THE EVALUATION OF COMPENSABLE REGULATIONS: A RETURN TO BEUSCHER'S DEFENSE OF INVALIDATION

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I. INTRODUCTION

Donald Hagman's *Windfalls for Wipeouts*[1] is a seminal legal work, because it offers a comprehensive study and a comprehensive proposal for compensating the losses of landowners and recapturing the benefits to landowners—losses and benefits flowing from the activities of governments and private parties.

The law of *Windfalls for Wipeouts* is appealing for one basic reason: A law compensating undeserved loss by undeserved gain appears to reassert the explicit role of law in its rightful function as an instrument of fairness.[2] Of course, the type of fairness sought is a limited one. Donald Hagman and his co-authors of *Windfalls for*

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1. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978) [hereinafter cited as HAGMAN].

2. Rawls has articulated the fairness theory of justice. J. RAWLS, A THEORY OF JUSTICE (1971). It is worth noting, however, that he distinguishes narrow legal formal equity from broader social justice. *Id.* at 235-38. HAGMAN, *supra* note 1, does not mention a concept of justice, since HAGMAN is not concerned with Rawl's "difference principle" which focuses on protecting the least favored. HAGMAN clearly concludes

Wipeouts narrow their sights to the subject of land value capture and compensation. This narrowing may result in an increase in equitable treatment among real property owners, which, as the authors point out,[3] does not mean that justice has been achieved in society as a whole. If we don't permit Hagman's narrower notion of equity among real property holders to divert our attention from the broader inequalities of our society,[4] the restoration of fairness among middle-class property owners could be the first step towards a return to the basic principle that law is an explicit means to achieve justice.[5] On the other hand, total preoccupation with Hagman's pursuit of middle-class equity at the expense of social justice is a dangerous disability, one which should be avoided.[6]

In this Article I discuss the *objects* of justice—the "property" to be redistributed through the windfalls-wipeouts scheme. More specifically, I examine the nature of the property which Hagman proposes to redistribute, and whether such redistribution through compensatory mechanisms is always possible.

Central to the idea of *Windfalls for Wipeouts* is the translation of the windfalls into money measurements to permit a compensation for the wipeout. Justice is monetized and the fundamental nature of property is correspondingly commercialized. This translation of property into money equivalents is nowhere more apparent than in Hagman's discussion of "Compensable Regulations."[7] Hagman believes that either through legislative or court action, "significant" wipeouts due to regulations should be compensated by money payments.[8]

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that windfalls for wipeouts is middle-class justice. *See* text accompanying notes 2-6 *infra*.

3. HAGMAN, *supra* note 1, at 155-68.

4. One could argue, of course, that the functioning of the legal system does precisely this: absorb the attention of lawyers to a narrow middle-class fairness at the expense of larger social justice issues.

5. Other papers offered at a conference on this topic debate the appropriate standards of equity and their relationship to other values in our society such as efficiency in the search to determine what losses and gains are "undeserved." Windfalls for Wipeouts Conference, Vermont Law School, August, 1979.

6. One way to avoid such a disability is to analyze the "windfalls" (few) and "wipeouts" (many) that the poor in American society suffer from the regulatory apparatus. For a brief discussion of relief only for "little people," see HAGMAN, *supra* note 1, at 251.

7. *Id.* at 256-307.

8. *Id.* at pp. 31 et seq. on the omnibus scheme, pp. 44 et seq. on the specific "nar-

Hagman notwithstanding, my conclusion is that certain selected individual and social values adhere to property, that these important aspects of property are not translatable into money equivalents, and that hence, these values cannot be redistributed by the state through compensatory mechanisms. At the practical level, such a conclusion leads me to reassert the need for invalidation of certain regulations rather than compensating the victim of such regulation. Accordingly, I return to the conclusions (but not to the reasoning) of Beuscher with which Hagman so definitely disagrees.[9] I do not, however, regard invalidation and compensation as mutually exclusive remedies, and, therefore, I offer certain modest amendments to Hagman's grand omnibus scheme for compensation.

At the theoretical level, I face the difficult problem of reconciling the ideal of fairness with the practical non-fungibility of property. Obviously, if monetary compensation systems often cannot be used to achieve complete fairness, what, if anything, can be used? Is one bound to an inequalitarian status quo in these situations where compensation is not appropriate? I discuss some incomplete proposals for escaping this dilemma later in the Article.

II. HAGMAN'S POSITION ON COMPENSABLE REGULATIONS

Hagman neatly summarizes his position on compensable regulations as follows:

> When there is a harsh regulation constituting a taking, the court shall require payment of damages while the invalid regulation was in force. The court shall further hold the matter and permit the local government to consider whether it wants to continue the regulation in force and pay future damages. If the government so indicates, the damages shall be the difference in the annual rental value of the property regulated and as it could be validly regulated, with payments made annually so long as the invalid regulation is continued in force. No property interest is acquired.[10]

Hagman's argument is: 1) there are "harsh" regulations which do constitute "takings;" 2) when a regulation is deemed to be "a taking,"

row scheme", and chapter 11 for compensible regulations. Hagman does not discuss the possibility of compensating by exchange of land which could expand the practicality and applicability of compensating approaches.

9. HAGMAN, *supra* note 1, at 256-58.

10. *Id.* at 296.

there should be compensation;[11] 3) the regulation should be compensated in the form of damages (rather than the acquistion of interest); 4) the regulator should have the option of continuing regulation and paying damages (as opposed to simply making a retrospective arrangement or permitting the regulated to have the option); 5) the amount of compensation would be the difference in the annual rental value of the property regulated with annual payments so long as the invalid regulation is in force.

Hagman buttresses his conclusion by arguing that the bulk of scholarly opinion favors compensating regulations and that opinion which does not, is mistaken.[12] Hagman documents that legislatures have provided for such compensatory mechanisms through the Highway Beautification Act,[13] the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970,[14] as well as state legislation.[15] His discussion itemizes the variety of recent legislative proposals for such compensation approaches.[16] Hagman concludes there has been judicial recognition "from constitutional cloth"[17] and he summarizes what other CANZEUS countries[18] have adopted in the way of compensatory schemes.[19]

In reading the conclusion that "American courts and legislators might well find it in the public interest to tip-toe into the compensable regulation area,"[20] Hagman does not explicitly relate to his chapter on the omnibus scheme for windfalls for wipeouts which he sets forth in the book, but, presumably, the entire chapter on compensable regulations can be construed as indirect support for his more general recommendations for an omnibus scheme. On the other hand, perhaps he is saying that compensable regulations are the first step toward a broader windfalls for wipeouts approach. This ambiguity

11. This assumes the regulation would not be invalidated. Conversations with Hagman suggest that he does not rule out invalidation, but his text does not indicate that, nor does he indicate what the line is between compensation and invalidation.

12. HAGMAN, *supra* note 1, at 256-66, 290-97.

13. 23 U.S.C. § 131(g) (1976).

14. 42 U.S.C §§ 4601-4655 (1976).

15. *See* Hagman, *supra* note 1, at 266-68.

16. HAGMAN, *supra* note 1, at 269-72.

17. *Id.* at 272-79.

18. The CANZEUS countries are: Canada, Australia, New Zealand, England, and the United States.

19. *Id.* at 279-90.

20. *Id.* at 307.

may be important to a complete evaluation of Hagman's argument, because without the windfall recapture mechanism in place, money may not be readily available for wipeout compensation.

A second tantalizing ambiguity in Hagman's argument is that he never really tells us where he stands on the line between acceptable regulation (without invalidation or compensation) and unacceptable regulation. Hagman fails to discuss what a "harsh" regulation is. He leaves unsolved the "taking" question. Hagman is so intent on arguing for compensation rather than invalidation as a remedy and arguing that no property interest should be acquired as part of that compensation that readers are left with no real definition of the "harsh" regulations for which compensation will be forthcoming.[21] Without agreement on the "taking issue," the smooth administration of a windfall for wipeouts scheme collapses.

III. THE NEED FOR INVALIDATION TO PROTECT INDIVIDUAL VALUES

A. *Pragmatic Rationales for Invalidation*

The central assertion in Hagman's chapter on compensable regulations is that invalidation as a remedy for "harsh" regulations is a less desirable policy than compensation. Hagman rejects some reasons given by Beuscher for reliance on invalidation.[22] Among other assertions, Beuscher argued that 1) the finances and operation of government would be adversely affected; 2) the property might have other uses; 3) invalidation was the best remedy against "arbitrary" exercise of government power; and 4) the due process clause addition to the compensation clause in the Constitution suggests that the Constitution's drafters believed that not all wrongful interference is compensable.[23] Some of these reasons have been reasserted in *Agins v. City of Tiburon*,[24] recently decided by the United States Supreme Court.

21. There are several places in the book where Hagman appears to assume a standard for an appropriate line between regulation and acquisition. *See, e.g.*, HAGMAN, *supra* note 1, at 515. In his omnibus scheme, he allows a 10% reduction not to be significant.

22. *Id.* at 257, 290-93. I do not believe that Hagman answers Beuscher's last objection, based upon an appeal to the "due process" clause.

23. J. BEUSCHER, LAND USE CONTROLS: CASES AND MATERIALS, 538-550 (3rd ed. 1964).

24 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 100 S. Ct. 2138 (1980).

However, Hagman ignores the facts in "taking" cases, as reviewed by Norman Williams,[25] facts which suggest that the court's invalidation serves several pragmatic functions not easily handled by compensation. Williams points out that in addition to looking at the impact of the regulation on the value of the land, the courts look at the legitimacy of the goals of the public activity involved, whether the method chosen to regulate was overbroad or arbitrary, and the clarity and administrative feasibility of the regulation in question.[26] Hagman, by turning a regulation into a readily available compensatory provision, could discourage the court from using invalidation as a flexible method for handling these problems. In reply, Hagman could argue that if public compensation were available, the costs to the public fisc would discourage adoption of regulations with inappropriate goals, overbroad programs, unclear regulations, and infeasible adminsitrative schemes. Thus, a flexible invalidation method would not be needed. Alternatively, Hagman might argue that objections to regulations based upon these concerns identified by Williams should properly be raised in court under other legal doctrines. Thus, Hagman could plausibly argue that the Due Process and Equal Protection clauses should be invoked. Such a position, however, invites the observation: If invalidation takes place under the "taking" rationale or under other doctrines, Hagman's desire for an efficient system of compensation is defeated.

Williams has pointed out that invalidation is likely to occur where no carefully considered rationale exists for the regulation, where a broad public interest is not being pursued, where municipalities have been blatantly inconsistent in their policies, or where they have sought to use regulations to deliberately lower their costs of acquisition.[27] All of these circumstances probably involve situations where proper planning has not occurred. Compensatory schemes, rather than invalidation in these situations, will merely permit the states or municipalities to buy their way out of planning defects. (Hagman assumes that the increased cost of improper regulations would discourage such regulations—an interesting if unproved hypothesis.)

Of course, Hagman points out that invalidation does not deter municipalities from the above lamentable practices.[28] This may be true

25. 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 162.06 (1975).

26. *Id.*

27. *Id.*

28. HAGMAN, *supra* note 1, at 293.

although Hagman does not cite empirical evidence. (Such evidence is needed!) In any case, the answer to making invalidation a more effective tool may be to have a more detailed court remedy accompanying the invalidation, requiring the municipality to engage in more adequate methods of planning and regulation.[29]

Another major reason for invalidation (specifically related to the "taking" doctrine) is that the property owner must receive a reasonable economic return within a reasonable period of time.[30] Obviously, this rationale best fits Hagman's proposal for the compensatory alternative. As long as the values of private property are economically measurable, and such economic measurement "exhausts" or covers completely the values of the property, compensation would be appropriate. Thus, it is appropriate to limit Hagman's compensation approach to "pure economic" situations, where other pragmatic concerns or noncommercial values do not require invalidation. The question, then, is whether in many situations there remain non-quantifiable individual values in private property which are a protected core either within the constitutional "taking" rationale or the due process clause, and if there are such values, must the court not continue to employ the invalidation theory and remedy.

B. *Non-Pragmatic Rationales for Invalidation*

A recent treatise on the nature of private property suggests that private property rights are based on a qualified claim of individuals to the benefits of their labor, the utilitarian need of individuals to acquire, possess, use and consume, partly as an expression of the human personality, the need for a private property base for political liberty, and the need of the human species for territorality.[31] Such claims and needs form the basis of non-quantifiable values at the core of private property protection.[32] Five lines of legal cases are sugges-

29. The courts have, of course, expanded their remedies in deciding other land use issues, *e.g.*, exclusional zoning. Perhaps the court should appiont referees and hold the case under supervision until new valid legislation is passed.

30. *See* N. WILLIAMS, *supra* note 23, § 162.06.

31. *L. Becker, Property Rights, Philosophic Foundations* (1977). *See also* C. B. MACPHERSON, POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962), in which MacPherson argues that the seventeenth century view of property in the United States embraced these broad economic values.

32. *Id.* Becker offers two other valid defenses of private property. One is based upon the property basis for political liberty and the other on "surplus labor." Both could be handled by forms of guaranteed compensation.

tive of a growing respect for this non-quantifiable residuum of value in private property.

First are those cases dealing with the due process clause. In *Moore v. East Cleveland*,[33] for example, the Court determined that East Cleveland's housing ordinance, which limited occupancy of a dwelling unit to members of a "single family" (defined as a limited category of related individuals), violated the due process clause of the federal Constitution. Most interesting was a concurring opinion by Justice Stevens which argued that such an ordinance intruded upon the basic property right of an owner to determine the intended composition of his or her household and that this property right was protected under a combination of the taking and due process clauses.[34] Under such a constitutional approach, one can imagine regulations which result in the depreciation of significant non-economic beneficial use (such as privacy) being invalidated by the courts.[35] Fixing the precise boundaries for the protection of property based privacy is indeed quite difficult, and beyond the scope of this article.

A second series of cases indicating increasing respect for the non-monetary aspects of property are those which limit the placing of unconstitutional legislative conditions in government grants.[36] In discussing such constitutional limits upon legislative conditions in government grants, Reich has observed that one of the functions of property "is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization."[37] These activities of private individuals and organizations are deemed not to be susceptible to the compensation of government grants. Thus, the cases which place a constitutional limit

33. 431 U.S. 494 (1977). Other Supreme Court cases resurrecting the property doctrine are summarized in W. VanAlstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Rights: The First Decade of the Burger Court*, 43 LAW AND CONTEMP. PROB. 66, 66-82 (1980).

34. *Id.* at 513-21.

35. For a discussion of privacy as a value to be protected see C. FRIED, AN ANATOMY OF VALUES, 137-55 (1970). For a discussion of the evolving relationship of forms of work and property to privacy, see H. ARENDT, THE HUMAN CONDITION 109-18 (1958).

36. For a discussion of these cases, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935) (criticizing the government's power to place conditions on constitutional rights in government contracts); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960) (criticizing the reasoning used by the government and the courts to conditions on constitutional rights).

37. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

on government grant conditions may provide precedents for limiting the extent to which government compensation can be used at all to pay for the losses resulting from a regulation which would intrude upon "the activities of each private individual or organization."[38]

A third suggestive analysis of cases pertaining to nonmonetary aspects of property is Bruce Ackerman's recent brilliant discussion of the "taking" cases.[39] Ackerman suggests that the "taking cases" can be best explained by the concept of "social property"—which any "well-socialized" person should recognize as marking things as "layman's things."[40] If the state transfers the rightful possession, or destroys, or renders the "layman's thing" useless without "ordinary justification," the property has "been taken." "Social property" is distinguished from "legal property" (stock, bonds, etc.), which are not regarded in the same way, either by the layman or the court. Although Ackerman implies that such ordinary layman's interpretations of property might be better discarded, his analysis suggests that the ordinary "well-socialized" layman recognizes individual claims to things which cannot be taken by the state in a certain way and without a good reason. Hagman treats all property as "legal property," easily compensated for. Such a treatment does not correspond with the ordinary "well-socialized" layman.

A fourth line of cases are those placing a limit on the broad eminent domain power, primarily for first amendment reasons. These cases indicate there is some property government cannot buy.[41] A fifth line of cases reflects the courts' unwillingness to extend inverse condemnation to the regulatory situation. This line of cases is cited in *Agins v. City of Tiburon*.[42] In *Agins*, landowners brought an inverse condemnation action seeking damages and declaratory relief from a "Planned Residential Development and Open Space Zone," with a density up to one dwelling unit per acre. The California Supreme Court rejected the remedy of inverse condemnation for "an excessive use of police power" citing *Friedman v. City of Fairfax*,[43]

38. *Id.*

39. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

40. *Id.* at

41. See Nichols, *Eminent Domain: Constitutional Problems in the Taking of Church Lands*, 31 OKLA. L. REV. 191 (1978), (suggesting that the First Amendment blocks condemnation of church property).

42. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 100 S. Ct. 2138 (1980).

43. 81 Cal. App. 3d 667 (1978).

and overruling *Eldridge v. City of Palo Alto*.[44] The United States Supreme Court affirmed the finding that no constitutional taking occurred.[45]

Preventing the direct intervention of the state by use of compensatory regulations into the relationship between privately-owned goods and the person who owns them is based, in some cases, on a respect for the relationship between goods and the human personality. Invalidation alone can protect such a relationship. Compensation, obviously, does not permit such a relationship to be maintained. This view of property—which seeks to protect selected values adhering to private property—is indirectly confirmed by Hagman's own reluctance to extend his windfalls for wipeouts omnibus scheme to compensation for personal property[46] or the purchase of the "new property" discussed by Reich. This reluctance to extend compensatory schemes to personal property betrays Hagman's tacit recognition of the non-economic values of at least some property. Unfortunately, Hagman's recognition does not extend beyond the artificial distinction between real and personal property. Yet this distinction must be replaced by a distinction between property serving certain important personal values and property functioning in the economic market place. It is this latter category of property which Ackerman labels "legal property" and for which compensation schemes are better suited.

Given the frequent overlap between property involving individual values and economic property, courts will have to review taking cases on a case by case basis. In specific cases the court can also prevent the false appeal to personal values from functioning as a mask for special treatment of economic interests. The flexibility of the invalidation tool should permit courts to recognize situations where important non-economic values are at stake. If invalidation is successfully invoked in certain cases where compensation would be fully appropriate, little harm occurs. Court review is necessary because appropriate exceptions cannot be easily articulated in any legislative compensatory scheme.

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44. 57 Cal. App. 3d 613 (1976). *But cf.* Furey v. City of Sacramento, 598 P.2d 844, 157 Cal. Rptr. 684 (1979).

45. 100 S. Ct. 2138 (1980).

46. HAGMAN, *supra* note 1, at 291. The seventeenth century notion of common property, as the private right to a common resource, as opposed to state property, was recently discussed in PROPERTY (C.B. MacPherson ed. 1978).

IV. THE NEED FOR INVALIDATION—TO PROTECT THE SOCIAL VALUES OF PRIVATE PROPERTY

The discussion above focuses upon individual values of privacy and personality. But, certain urban and environmental values, which are customarily viewed as social rather than private property values, may be values to which an individual should be able to lay claim through an interest in property. For example, the personal security which an individual urban property owner has due to the presence of neighbors' "eyes on the street" is quite real as proven by recent urban planning literature. Although private values seem part and parcel of an individual's claim to private property, a more revolutionary way of viewing the matter is to conclude that invalidation under the taking and due process clauses serves to protect both the private and social aspects of private property-values which cannot be protected by compensation to one or a few individuals. The irony of private property principles protecting social values adhering to property needs further explanation.

Thus, paralleling the need to recognize the values of individuality adhering to private property is the need to explicitly acknowledge the social dimensions of the functions of private property. The social dimension of property may be found in the historians' description of the eminent domain doctrine,[47] the economists' view of property as a public device for organizing economic decision making,[48] the "institutionalists' " recognition of the modern "fission" of private property and public control of the parts of modern property's institutions,[49] and the ecologist's recognition of the interconnection of the res of property in one urban or ecological system.[50]

These various insights into the social nature of property suggest that one should begin with a recognition of its social functions. Unfortunately, Hagman's philosophical starting point for his study of compensable regulations is an individualist's view of property. He begins with individual claims to property and assumes that societal regulation is an interference with these individual claims. This individualist bias is illustrated in the following example.

47. *See* Nichols, *supra* note 39.

48. *See generally* Demsetz, *The Exchange and Enforcement of Property, Rights*, 7 J. L. & ECON. 11 (1964).

49. A. BERLE, POWER WITHOUT PROPERTY (1959).

50. *See* J. SENECA & M. TAUSSIG, ENVIRONMENTAL ECONOMICS (1974).

Suppose X owns a large wetland which he wants to fill and develop and which, before development, has a fair market value of $50,000. A wetlands regulation is passed which prohibits all uses beneficial to the owner and results in a significant depreciation of $40,000 in the value of X's property. There is a compensatory mechanism for wipeouts. Assuming this regulation is deemed "harsh," in Hagman's terms, compensation is made available. If the wetland could be validly regulated resulting in a $10,000 depreciation, the damages would be the rental value of $30,000 ($40,000 value under valid regulation minus the $10,000 remaining value under invalid regulation).[51]

Unfortunately, such a neat "individualist" example does not mirror the reality of how compensatory schemes are administered. The administrators of the compensation schemes in Rhode Island,[52] Massachusetts,[53] and Connecticut[54] have reported that compensation under the laws is currently not being paid, and would probably not be paid, even if funds had been appropriated.[55] The administrators reported that either: 1) the statute for compensation was never considered as a "serious provision" (Hagman would argue because no corresponding windfall was available to fund it); or 2) the administrators never seriously considered using the clause because the natural resource involved was believed to be "really public;" or 3) because any serious challenge by an individual property owner for compensation could be bargained away by permitting the owner to develop some of the land; or 4) because the administrators would wait hoping for monies from federal sources to acquire the relevant lands in fee.

The failure of compensatory schemes to work at the administrative level is imitated by the courts. Courts do not treat these compensatory schemes any different from non-compensatory regulations. Under one interpretation of Hagman, the compensatory regulation would permit a court to award compensation where, if no such compensation were available, the court might uphold the regulation de-

51. HAGMAN, *supra* note 19.

52. R.I. GEN. LAWS § 2-1-16 (Supp. 1978) (allowing courts to award damages as compensation without finding that a taking has occurred).

53. MASS. ANN. LAWS Ch. 131, § 40a (Michie Law Coop. 1972) (providing for compensation if court finds that property regulation constitutes a taking).

54. CONN. GEN. STAT. § 22a-43a (1979) (providing for compensation if court finds that property regulation constitutes a taking).

55. Telephone conversations with administrators of Connecticut's Dept. of Environmental Protection, Rhode Island Dept. of Environmental Management and Massachusetts.

spite a serious wipeout. Unfortunately, courts do not appear to follow such Hagmanesque reasoning.

This practical failure of compensatory schemes has theoretical significance. Borrowing from Hagman's language, those compensatory schemes which have been adapted by requiring compensation, made evident the true cost of the public good to the public. The failure of these compensatory schemes merely means that when the public is aware of the costs, it is unwilling to pay the freight. Why does the public react this way?

First, the protection of natural resources such as wetlands by compensatory schemes cannot be offered as "a public good" on a one-by-one, wetland-by-wetland basis as would occur under a compensable regulatory system. Potential public purchasers of any one wetland would be unsure that all or enough land would be protected to fulfill the inter-connected functions of wetlands. Hence, they may be reluctant to buy any one wetland. Although the regulatory compensatory system is implemented on a case-by-case basis, the value of the object regulated is cumulative, *e.g.*, a tidal or inland wetland may have public value only as a part of a *system* of wetlands. The public is therefore unable to assure itself of the satisfactory purchase of many social goods in question through a piecemeal compensatory regulatory scheme. Equally important, given the past history of the public using regulations without paying, the public will adopt a strategy of a new kind of "freeriding;" the public will rely upon unchallenged regulations whereever possible, seeking to avoid payment of compensation. Hagman, in his compensation scheme, ignores the social and interconnected aspects of natural resources and the social context of their regulation.

There is, however, a deeper individualist bias in Hagman's thought. How would a social theorist approach the analysis of the wetlands case described above? Assume society has claim to certain "social goods" such as a water supply, a non-flooding landscape, and a sufficient supply of wetlands to supply nutrients for fish and wildlife. X chooses to take a portion of these social goods through development of "his" land. Presumably, X should pay for these social goods at an "appropriate" price if they are for sale. Ancient private property rules which permit X to take funds from the store of social goods through uncontrolled use of private property, are, in effect, rules "regulating" the expropriation of the social goods by private persons. These private property rules do not provide for proper compensation to society for the social goods taken by X. Public nuisance

law,[56] of course, was a rudimentary method for repayment. Various schemes of effluent fees[57] are more sophisticated forms of seeking to recover the value of the social goods X has taken.

Suppose, however, that a regulation is passed to stop X from using his property in a way that results in his taking from the social goods of society. Such a regulation could theoretically be "harsh" to society, if it did not *fully* stop X from taking social goods (either because it was inadequately formulated or enforced).[58] In this case, or from this point of view, society should be "compensated" beyond the regulation. Needless to say, Hagman does not discuss this compensation.

Hagman does point out, that a regulation, if non-compensatory, may unnecessarily prohibit the individual from selling his property to the public, whereas a compensatory regulation would permit such a sale. Hagman emphasizes giving the individual the freedom to sell his resources to society through compensatory regulations, but he does not see how the individual may have to pay society for the use of its resources. *It is very revealing that Hagman worries about regulations "harsh" to the individual private property owner, but not those "harsh" to society.*

There is a final, even deeper flaw in Hagman's analysis. Some authors[59] have pointed out that it is economically important whether one begins with the assumption that the public has goods which it may be willing to sell as opposed to assuming that the private person owns all goods to be bought by the public in the case of regulation. To quote from Seneca and Tausig:

> Suppose that we begin, instead from the plausible assumption that property rights to the air and other environmental resources reside in the general public and cannot be appropriated by any private parties without adequate compensation. With this assumption it no longer makes sense to value a given level of air quality by asking how much individuals in society are collectively willing to pay for it, as they already own it. Instead, it is

56. In addition to Hagman's discussion, see W. ROGERS, ENVIRONMENTAL LAW §§ 2.1-2.12 (1977).

57. *See* F. ANDERSON, A. KNEESE, P. REED, R. STEVENSON & S. TAYLOR, ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 31-38, 59-68, 134-137 (1977).

58. A recent study of Connecticut's tidelands program reveals a failure to protect these resources. Coastal Area Managment Program, Study of Connecticut's Tide Fund Permit Program (1979) (unpublished manuscript).

59. *E.g.*, J. SENECA & M. TAUSSIG, ENVIRONMENTAL ECONOMICS (1974).

> natural to ask for the minimum amount all individuals in society collectively would be willing to accept as compensation to give up their rights to all higher quality levels. The latter approach yields a maximum estimate of the value of a given level of air quality, and of the quality of environmental resources in general. Why does the latter approach acquire a higher valuation than the willingness to pay approach? The answer is that the original assignment of property rights to the public gives it greater financial ability to achieve a higher standard of consumption, including the consumption of environmental quality.[60]

Hagman, of course, in his chapter on compensatory regulations, assumes that property rests with the individual.

On the basis of these observations, I propose a compensation system complementary to Hagman's system—one which compensates society for regulations which inadequately protect its interest. How would such a complementary system work? Or in other words, how do we put social and individualist perspectives together? We can begin with the private property rule orientation of Hagman. Let's assume from the above example, we measure the amount of "wipeout" to X of the regulation as $30,000. Subtracted from the amount of compensation due to X will be the market value of the social goods taken by X *despite the regulation*, if such goods were offered on the market. If that amount were higher than the compensation due to him (such as $50,000) then X would make a payment (such as $20,000).

Does Hagman account for these amounts to be subtracted from wipeouts added to the social windfall profits? First, Hagman argues in the chapter on compensable regulations that he measured the amount of the wipeout by the difference of the value in the property under the minimally valid regulation and the value of property under the invalid regulation. By doing this he is permitting recognition of the social aspects of property "taken" by the property owner by permitting some regulation without compensation.

This qualification is not contained in his broader definition of wipeout,[61] under his omnibus scheme, or in the definition of value of property for wipeout determination under his narrower land use control scheme.[62] Whether it is contained under his definition of wind-

60. *Id.* at

61. HAGMAN, *supra* note 1, at 44.

62. *Id.* at 60-71.

fall[63] is dubious.

Hagman does approach concern for the social values of property in the discussion in Chapter 16 of existing windfall mechanisms, such as development exactions, impact taxes or other windfall devices. In that chapter, Madelyn Glickfield, in her discussion of the sale of development permission, proposes that the sale price for permission be based upon criteria which include public costs engendered by the development. Glickfield suggests that net costs of a proposal be estimated based not only upon more readily valuable infrastructure costs, but also upon other social costs, such as air pollution, and other costs of the development diverging from the community's policies.[64] The author goes on to admit, however, that such an approach is not feasible. Thus, Hagman and Glickfield recognize the social aspects of property, but do not offer a feasible scheme for protecting them. *It is the lack of feasibility of estimating net social benefits of projects which leads away from the refined approach of determining quantitative monetary compensation and, instead, leads to upholding the regulation without compensation based on a rough judgment that the proposed regulation protects a sufficient if unspecified quantity of social costs. Upholding the regulation is justified without requiring compensation. Alternatively, when such social costs appear minimal and the cost burden upon the developer is immediate, substantial and obvious, the regulation is invalidated.* Thus, the rough "balancing approach" to the taking question, intellectually unsatisfactory as it is, becomes the practical answer in most situations.

Even if a more refined cost-benefit analysis is done, by estimating net costs and benefits of a development proposal, the history of cost-benefit analysis has revealed that there are a variety of social costs and benefits which are not economically measurable.[65] Moreover, the agencies conducting such analyses are notoriously biased. Nothing in Hagman's description of the windfalls-wipeout's agency suggests that this agency would be any less biased. Courts must have the power and legal doctrines necessary to review, check, modify and invalidate any such cost-benefit analysis of the proposed agency,[66] or

63. *Id.* at 40.

64. *Id.* at 394-97.

65. Rosen, *Cost-Benefit Analysis, Judicial Review and the National Environmental Policy Act*, 7 ENVT'L. L. 363-81 (1977).

66. For an example of a similar court review of an environmental cost-benefit analysis, see Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

act as the first line decisionmaker in taking questions.

V. INVALIDATION AS A SOLUTION TO PRACTICAL PROBLEMS OF MEASURING VALUES[67]

A final reason for retaining the invalidation remedy rather than relying upon compensation lies in the very real practical problems of measuring economic values even if one is dealing with "legal property." First, as stated above, Hagman has not provided a standard for measuring the base level of compensation. He does not specify which maximum regulation would be upheld as a base for both determining a "taking" and establishing a base for measurement of compensation. Second, he has not told us how to measure the market value of the hypothetical valid regulation. Third, Miscyznski's study of land use controls in the Hagman book suggests that the impact of a given regulation is not only on the property in question, but upon the property in the entire market.[68] If compensation is to be recognized as measurable or to be paid out at the time of passage of the regulation,[69] the measure of the value over the entire market seems to me

67. A reason for Hagman's efforts to establish compensable regulations is to further equity by not placing the burden upon uncompensated property owners. Yet, it is questionable whether his formula for compensation would treat uncompensated landowners "equally."

For illustrative purposes assume there are two landowners, A and B, in a prime farmland area, each owning 100 acres at an equal market value of $500,000. A wishes to develop housing on one-half of his land and leave 50 acres for farmland. B wishes to develop his entire parcel as a shopping center. Since there is a public desire to keep farmland for farm purposes both are forbidden development opportunity by an agricultural zone. A and B suffer a similar market loss in the value of their properties. Consequently, both are compensated the same even though the social harm of A's uses is clearly less than the harm of B's uses and despite the fact that B might sustain a larger actual loss than A due to the regulation.

Assume further that A could cluster his housing which would leave 60 acres for farming and B could arrange the shopping center to allow 30 acres for farming. Should the relative cost of these arrangements to A and B be considered? Should the relative development options for maximizing the social good of A and B and their willingness to consider these options be considered in measuring the compensation each should receive? This Article does not pretend to answer these questions. Nor does it argue that invalidation remedies would result in more equitable treatment of different property owners. Nevertheless, the development of a compensation system dramatizes equity issues, which, if not resolved, may lead to a system which is more demoralizing to its participants.

68. HAGMAN, *supra* note 1, at 75-111.

69. This is Hagman's recommendation. HAGMAN, *supra* note 1, at p.302.

(and to Hagman's coauthor)[70] extremely difficult. Fourth, specific compensable regulations require compensation be given for damage *due to* the regulation. Appraisal of damage "due to" is the most difficult calculation of all.

The difficulties in measuring provide a rationale for either upholding or invalidating a regulation rather than providing compensation. Invalidation may be based upon the rough judgment that measurement of compensation is so difficult, questionable and expensive, that invalidation or upholding the regulation is the cheaper and less demoralizing alternative.

VI. CONCLUSION

In summary, the thesis of this Article is that invalidation of regulations rather than compensation is necessary to protect individual non-fungible values adhering to property, to give courts flexibility to weight many factors in the "taking" situation, to give courts the opportunity to review agency determination of the social dimensions of property, and to invalidate "harsh" regulations whose damages cannot be accurately measured. The retention of invalidation does not prohibit the use of compensation for economic property, including, where possible, measurement of non-economic costs and benefits. Invalidation is the appropriate remedy in situation where compensation is inadequate.

I want to emphasize that my unwillingness to give full scope to compensatory principles is not equivalent to an inequalitarian position. As Hagman himself points out, windfalls and wipeouts are middle-class landowner problems. To the extent that I fail to support such a system, the most I can be accused of being is an enemy of middle-class equity. Moreover, the recognition and emphasis of the social dimension of property provides support for those who benefit from social regulations. To be sure, those persons benefiting from such regulations may or may not be the poorer segments of our society (depending on the regulation in question). The distributive impacts of regulation is a different question which should be handled by other modifications to our present regulatory system.

If equity as a key term in justice is to be measured arithmetically by the monetary value of the rights in question, any compensatory scheme, such as Hagman's, will probably benefit the richer segments

70. HAGMAN, *supra* note 2, at 103-11.

of society since they will have claims to a greater amount of measurable wealth. If, on the other hand, equity is viewed as proportional access to a wide range of monetary and non-monetary values, then it is less clear that the wealthier are in a better position.[71] Under this broader concept of justice, non-monetary legal methods will be needed to protect these values. Rather than focusing on ingenious schemes for monetary compensation, we should be looking at legal methods for the protection of non-monetary values in American society.

71. The compensatory principle assumes that the equality of fairness or justice can be properly measured out by compensatory principles. An analysis of the idea of equality suggest that there are forms of equality which are not subject to quantitative treatment, either because they are equalities of value, difficult to measure, or equalities of preseciptive remedies (which may not be subject to more or less). See "The Idea of Equality", pp. 303-350, *The Great Ideas Today* (1968) Britannica. Rawls rejects the notion of equality implicit in the concept of fairness because of the difficulties of measurement and because such preportionate equality would give to some a stronger claim to social resources based upon their natural inequality (p. 510). RAWLS, *A Theory of Justice* (1971).