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Planning Without Prices: The Taking Clause As It Relates to Land Use Regulation Without Compensation [Review of book edited by Bernard H. Siegan]

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BOOK REVIEW

ROBERT H. ABRAMS†

Reviewing: PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATES TO LAND USE REGULATION WITHOUT COMPENSATION. Edited by Bernard H. Siegan. Lexington, Mass.: D.C. Heath & Co., 1977. Pp. 191. \$14.50.

This volume presents a series of papers delivered in 1975 at a conference entitled "The Taking Issue: An Economic Analysis."¹ It is prefaced with an essay by Professor B. H. Siegan,² the chairperson of the conference. The central paper, by M. Bruce Johnson, decries the present practice of land use regulation without compensation as "Planning Without Prices."³ Several distinguished commentators, both legal and economic, comment on Johnson's position.⁴ This review will examine some of the major topics discussed in the volume and raise a few objections to its analysis.

Siegan's preface has unusual prominence for an introduction.⁵ In part this stems from the fact that the publication of the book lagged more than a year and one-half behind the conference and in the interim several judicial opinions had been rendered which allegedly required exegesis. In part this reflects the need to establish a working understanding of the concept of

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1. The legal problem, which is generically described as the taking issue, arises in determining when in the wake of governmental regulation compensation must be paid under the due process clause of the fifth amendment (applied to the states by the fourteenth amendment). The relevant language is: "nor shall private property be taken for public use without just compensation." U.S. CONST., Amend. V.

2. Siegan, *Editor's Introduction: The Anomaly of Regulation under the Taking Clause*, in PLANNING WITHOUT PRICES (B. Siegan, ed. 1977).

3. Johnson, *Planning Without Prices: A Discussion of Land Use Regulation without Compensation*, in PLANNING WITHOUT PRICES 63 (B. Siegan, ed. 1977).

4. They are: Anderson, *Some Thoughts on the Political Economy of Land Use Regulation*; Hagman, *Land Use Regulation without Compensation: A Mugwumpian View*; Davis, *A Political Economist Views the Taking Issue*; Tarlock, *A Correlative Rights Approach to the Taking Issue*; Johnson, *Response to the Discussants of "Planning Without Prices,"* in PLANNING WITHOUT PRICES (B. Siegan, ed. 1977).

5. The essay occupies 62 of 184 pages in the volume, thus exceeding in length the principal essay of Johnson, even when Johnson's rebuttal remarks are added.

private property⁶ at the outset of any discourse on the taking issue. Siegan's preface, however, becomes an assault on the spate of modern precedents⁷, which have broadened the ambit of permissible governmental activity in the area of land use planning. In the face of calls for even broader governmental freedom from the compensation requirement of the Bill of Rights,⁸ Siegan offers a redefinition of the problem.

Siegan attempts to draw from the condemnation and inverse condemnation cases, which were decided under the Holmesian formulation from *Pennsylvania Coal Co. v. Mahon*,⁹ a definition of private property that includes as a compensable property interest the invasion of landowner expectations of future profits or profitable uses.¹⁰ The relevant inquiry becomes: When may a property owner successfully pursue an action for inverse condemnation. Taken together, the inverse condemnation decisions present a series of *ad hoc* determinations that in the particular circumstances the government must compensate. It is not obvious that an award of damages to a particular plaintiff is indicative of the appropriate outer limits of governmental authority, let alone a basis for wholesale invalidation of the regulatory powers of government.¹¹ While Siegan does not explicitly make such a claim, he appears to have such a goal in mind, for if his definition of private property is correct, then all that is left is a mechanical denouement reciting that all govern-

6. Taking issues occur in many contexts where the asserted effect of governmental activity is the curtailment or destruction of private property. *See, e.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928) (legislation requiring destruction of private property to prevent spread of blight); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (legislation prohibiting full exercise of privately owned mineral rights to avoid subsidence of residentially occupied lands); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (restriction on type of use to be made of a parcel, which forced elimination of a highly profitable existing use, leaving no commensurate use available).

7. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

8. *See* THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH (W. Reilly ed. 1973); F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

9. 260 U.S. 393 (1922). Justice Holmes' famous formulation is that a regulation which is too restrictive becomes a taking. *Id.* 413.

10. Siegan's discussion of *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), and *Keystone Assocs. v. State*, 82 Misc. 2d 620, 371 N.Y.S.2d 814 (Ct. Cl. 1975), *aff'd*, 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1972) is particularly in point. Siegan, *supra* note 2, at 7-8, 15-16.

11. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 459-65 (1978).

mental land use controls interfere with such property interests, and are therefore appropriately viewed as takings.¹²

The Johnson paper starts with a similar premise, that "[i]t is important to agree at the outset that the debate is over property rights"¹³ Unlike Siegan, Johnson initially leaves the term "private property" undefined so that the issue becomes what property interests will be protected by the taking clause. Johnson demonstrates the profundity of the consequences which will follow from the definition ultimately chosen. Johnson's argument is essentially simple although its legal underpinnings are difficult to follow: absent some price mechanism, government regulators of property use will overregulate, causing a severely sub-optimal utilization of land as a resource. Johnson's solution is an indirect one, calling for further research into the role of property rights in civil and economic liberty.¹⁴ Implicit in his plea¹⁵ is the threat that too narrow a definition of compensable property interests will vitiate important constitutional guarantees of individual freedom.¹⁶

The legal reasoning which prefaces the bold leap to such a conclusion is deserving of explication. Initially Johnson notes that the Constitution's language sets up two entirely separate protections—one requiring due process for all deprivations of life, liberty, and property; another requiring (without apparent qualification) compensation when private property is taken for public use.¹⁷ He then notes that the broad due process protection is a qualified protection; the police power of the state can permissibly operate to the detriment of individual claims of protected interests. Moreover, the concept of permissible regulation has grown from nuisance abatement, a long acknowledged governmental prerogative, to nuisance prevention with the 1926 decision of *Euclid v. Ambler Realty Co.*¹⁸ Shortly thereafter, the

12. Indeed, Siegan attempts such a demonstration, with emphasis on refuting the propriety of the special deference given to zoning regulation. See Siegan, *supra* note 2, at 16-50.

13. Johnson, *supra* note 3, at 65.

14. *Id.* 104.

15. Johnson's discussion makes this point explicit. *Id.* 79-81.

16. Perhaps overstating his own position, Johnson, in conclusion, raises the spectre that other guaranteed freedoms will also perish in the wake of unchecked government regulation: "Until this task is accomplished, fundamental individual rights will continue to erode in the face of pressures to advance the cause célèbre of the day." *Id.* 104.

17. *Id.* 68.

18. 272 U.S. 365 (1926).

doctrine of substantive due process fell into disrepute, eliminating another check on the potential majoritarian tyranny of the legislature and the agencies it creates. Reflecting on this state of affairs, Johnson, after establishing an unusual model of constitutional values,¹⁹ concludes that the "submissive" due process protection of the fifth amendment offers no protection to property. Thus, the taking clause remains the only hope: "[I]f the state does not pay compensation for damage it does by its regulation, then private property rights have vanished."²⁰ One need not parse Johnson's words to realize that his empty vessel attitude toward property rights is already filled with intuitive notions of substantive content. The "damage" that will flow from government regulation not accompanied by compensation must be damage stemming from the destruction of some aspect of private property. In short, Johnson's paper is not neutral because he implicitly defines the content of private property rights without justifying his choice.

In contrast to Johnson's implicit definition of protected property rights is the definition offered by Professor A. Dan Tarlock. Tarlock states that: "The current tension between private property and government regulation arises out of need to assign property rights in common property resources that have not been previously seen as common."²¹ Noting, as does Johnson, that natural law and natural rights theories of property have been eclipsed in the twentieth century, Tarlock proceeds in an entirely different direction. He does not seek to reinvest the private property tradition with new vitality, rather he builds on a model which acknowledges the authority of society to subordinate individual interests to societal interests. Specifically, Tarlock nurtures the concept that the goal of modern property law is "to assign [property] rights so that the maximum number of users can make an efficient use of the property."²²

19. This description of Johnson's constitutional model may, in fact, be too polite, for the model proposed appears to be nonsense. Johnson envisions a continuum which runs between "absolute police power at one end and the due process protection at the other." Johnson, *supra* note 3, at 80. Realistically, however, Johnson is seeking to assert (albeit inartfully) that the scope and standard of judicial review of legislative reduction of individual freedom varies depending on the right allegedly abridged. He argues property should regain its former place, close to speech, in the hierarchy of constitutionally valued and judicially protected freedoms.

20. Johnson, *supra* note 3, at 81.

21. Tarlock, *supra* note 4, at 163.

22. *Id.* 168.

Thus, society as a regulator can validly regulate, without paying compensation, when the object of the regulation is an assertion of the correlative rights in the property, which are "owned" by other property holders or society at large. In contrast, regulations which expropriate a benefit and confer it on a broader, more diffuse class are compensable. While this is an interesting thesis, it is not developed with enough detail to allow truly meaningful discussion.²³

The use of economic analysis in *Planning Without Prices* occasions somewhat less comment than did the definition of private property. The presentation is largely direct and understandable; the principles applied are familiar even to those who have only a passing knowledge of price theory and microeconomics. There are, however, some interesting wrinkles to Johnson's presentation. For example, Johnson maintains that the displeasure of those who object to a private market decision to develop previously untrammelled natural resources should be ignored. This is a specific illustration of the general problem of treating adverse psychological effects as externalities.²⁴ Although Johnson recognizes that it is theoretically possible to create an economic system that considers the welfare of these remote third parties,²⁵ he concludes that "this organization of society could theoretically block all economic activity . . ." ²⁶ Recognizing that a typical market economy will not reflect the psychological costs to those opposing a particular resource decision, he notes that the alternative method of accounting for such costs is state regulation.²⁷

23. See Johnson's intriguing rebuttal on the ground that there is much ambiguity inherent in Tarlock's model regarding the original assignment of correlative property interests. Johnson, *supra* note 4, at 182-83.

24. For a thorough definition of externality, see Johnson, *supra* note 3, at 74. Johnson quotes Pigou:

[O]ne person A, in the course of rendering some service . . . to a second person B, incidentally also renders services or disservices to other persons (not producers of like services), of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.

Id., quoting A.C. PIGOU, *THE ECONOMICS OF WELFARE* 183 (1932).

25. This describes a Pareto-optimal system. Stated simply, a transaction is Pareto-preferred when there is no one in the society who would feel himself worse off if the transaction were made. A particular set of transactions is Pareto-optimal if all possible Pareto-preferred transactions have occurred. See generally Johnson, *supra* note 3, at 72-73 and authorities cited therein.

26. *Id.* 76.

27. He states, "the market itself will internalize in a private property system some (many or few?) of the externalities without state interference." Johnson, *supra* note 3, at 83.

In a series of oblique passages, Johnson then discusses the limitations on state power to regulate in order to avoid the imposition of psychological costs on those opposing a particular resource decision, such as the development of previously undeveloped resources. In this analysis, Johnson explores side constraints, which he largely defines by example. In his view, for instance, the first amendment free speech guarantee can be considered a side constraint that would insulate the sale of books advocating unpopular ideas from state regulation. While there will still be some individuals who may feel less well off because the unpopular views are being disseminated, the side constraint prevents government from acting to protect their feelings. Restated in economic terms, the net effect of side constraints is to allow analysis of a particular transaction to ignore externalities if the cause of those externalities is within the ambit of the side constraint.

Having developed this elaborate analytic superstructure, Johnson is then able to unleash side constraints as a basis for ignoring the welfare losses of conservationists. Government intervention to prevent these losses would appear impossible in a Pareto-preferred²⁸ system because of the presumed diversity of individual tastes. Some individuals will feel themselves less well off as a consequence of the regulation *unless* compensation is paid.²⁹ Of course, the payment of compensation would in turn engender disappointment in those who oppose its payment.³⁰ To Johnson, the means of avoiding this unhappy state action is to increase the constraint set of individual rights, particularly the rights of private property. Thus, it seems Johnson has taken an interesting but circuitous path only to assume his conclusion.³¹

While it would be possible to comment further on other important themes³² found in *Planning Without Prices*, this review

28. For a definition of Pareto-preferred see note 26 *supra*.

29. Johnson, *supra* note 3, at 83.

30. It is apparent that such individuals exist, see, e.g., Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201 (1974).

31. In fact, Johnson himself seems to say as much. He states:

"The larger the constraint set of individual rights, the smaller the set of admissible externalities subject to state action. This approach, which may strike some as a finesse of the problem, reduces the area of controversial activities by definition." Johnson, *supra* note 3, at 83.

32. Johnson's analysis of why bureaucracies produce over regulation and the Johnson-Hagman debate over the impact of land use controls on the poor, are but two of many topics which merit attention.

has sufficiently conveyed the flavor of the volume and the issues therein. Although the book is heavily weighted toward Siegan's position,³³ which favors market economics as the preferred allocative device, it makes a useful contribution to the literature on the role of the fifth amendment in the land use planning context. Despite its organizational faults and gaps in logic the papers are well researched and provocative, making it a valuable source of information on the taking issue. The volume is weakened by the relative brevity of the papers and the inadequacy of conference paper format for so vast a subject. There is still much to be said of the taking issue in the planning context.³⁴

33. *See, e.g.*, B.H. SIEGAN, *OTHER PEOPLE'S PROPERTY* (1976); B.H. SIEGAN, *LAND USE WITHOUT ZONING* (1973).

34. For a recent attempt at clarification in this difficult field *see*, B.A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). *But see* Epstein, *Book Review*, 30 *STAN. L. REV.* 635 (1978).