977).

282. WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE & COMPENSATION 297 (D. Hagman & D. Misczynski eds. 1978); Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 U.C.L.A. L. REV. 711, 730 (1982). *Cf. Davis v. Passman*, 442 U.S. 228, 248 (1979).

No point would be served by getting enmeshed here in the possible methods for computing the *amount* of compensation to be awarded. The Gang of Five urges that the problems in that process are severe. *The Manifesto*, *supra* note 1, at 223-24. However, as Mr. Babcock has cogently noted, the "difficulties of valuation and appraisal are not more difficult in these instances than in cases of condemnation where the taking involves something less than the fee." R. BABCOCK, *THE ZONING GAME* 171 (1966). More persuasively, no insurmountable problems have arisen when the government condemns partial interests, if only temporarily as it did on a vast scale during World War II. This does not diminish the appraisal problem. But courts have had broad experience in formulating rules of valuation (even when that varies from what happens in the real world) in order to convert the simple constitutional phrase "just compensation" into dollars and cents. *See, e.g.*, Kanner, *Condemnation Blight: Just How Just*

violations and order restitution, rather than reissuing a license to steal.

Either way, the Gang of Five has made an argument that proves too much.

The intellectual dishonesty in *The Manifesto*'s presentation is apparent in its statement of what it calls a settled constitutional doctrine: "[P]olice power regulations that restrict the value or use of property are the price we pay for a reasonably lawful and orderly society."²⁸³

"[W]e" pay? Who are "we"?

Currently, in jurisdictions like California (and as they would be elsewhere if the rest of the Nation is reformed in the Gang of Five's image), "we" do not pay that price. Only random victims pay that price. In fact, if the benefits of the regulations to society at large are sufficient to justify their adoption, then "we" (i.e., society at large) *ought* to pay, and foot the bill for the benefits received.²⁸⁴ *That* would be reasonable and or-

Is Just Compensation?, 48 NOTRE DAME LAW. 765 (1973). The nuts and bolts of the valuation process can be worked out once it is settled as a matter of federal constitutional law that compensation is mandated, for that is indeed a case by case, fact-dependent process. For some tentative beginnings, see WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE & COMPENSATION (D. Hagman & D. Misczynski eds. 1978); Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases*, in ZONING AND PLANNING LAW HANDBOOK 201 (1982).

283. *The Manifesto*, *supra* note 1, at 218 (emphasis added). This is reminiscent of the bad old days (before the enactment of the Uniform Real Property Acquisition Policy Act) when the highway builders were bulldozing innocent people for the greater glory of the highway lobby, while intoning the saw that such was the "price of progress." We could not understand then, nor can we now, why the "price" is not exacted from the beneficiaries rather than the victims of "progress" or—as they now seem to be known—the victims of "a reasonably lawful and orderly society." See Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 86 n.118 (1969).

284. That, after all, has long been at the heart of inverse condemnation doctrine. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Even assuming the worst possible scenario from the regulating entity's point of view (i.e., those situations where the courts find the invasion of private property rights to be so egregious as to work a complete taking), the municipality does not lose money, but rather acquires a valuable asset whose acquisition axiomatically betters the public condition, and which is acquired at a judicially determined fair market value. Moreover, insurance protection is available, see, e.g., *City of Mill Valley v. Transamerica Ins. Co.*, 98 Cal. App. 3d 595, 159 Cal. Rptr. 635 (1979), although query whether insurance protection should be available where the inverse condemnation results in an acquisition of a valuable property at its fair market value; wouldn't insurance then result in double compensation to the government? Moreover, if the municipality should decide that the acquired asset is indeed beyond its means (or, more accurately, beyond its *willingness* to acquire), it would have the further option of selling the land.

This idea is hardly novel. It is now authorized in cases of so-called excess condemnation, where under some circumstances a public entity condemns more land than it will use for the public project. See CAL. CIV. PROC. CODE § 1240.430 (West 1982). Such excess acquisition may occur because the government desires it, see *United States ex rel. TVA v. Welch*, 327 U.S.

derly, particularly since onerous land use regulations overwhelmingly tend to benefit upper crust suburbs, at the expense of those on lower rungs of the socioeconomic ladder who would benefit from greater availability of multiple residences and fewer large lot estates. As Justice Mosk of the California Supreme Court put it: "No one ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper class housing development."²⁸⁵

Nor is it an answer to intone the hoary saw about zoning providing a reciprocity of advantage that is said to be bestowed on all members of the regulated community by allocation of permitted land uses.²⁸⁶ Whatever merit may be found in that concept is limited chiefly to those situations where the zoning or other land regulations are stable and result in a pattern of reliable and economically rational land uses (typically, but not necessarily, in an established, built-out community). But that reciprocity concept has little or no applicability to situations involving shifting land use regulations that result in often deliberate stultification of desirable land—usually in tony communities—for the aesthetic pleasure of neighbors with clout. To speak to owners of the stultified land of "reciprocity of advantage" under those circumstances makes about as much sense as lecturing black Americans in the 1940's about the reciprocity of advantage flowing from racial segregation laws, whereby the "advantage" to them would flow from their known and stable position in society, even if the true benefits of their societal position would inure to their white neighbors with clout.

What this all boils down to is the essence of democratic governance. Ultimately the Gang of Five fears that if local governments actually had to pay for the benefits they obtain for their favored constituencies by regulation, the public might not be willing to come up with the money. But if the people cannot be convinced that the avowedly cherished ends

546 (1946); *People v. Superior Court*, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968), or because the owner does. See CAL. GOV'T CODE § 7267.7 (West 1980); 42 U.S.C. § 4651(9) (1982). Either way, resale of land acquired by the government is hardly unusual; indeed, it is an essential feature of urban redevelopment programs. *Berman v. Parker*, 348 U.S. 26, 33-34 (1954). See *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 74, 646 P.2d 835, 843, 183 Cal. Rptr. 673, 682 (1982); D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 112-18, 687-728 (1966). See also *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321 (1984).

285. Mosk, *Finding a Direction for Our Environment*, BARRISTER, Spring 1976, at 18. See B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 37 (1979); D. MANDELKER, *ENVIRONMENT AND EQUITY* 16 (1981).

286. See *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 517, 522 P.2d 12, 19, 113 Cal. Rptr. 836, 843 (1974).

are important enough to raise the money, how does that justify going ahead with the program anyway and fobbing off the cost on a relatively few innocent third parties? If the people do not want it badly enough to pay for it, then they should not have it—no matter how much the Gang of Five or some cloistered planner thinks the public would benefit from having it.²⁸⁷ To will the ends without likewise willing constitutionally respectable means is simply intellectually dishonest. Cries of support for the environment, no more than cries for “law and order,” cannot lay claim to respectability unless the supreme law is respected in letter and spirit.

There is nothing new about this thought. The Supreme Court plainly expressed it in *Pennsylvania Coal Co. v. Mahon*:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.²⁸⁸

The Manifesto's economic theory is thus based on sleight-of-hand. It is voodoo economics. It is based on the premise that by making the right incantation and shifting the cost onto the shoulders of a few disfavored and ultimately randomly chosen individuals, the cost of major public programs can be made to vanish. But it ain't so. The cost is always present. The only question is who picks up the tab.

There is no such thing as a free lunch.

287. Every municipality needs transportation, and every municipality owns automobiles for that reason. Yet no one has ever suggested that a municipality should have the power to exact Cadillacs from local car dealers as a condition of issuance of a business license, when the municipal budget can only pay for Fords. No reason appears why similar reasoning should not apply to a municipality's real property needs and desires. As Professor Michelman aptly concluded: “[A]ny measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.” Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1181 (1967).

288. 260 U.S. 393, 415 (1922). *Accord* *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962).

X. DID ANYONE FEEL A "CHILL" WHEN THE DOOR OPENED?

The Gang of Five is worried. *The Manifesto* attempts to paint a picture of government planners being so "chill[ed]"²⁸⁹ if the Court opens the door to compensatory awards for regulations which take property that they will be left "limp"²⁹⁰ and unable to muster the courage to make the right decisions.

This is an argument that is so old it is getting shopworn.²⁹¹ It has rarely persuaded courts in the past and, when it has, they often have been proven wrong.²⁹²

The United States Supreme Court is a frequent target of this "risk to the fisc" argument. While occasionally sparking dissents (indicating that the problem was the cause for substantial debate), the Court has refused to bow to the pressure.²⁹³ In *Owen v. City of Independence*,²⁹⁴ one of its

289. *The Manifesto*, *supra* note 1, at 237.

290. *Id.* at 240.

291. For discussions in the context of compensation for aircraft noise nuisances and loss of business goodwill, see Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W.L. REV. 199, 252-59 (1973); Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 76-85 (1969).

292. See Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 77-79 (1969); Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 786 n.101 (1973).

Illustrative is the alarm expressed by California Chief Justice Traynor's dissent in *Bacich v. Board of Control*, 23 Cal. 2d 343, 366, 144 P.2d 818, 832 (1943) (Traynor, C.J., dissenting). There, dissenting from the court's holding that property owners must be compensated for impairment of access, Chief Justice Traynor lamented that such compensation would prevent construction of any more freeways. The only freeway then in existence was the eight mile long Arroyo Seco (now Pasadena) Freeway. Needless to say, the concern was baseless. While compensating property owners for their impairment of access, California has constructed thousands of miles of freeways, while running up an astronomical surplus of funds in the heyday of freeway construction. See Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 786 n.101 (1973).

In like vein, Justice Douglas' concern over swollen verdicts in *United States v. General Motors Corp.*, 323 U.S. 373, 385 (1945) (Douglas, J., concurring in part), proved unfounded, and allowing recovery for moving expenses in temporary takings did not present so much as a pebble by way of obstacle to the tidal wave of condemnations that were soon to sweep over the Nation as part of the urban development and federal highway construction programs launched in the 1950's. Similarly clouded was the crystal ball of Justice Black dissenting in *United States v. Causby*, 328 U.S. 256, 274 (1946) (Black, J., dissenting), where he lamented over the unwarranted judicial interference in Congressional powers to solve new problems. Yet, as we know, aviation has come a long way since 1942, when waves of four-engine bombers and fighter planes descended on Tom Causby's chicken farm in North Carolina. Finally, Justice Douglas' dissent in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 161 (1974) (Douglas, J., dissenting), lamenting a projected multi-billion dollar liability, failed to materialize.

293. See, e.g., *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 1005 (1985)

more recent pronouncements, the Court was outspoken in rejecting the "chilling" argument. The Court concluded that not only was the "chilling" presumption questionable, but that public officials have a duty to consider the constitutional consequences of their acts:

First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.²⁹⁵

Nor did the Court stop there. It noted that its decision was based on considerations of governmental responsibility and protection of the rights of individuals rather than on whether "blame" should be the key to constitutional enforcement.²⁹⁶ There is no reason to believe that such

(overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976) and subjecting state agencies to federal minimum wage standards); *Owen v. City of Independence*, 445 U.S. 622 (1980) (denying municipalities good faith immunity in suits under 42 U.S.C. § 1983); *Nevada v. Hall*, 440 U.S. 410 (1979) (subjecting states to suit in other states); *Butz v. Economou*, 438 U.S. 478 (1978) (denying absolute immunity to federal officials); *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (holding municipalities liable to suit under 42 U.S.C. § 1983); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (holding municipalities subject to antitrust laws); *Milliken v. Bradley*, 433 U.S. 267 (1977) (ordering state to pay six million dollars toward costs of a desegregation decree); *United States v. Causby*, 328 U.S. 256 (1946) (holding governmental airport operators liable for takings caused by excessive noise).

294. 445 U.S. 622 (1980).

295. *Id.* at 656 (citation omitted) (emphasis in original).

296. *Id.* at 657. Cf. Delogu, *The Misuse of Local Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 64 (1980). That should be sufficient to dispose of the concern of the Gang of Five about whether liability should be based on the "intent" of the government to take property without compensation. See *The Manifesto*, *supra* note 1, at 219-20. It also responds to the argument that "[t]he Brennan doctrine would punish the well-intentioned local legislature as well as the odious one." *Id.* at 243. That misses the point. "[P]unish[ment]" is not the goal; compensation is. Should the government be free to confiscate property when its functionaries think they are entitled to do so? The answer has been negative at least since *Meigs v. M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815). See also *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983). The Constitution guards against *all* uncompensated takings, not just maliciously intended ones. If a taking has occurred, compensation should follow. As the Court put it in *Owen*:

Doctrines of tort law have changed significantly over the past century, and our no-

protection and concern are any less valid (or will lead to more governmental wimpiness) than in other areas in which liability has traditionally been enforced.²⁹⁷

The Manifesto's idea that government agencies will be taken unaware, or "sandbagged" by property owners who know that they will be adversely affected but lie in the weeds so they may enjoy the spectacle of protracted litigation²⁹⁸ is, with all the respect it deserves, preposterous. Talk about disparaging the realities of land use! Land use decisions are not made in a vacuum. When municipal planners embark on a program of preserving open space, or exacting dedication of property or provision of some municipal service as a condition to development permission, or changing the zoning of land, such decisions are the product of study and public hearings.²⁹⁹ The choices made are deliberate. The process is long

tions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

... The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

445 U.S. at 657 (citation omitted).

297. Curiously, the California Supreme Court, which stands in the forefront of the sponsors of the "chilling" doctrine in land use cases, has had no difficulty dismissing out of hand the argument that government would cease to govern properly if held accountable for its torts. *Compare Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-76, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 376-77 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), with *Johnson v. State*, 69 Cal. 2d 782, 792, 447 P.2d 352, 73 Cal. Rptr. 240, 247 (1968). See also cases discussed in Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W.L. REV. 199, 252-59 (1973), and Kanner, *When is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 76-85 (1969).

Moreover, to deny compensation in a field governed by an *express* constitutional guarantee of compensation while allowing it in areas where the right to compensation must be judicially created, *see, e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), makes no sense.

298. See *The Manifesto*, *supra* note 1, at 223.

299. See, *e.g.*, 2 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* §§ 22.01-22.02, 27.04, 27.06, 29.01-29.03 (4th ed. 1985); 1 N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND POLICE POWER* §§ 1.22-1.33, at 40-55 (1974).

A jury in Utah recently returned a \$3.2 million judgment against the town of Brian Head and eight current and former town officials for abusing the police power to stifle competition in condominium construction. *The evidence showed that the plans had been presented to the planning commission and town board 13 times* (and reworked in between to meet town objections and suggestions). Messerly, *Jury Finds Officials Abused Power: Brian Head Developers Awarded \$3.2-Million Damages*, L.A. Times, Feb. 9, 1986, part VII, at 9, col. 1. The pattern is

and entails many steps. Property owners who feel they are unfairly treated are vocal in their opposition.³⁰⁰ Besides, the recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank*³⁰¹ makes it mandatory for a property owner to run a lengthy, complex gauntlet of applications, hearings, administrative reviews, legislative debates, etc., which cannot help but put every municipal government that is not comatose on clear notice that the contested regulation is claimed to be draconian in its impact. No one *wants* to buy a lawsuit rather than use his property.³⁰²

Thus, when a municipality consciously decides that—notwithstanding the protests of the regulated—it is in the public interest to enact the regulation, it is not “unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.”³⁰³

Far from “chilling” the efforts of municipal planners, the potential of compensatory judgments should bring them into the real world and encourage them to evaluate not merely whether what they want to do is abstractly desirable, but also the economic consequences undisguised by disingenuous disregard of ensuing externalities.

Finally, this version of “chilling” stands both logic and Constitutional doctrine on their respective heads. The concept of “chilling” rests on the idea that rights protected by the Constitution are so precious that they require judicial protection not only from outright invasions, but also from governmental activities which, though not crudely violative of the constitutional letter, would in practice erode those cherished rights. *That* is what legitimate concerns over “chilling” are about.

To urge a perverted concept of “chilling” which demands that constitutional values (i.e., protection of the rights of property owners against uncompensated takings) be narrowly circumscribed, lest those who would violate them be “chilled,” is simply an Orwellian inversion of the English language, as well as of constitutional values. The ethical and logical basis on which the concept of “chilling” rests is intended to pro-

not unusual, even if the number of presentations seems high. People who want to develop their property are generally willing to go to great lengths to achieve municipal approval. Oh, yes, need we mention that the delay caused the Brian Head property to go into foreclosure? *Id.* See *supra* note 245 and accompanying text. If any further persuasion is needed, take a look at the facts of *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1190-91 (5th Cir. 1981).

300. See generally R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* (1985).

301. 105 S. Ct. 3108 (1985).

302. See *The Manifesto*, *supra* note 1, at 207 n.47.

303. *Boyce Motor Lines, Inc., v. United States*, 342 U.S. 337, 340 (1952) (footnote omitted). *Accord* *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980).

tect the individual citizen from constitutional overreaching by the powerful government, not the other way around. It is indeed supposed to provide disincentives to the government when it sets out on a constitutionally suspect path. Confronting a would-be constitutional violator with the prospect of unpleasant consequences is not "chilling"—it is deterrence from wrongdoing.

It would be an anomalous inversion of societal values to say that constitutional violations should be encouraged, lest their discouragement work a "chilling" of those who would set out on a path of collision with the nation's organic law.

XI. CONCLUSION

It is time for resolution. Indeed, the time is long past. Government agencies and all who deal with them need to know what the rules are. The thrill has gone out of continuous litigation.

The Manifesto, openly designed as "a brief opposing the theory that regulation which 'goes too far' constitutionally requires compensation,"³⁰⁴ purports to offer guidance. But how much help can it be? It is hoped that the discussion in these pages has exposed the manifold errors and omissions in the Gang of Five's analysis. If nothing else, a "brief" on remedies which fails to discuss or even cite any of the Supreme Court's cases on remedies must be suspect—to put it charitably.

Perhaps there were simply too many cooks. With five sets of hands contributing to the effort, crucial cases went unmentioned, settled doctrines were confused or overlooked, and analytical gaffes multiplied. Rhetorical vigor and hyperbole took precedence over analysis and consistency of thought.

Plainly, something got scrambled aside from the breakfast eggs at that White River Junction HOJO's. Perhaps the true identity of this Gang of Five is *The Gang That Couldn't Shoot Straight*.

In his casebook on land use planning, Professor Williams included an injunction which seems highly pertinent as an admonition to the readers of *The Manifesto*: "Read, mark, and inwardly digest—but don't believe a word of it."³⁰⁵

304. *The Manifesto*, *supra* note 1, at 245.

305. 1 N. WILLIAMS, *AMERICAN PLANNING LAW: LAND USE AND POLICE POWER* (1978), quoted in Williams, *Planning Law in the 80s: What Do We Know About It?*, in *ZONING AND PLANNING LAW HANDBOOK* 465, 501 (1984).

