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**THE PROPERTY RIGHTS SWEEPSTAKES: HAS ANYONE  
HELD THE WINNING TICKET?**

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INTRODUCTION

After nearly three decades struggling with the problem, the U.S. Supreme Court seems finally to have given up the effort to formulate workable rules for regulatory takings. The theoretical battle appears to be over, at least for the present, with no winners. But there are losers, landowners who are clearly victims of inequity, if not of constitutional wrongs. Why do we find ourselves in this situation? It is an inescapable product of the land use system we have created. To promote unconstrained private initiative by landowners, we allow owners in a version of a prior appropriation system to use up limited ambient resources like open space and habitat. As a result, nothing is left to later-developing landowners when the limits of acceptable use are finally acknowledged through late-stage regulation. We have thus created a system of winners and losers, burdening a few with obligations that should in fairness have been more equitably apportioned. We can and should do something about it, as an alternative to constitutional litigation.

I. THE STATUS OF THE REGULATORY TAKINGS CONTROVERSY

For nearly 50 years, from the mid-1920s until the mid-1970s, regulatory takings litigation was quiescent almost to the point of disregard. It appeared that the troublesome questions involving government regulation of property, and land use in particular, had been settled.<sup>1</sup>

In essence, the position of the Supreme Court was: (1) even if your property use had previously been lawful and entirely acceptable; (2) you were doing nothing traditionally harmful; and (3) the regulation imposed substantial economic loss on you without any direct mitigating benefit, you could nonetheless be obliged to bear the cost of such regulation rather than having it borne by the general public.

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1. The standard reference was *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which sustained use separation zoning.

The Court never explained satisfactorily why the burdens of such changes should be individually, rather than communally, borne. However, the general notion seemed to be that one must adapt to changing times and values (prohibition,<sup>2</sup> rent control,<sup>3</sup> urbanization<sup>4</sup>) and must live with the fact that legislatures sometimes act imprudently. As Justice Holmes put it with his inimitable succinctness: “That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on [the regulated party’s] constitutional rights.”<sup>5</sup>

While an occasional regulatory taking case would attract the Court’s attention,<sup>6</sup> it evinced no interest in exploring takings law in terms of doctrinal development, saying that there were “[n]o rigid rules”<sup>7</sup> or “set formula[e]”<sup>8</sup> available to tell where regulation ended and a taking began. Then, beginning in the 1980s, something dramatic happened. Probably stimulated first by Justice Rehnquist, who had dissented in the hotly contested *Penn Central* historic preservation case,<sup>9</sup> and then intensified with the appointments of Antonin Scalia in 1986 and Clarence Thomas in 1991, a majority of the Justices began to show a strong interest in regulatory takings cases. In the ensuing two decades, the Court granted review of an unusual number of takings disputes.<sup>10</sup> No doubt the emergence of a well-

2. *Mugler v. Kansas*, 123 U.S. 623, 657 (1887).

3. *Block v. Hirsch*, 256 U.S. 135, 158 (1921).

4. *Euclid*, 272 U.S. 388–90.

5. *Erie R.R. v. Pub. Utils. Comm’rs*, 254 U.S. 394, 410 (1921). Notably, the much-cited Holmes opinion finding a taking in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is exceptional—and probably is explained by the earlier grant of a servitude to the coal company by the landowner—as the great majority of Holmes’s regulatory taking opinions sustain the regulation as non-compensable. See Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 44–45 (1964).

6. *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Armstrong v. United States*, 364 U.S. 40 (1960); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952). There always arise takings cases that do not involve land use and drawing the line between the police power and expropriation, and I do not consider them here. *E.g.*, *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Found.*, 524 U.S. 155 (1998); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979).

7. *Caltex*, 344 U.S. at 156.

8. *Goldblatt*, 369 U.S. at 594.

9. Scalia was appointed in 1986; the *Penn Central* case was decided in 1978. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138–53 (1978) (Rehnquist, J., dissenting).

10. *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *E. Enters. v. Apfel* 524 U.S. 498 (1998); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The Court decided *Agins* and *Ruckelshaus* following *Penn Central* but prior to the

organized, legally astute property rights movement was an important factor as well.

While the vague and open-ended three-pronged test of the 1978 *Penn Central* decision effectively kept in place the long-standing “no rigid rule” and “no set formula” standard,<sup>11</sup> beginning in the 1980s a judicial effort to formulate some clear doctrinal rules for regulatory takings cases emerged. These rules included the “substantially advance” standard of *Agins*<sup>12</sup> and—following the Scalia appointment—the temporary taking doctrine of *First English*,<sup>13</sup> the “nexus” and “rough proportionality” tests of *Nollan*<sup>14</sup> and *Dolan*,<sup>15</sup> the formal invasion rule in *Loretto*,<sup>16</sup> the “when acquired” issue in *Palazzolo*,<sup>17</sup> and the “per se/completely eliminates” and “background principles” rule of *Lucas*.<sup>18</sup>

While each of these standards generated considerable lower court litigation, as well as a mountain of law review literature, experience showed that none of the doctrinal standards worked satisfactorily as predictors of outcome. By 2002, in the *Tahoe-Sierra* moratorium case—where the plaintiffs argued ineptly for a formally mechanical application of the temporary taking rule of *First English*—it began to look like the Court was losing its taste for doctrinal resolution of the regulatory taking conundrum.<sup>19</sup> Three years later, in *Lingle*, it formally abandoned the *Agins* “substantially advance” rule, a due process rather than expropriation standard,<sup>20</sup> and returned to the open-ended, I-(hope)-I-know-it-when-I-see-it approach of *Penn Central*—where we are now.<sup>21</sup>

Today most observers (and I suspect most judges) are ready to concede

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appointment of Scalia. See also *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (dismissing a takings claim on ripeness grounds).

11. The existence of a taking was said to turn on a judicial determination of the economic impact on the claimant, the extent to which the claimant has investment-backed expectations, and the character of the challenged government action. *Penn Cent.*, 438 U.S. at 124.

12. *Agins*, 447 U.S. at 260.

13. *First English*, 482 U.S. at 318.

14. *Nollan*, 483 U.S. at 837.

15. *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

16. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

17. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630, 632 (2001).

18. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1052 (1992).

19. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

20. The standard comes from the due process opinion in *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), though Justice Powell in *Agins* converted it to a takings standard. *Agins v. Tiburon*, 447 U.S. 255, 261 (1980).

21. *Lingle v. Chevron, U.S.A.*, 544 U.S. 528, 540 (2004). In June 2009, the Supreme Court granted review of a takings case, *Stop Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 129 S. Ct. 2792 (2009) (mem.), involving a Florida statute that cut off a riparian owner's right to new accretions in the context of a public beach restoration project.

that government regulation of property operates along a continuum from urgent to marginally important, from minimally costly to extremely burdensome, and from quite traditional to novel and unexpected. Judge-made rules designed to draw a line of constitutional significance between what must be borne by the property owner to what ought to be compensated by the taxpayers are—in all but a very small class of cases<sup>22</sup>—elusive and probably impossible to reduce to any predictive doctrinal formulation. Professor Michelman noted this point in his seminal article many years ago.<sup>23</sup>

Perhaps the time is ripe to take a fresh look at regulation of property, not as a matter of constitutional entitlement and not in search of doctrine, but simply to better understand why this issue has continued to nag at our sense of justice. In short, perhaps it is time simply to talk about fairness and why it seems so elusive in these cases.

## II. FAIRNESS

Before doing so, however, I want to put to the side consideration of a class of cases that, though characterized as takings cases, really involve due process violations.<sup>24</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* and *Eastern Enterprises v. Apfel* are illustrative.<sup>25</sup> *Del Monte Dunes* was a case where the evidence strongly suggested that the authorities would not permit any development,<sup>26</sup> did not seriously consider the applicants'

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22. Ordinary physical invasions have never been particularly controversial, though a contested example appears from time to time, as in *Casitas Municipal Water District v. United States*, 543 F.3d 1276 (C.A. Fed. 2008). There are also some instances (like zoning private land for public park use only) that are obvious expropriations in the verbal form of regulation. *E.g.*, *Miller v. City of Beaver Falls*, 82 A.2d 34 (1951).

23. [T]he courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require.

Frank I. Michelman, *Property, Utility and Fairness; Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1252 (1967).

24. In rejecting the "substantially advance" test of *Agins* in the *Lingle* case, Justice O'Connor said that the *Agins* "formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 540.

25. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 753 (1999) (invoking substantive due process as descriptive of the essential claim in *Agins*); *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

26. Some courts have effectively said that communities cannot simply close themselves to further development at the expense of owners of undeveloped land, but must instead search for some means of acceptable phased development. *See Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Bocas Villas Corp. v. Pence*, 45 Fla. Supp. 65 (Fla. Cir. Ct. 1976), *aff'd sub nom.*, *City of Boca Raton v. Boca Villas Corp.*, 371 So. 2d 154 (Fla. Dist. Ct.

repeated proposals, and kept rejecting them one after another, whatever their content.<sup>27</sup> This behavior is precisely the sort of forbidden governmental conduct that Justice Brennan condemned in his dissent in the earlier *San Diego Gas & Electric* case,<sup>28</sup> and that led to the Court's adoption of the temporary taking doctrine a few years later in *First English*.<sup>29</sup> *Eastern Enterprises* involved retroactive application of a health benefit law to former employees and though treated as a takings case would more appropriately, as Justice Kennedy explained, have been analyzed as a violation of substantive due process.<sup>30</sup>

I would also like to put to the side cases with factual situations like that in *Lucas*, where regulation is imposed so late (the last undeveloped plot on the beach) as to be wholly inefficacious. The State itself apparently recognized that the regulation was ineffective since, after compensating Mr.

App. 1979); *Swanson v. Marin Mun. Water Dist.*, 128 Cal. Rptr. 485, 493 (Cal. Ct. App. 1976). The limiting factor in cases of this sort is usually not exhaustion of ambient resources, but the cost and timing of needed new public infrastructure such as extended roads, water and sewer lines, or schools. See Sean Callagy, *The Water Moratorium: Takings, Markets, and Public Choice Implications of Water Districts*, 35 *ECOLOGY L.Q.* 223 (2008) (discussing a municipality's successful effort to limit growth by issuing a water use moratorium and refusing to upgrade infrastructure to provide better water resources).

26. *Del Monte Dunes*, 526 U.S. at 695–98.

28. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636–61 (1981) (Brennan, J., dissenting).

*“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, [109 Cal. Rptr. 799, 514 P.2d 111] 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.

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“See how easy it is to be a City Attorney. [sic] Sometimes you can lose the battle and still win the war. Good luck.”

*Id.* at 655–56 n.22 (quoting from a presentation at the 1974 conference of the National Institute of Municipal Law Officers in California) (second brackets added).

28. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987); see also *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334 (2002) (rejecting petitioner's “rolling moratoria” theory, which claimed that repeated and seemingly endless moratoria amounted to an unacknowledged no-development posture).

30. *E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in the judgment as a due process violation, but not on the finding of a taking). Compare *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19–20 (1976) (dismissing mining operator's due process challenge to a law that required compensation for former employees' deaths or disabilities) with *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 222–23 (1986) (finding that the Takings Clause was not violated by the imposition of non-contractual liabilities).

Lucas, it resold the land for the very development its regulation had prohibited.<sup>31</sup>

I want instead to consider those more common and troublesome situations where a quite legitimate public purpose is accomplished by regulation that does not constitute a taking under the precedents, yet where one is left with a nagging sense that the owner has not been treated fairly.<sup>32</sup>

In almost every regulatory taking case it considers, the Supreme Court will quote a statement from its 1960 decision in *Armstrong v. United States*: why is the plaintiff compelled “alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[?]”<sup>33</sup> The question is a good one, and it is worth asking how it happens that a particular burden happened to fall where it did, since in the most unsettling regulatory takings cases the plaintiff has not sought to do anything different from what all his neighbors have been doing. What makes the outcome in such cases seem especially perverse, I suggest, is that the problem the regulated party is obliged to resolve is one that has been created not by him but by his neighbors.

I shall use an *Agins*-like situation as an example, though the actual *Agins* case was more factually convoluted than my hypothetical suggests.<sup>34</sup>

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31. The case might properly have been analyzed as transgressing the due process standard of *Nectow v. Cambridge*, 277 U.S. 183 (1928). In *Lucas*, the land was ultimately purchased and then sold by the state, making it available for development after the South Carolina court found for the landowner on remand. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992); see also DAVID LUCAS, LUCAS VS. THE GREEN MACHINE 251–52 (Lorna Bolkey et al. eds., 1995) (stating that the two Lucas lots were sold to a developer for \$730,000). For a critical analysis of the Scalia opinion in the case, see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

32. The notion that fairness is the ultimate measure is omnipresent in takings cases. In *Penn Central*, the Court spoke of the need to determine “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.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

33. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

34. Tiburon consists of nearly 1700 acres. Brief of Respondent-Appellee at 3, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No. 79-602). While more than 250 acres may have been included in the one-to-five acre zoning (and I am unsure how much of that was already developed and perhaps grandfathered), in fact the town only ultimately acquired 48 acres as open space, in addition to the five-acre *Agins* tract, a total of about three percent of the land. Despite the zoning, the town did decide to acquire, rather than downzone, to achieve its open space. Brief for the United States as Amicus Curiae Supporting Respondents at 4, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No. 79-602); Brief for the Conservation Foundation et al. as Amici Curiae Supporting Respondents at 7 n.9, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No. 79-602). It appears that the proposed acquisition of the *Agins* tract broke down over *Agins*' demand for \$2 million for the five acres, which he had purchased in 1968 for \$50,000. Brief for the Conservation Foundation et al. as Amici Curiae Supporting Respondents at 15, *Agins*, 447 U.S. 255 (No. 79-602). Open space planning consultants recommended that the city issue bonds in the

Imagine that until the late 1960s a town just north of San Francisco remained quite undeveloped. Then, in the next decade, it experienced rapid development of expensive homes on small lots, reflecting high real estate prices. As the town's acreage began to fill up, concern about preserving open space mounted. The town debated whether to buy or regulate and in 1973 decided to regulate the few substantial tracts of remaining open land. A principal tract was a landowner's five-acre parcel purchased in 1968, which was re-zoned to allow not more than one house per-acre and as little as one house on the five acres, depending on the decision in an administrative permitting process. In the actual *Agins* case, the Supreme Court viewed the case as premature since no particular application to build had been submitted and denied, and it therefore was not yet possible to determine the economic burden *Agins* would have to bear.<sup>35</sup> *Agins*'s lawyers no doubt purposely brought the case at that stage in order to ask why the cost of newly-required open space zoning should be borne solely by those who owned the remaining open space at the time down-zoning occurred, rather than by the whole community that would benefit from it. As a matter of fairness, the question is a good one. I try to cast some light on it by taking an unconventional path, considering how—rather than why—we end up with such outcomes.

I begin with what I shall call the “ambient resource” hypothesis. Open space in a community is a sort of common amenity like clean air or clean water in a river. Like those resources, it is used up by landowners through development and use of land. While land development, in contrast to air or water discharges, does not physically emit anything outside its boundaries, its impacts—in such forms as congestion, high density, and diminution of light and air—impact the community as a whole. Just as air pollution at some point reaches an unacceptable level, so does loss of open space. A more familiar version of the issue (analogous to an *Agins*-type case) is the now common height, setback, and density limits imposed in urban areas.<sup>36</sup> The economic impact of these limits, however, is usually less severe than large-lot open space zoning.

In each of these situations, it seems appropriate to think of the problem as arising out of the perceived exhaustion of a common, and limited, ambient resource (clean air, absence of congestion, light and air, open space) that has effectively been appropriated by landowners putting their land to use. If we look at the problem this way it would seem most fair, *ab*

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amount of \$1.25 million for the purchase of open space. *Id.* at 7.

35. *Agins*, 447 U.S. at 260.

36. See, e.g., *Welch v. Swasey*, 214 U.S. 91, 103–04 (1909) (height); *Gorieb v. Fox*, 274 U.S. 603, 604–05 (1927) (setbacks).

*initio*, to allocate an equal share of these exhaustible resources to each acre of land. For example, allot to each landowner a certain amount of developmental density.<sup>37</sup> Under such a system, someone like Agins would not be limited to one house per acre (or per five acres) while his neighbors could build much more densely. Available open space, density, or air capacity would be equitably allocated in advance.<sup>38</sup>

If one thinks about the issue this way (landowners appropriating ambient resources), one's focus is on land rights in terms of space: that is, fairness would imply use rights equally distributed spatially. From that perspective, it seems that someone like my hypothetical open space owner is being treated unfairly since he has not had his fair share of an ambient resource (open space) to use. This is the way property rights advocates basically perceive the problem (as a denial of rights in space), though they do not talk in terms of misallocation or appropriation of ambient resources.

The other way of looking at the problem is from the perspective of property rights in time, which is the position courts have generally taken. That is, courts say you must adapt to the circumstances and constraints of the time when you choose to use your property. What might have been permissible earlier (such as more dense development) may no longer be permissible in a more urbanized or densely developed environment or when public values change.<sup>39</sup> From that perspective, a landowner is not being treated unfairly in comparison to his or her neighbors since they also had to adjust to the circumstances of the time in which they developed their land.

It is instructive to consider the exhaustion of ambient resources from the differing perspective of land rights seen in the framework of space and time. Considered in terms of space, to apply different standards (of density, for example) to neighboring properties seems *a priori* unfair. Considered in the framework of time, however, such differences seem reasonable since every owner had an equal chance at any given time to utilize his or her land consistently with the then-operative rules.

Notably, too, the different postures of time and space suggest different

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37. Nothing would prevent them from trading such development rights among themselves, in the manner of transferable development rights (TDRs). Therefore, nothing in such a system would require uniformity of use.

38. Notably, such allocation is sometimes achieved in the planned-unit development, where amenities such as open space are provided to all in common areas, and the cost of preserving such ambient resources is borne by all purchasers of residential parcels within the development. Similarly, developer exactions for amenities like parks, open space, and trails are another form of equitable sharing of costs and benefits. But such arrangements are ordinarily only development-wide and do not embrace an entire community. The use of assessment districts to pay for preserving common benefits, such as wetlands, serves the same purpose but has not been politically acceptable in the main.

39. The classic examples are *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Mugler v. Kansas*, 123 U.S. 623 (1887).

reactions to the common notion that ownership of property must involve a right to use it for some economically profitable purpose.<sup>40</sup> If one's perspective is property in space, then it seems logical to say that beneficial use of the space must be an element of your rights. But considered in the framework of time, it might be said that the owner had an opportunity to make a profitable, or more profitable, use but let that opportunity pass. While the choice of waiting might have paid off handsomely, in this event it did not.

### III. AN ILLUSTRATIVE EXAMPLE OF THE TWO SYSTEMS

To appreciate this dual way of looking at property rights, it might help to take note of an aspect of our legal system that formally adopts both a space-based and a time-based system. Water is a classic example of an ambient resource that can be used up—in the sense that the available supply is totally abstracted, leaving a river bed dry—or legally limited in the amounts that may be abstracted in order to protect water quality or to maintain a fishery. Recall how our water rights systems work. In the East, we generally follow the riparian system, which is space-based. And in the West, we generally follow the appropriation system, which is time-based.<sup>41</sup>

The riparian system grants equivalent use rights to all landowners whose property adjoins a river or lake. Under classic riparian theory, each riparian landowner has the same right to use the river based on its spatial identity (the size and location of its tract), regardless of the time of its use.<sup>42</sup>

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40. No right is recognized to use property profitably, even where the owner is perfectly innocent. For example, no compensation is required when newly discovered knowledge shows a product to be harmful or dangerous to health. As Justice Scalia himself noted in his opinion in *Lucas*, “the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault” would not be entitled to compensation even though “[s]uch regulatory action may well have the effect of eliminating the land’s only economically productive use . . . .” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Scalia’s explanation is that the desired use “was *always* unlawful” (i.e., harmful to health or safety), though no one knew it was harmful earlier. *Id.* at 1030 (emphasis in original). Such an explanation must be little comfort to an owner whose perfectly reasonable investment has been made worthless by a new law embodying newly discovered knowledge.

41. For a detailed explanation of the two systems, see A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (Susan Mauceri ed., Thomson Reuters/West 2009) (1988).

42. The dominant theory is that each riparian owner’s right is correlative. *Mason v. Hoyle*, 14 A. 786, 788 (Conn. 1888); *Half Moon Bay Land Co. v. Cowell*, 160 P. 675, 678 (Cal. 1916). In practice, there are many variations of riparianism. In some, a time-based element comes into play so that a later riparian who cannot show that an existing use is unreasonable may be left without a share of the water. See also *RESTATEMENT (SECOND) OF TORTS* § 855 (1979) (“The reasonableness of a use of water by a riparian proprietor is not controlled by the classification of the use as riparian or nonriparian.”). Sometimes the doctrinal system is contractually changed. Riparians may consent not to sue, and arrangements may be made for shortage-sharing in the case of prior appropriation. Such an arrangement

The water use right is effectively built into the land and is shared among all riparians. Some riparian owners may have to reduce their prior uses if there is not enough left for a newly demanding riparian. Conversely, under a prior appropriation system, timing is everything. If early appropriators take all the available water, later appropriators will be left with nothing. If existing uses have to be reduced, the most junior appropriators will first have to yield their water use until the new instream flow requirements are met.<sup>43</sup> Under that system, space means nothing and time means everything. Land ownership provides no entitlement to water.

Water law is the rare property regime where our legal system has explicitly confronted the time/space distinction in regard to the use of ambient resources. It illustrates that either approach to property rights is *a priori* legitimate and that a landowner may, or may not, have a property right to some share of those resources. Under prior appropriation, if the government determines that no more water is available for appropriation (whether to protect fish, water quality, or instream recreation) a landowner who has not previously appropriated is simply out of luck, regardless of the impact on the value of his land.

Of course, as a matter of strict legal theory, one may say that water is different. Even in a riparian system, it has always been considered a public resource rather than a right embedded in landownership.<sup>44</sup> My purpose, however, is not to suggest a strict parallel but simply to illustrate alternate ways of thinking about ambient resources. I suggest that one may appropriately consider them as embedded in landownership or as free-floating resources available for appropriation. With the possible exception of wildlife,<sup>45</sup> the legal system has not, as far as I know, directly addressed these issues for resources other than water. The ambient air is classically

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evidences a need for more equitable (shared) allocation.

43. The system can be somewhat more complex than this. As to private use rights, no doubt first-in-time operates. However, when existing uses must be reduced to ensure fish survival, there has been a question of whether all users (regardless of priority) can be obliged to contribute equally or whether the burden must fall entirely on the most junior-in-time users. *See United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 175 (Cal. Ct. App. 1986). Unlike capital developments on land, past water use can be easily revised for the future, and if all must contribute, the preferred status of senior-in-time appropriators is reduced. Also, under many arrangements where water is provided by a water district under a large-scale program, individual users may simply have contractual rights, and shortages may be shared pro-rata.

44. *See Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (“[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain [its] rivers . . .”).

45. Laws restricting private land use to protect wildlife habitat go back at least to the 17th century. *See Cawsey v. Brickey*, 144 P. 938, 942 (Wash. 1914); DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW 75-76* (2009) (observing that these protections existed in England during the reign of William and Mary in 1692).

considered unowned and unownable. But, in fact, people appropriate its assimilative capacity as a waste sink for industrial emissions, and we legally determine the limits of that capacity and regulate its use under air pollution laws.<sup>46</sup> Conversely, we seemingly have not addressed issues like density as an independent ambient resource at all, though we do regulate density development and treat it as an exhaustible resource that landowners utilize. The same can be said of habitat—a resource that we recognize and regulate within the context of laws like the Endangered Species Act (ESA)<sup>47</sup>—though it has never formally been given independent status from the acreage to which it is a constituent.

#### IV. HOW OUR SYSTEM WORKS IN FACT

Though we do not talk about it this way, it is obvious that we have adopted a sort of prior appropriation system for ambient resources like density, open space, and habitat. Those who develop first in time are generally allowed to do so with minimal limits on the use of those resources. Then at some later time, the community usually determines that acceptable limits have been reached and further appropriation is limited or prohibited. The landowner is then left in the same position as one who comes to appropriate water in a western state, only to find that the available supply has been fully taken by prior appropriators.<sup>48</sup>

It would have been possible to adopt a different system, under which these ambient resources were equally, or at least much more equally, allocated to landowners on a space-determinative basis. However, this system would have called for a much greater degree of land use planning at an early stage of development, which has distinctly not been the favored approach in this country. There are several probable explanations. The first is a political choice. It reflects a strong desire to leave planning initiatives to owners in the private marketplace, rather than opting for government planning.<sup>49</sup> So the prior appropriation system I have just described is no accident. It grows out of a deep political conviction about how, and by

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46. See, for example, the law relating to new sources in non-attainment areas (where assimilative capacity has legally been used up) under the federal Clean Air Act, 42 U.S.C. § 7501(a) (2006).

47. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006).

48. Governments commonly build projects to increase supplies, by building reservoirs and/or importing water from other sources, but no one thinks it is legally obliged to do so in order to make dry land economically productive.

49. Interestingly, collective governance in the context of private planning does not face the same constraints. This is illustrated by the authority vested in condominium and planned-development home owners associations through Covenants, Conditions, and Restrictions (CC&Rs) (private governance constitutions that are sometimes extremely restrictive). See, e.g., EVAN MCKENZIE, *PRIVATOPIA* 15–18 (1994) (listing examples of private governance constitutions that are sometimes extremely restrictive).

whom, the shape of the landscape should be determined. The result is that our land use lawmaking is basically what I would call late-stage regulation—restrictions come only when the ambient resource in question is nearly exhausted,<sup>50</sup> as illustrated by *Agins*-type cases.

A second explanation is that we are reluctant to adopt what has been called the precautionary approach to things like resource use, climate change being the most striking contemporary example. The consequence is that resources are largely exhausted by the time we officially acknowledge through legislation that we have a problem that needs to be addressed. Another illustration is loss of habitat that produces diminution of biodiversity. On this issue, our general posture has been to defer regulation until evidence of harm is indisputable (as the ESA itself illustrates, this is a last-ditch survival law, rather than a biodiversity protection law). The result is that the burden of protecting remaining habitat usually falls on a very small segment of the landowning population.<sup>51</sup>

#### V. THE SYSTEM WE HAVE CREATED

However unselfconsciously, we have created a competitive system in which landowners in effect vie with each other to get the benefit of acceptable levels of density, assimilative capacity, habitat, open space, and the like. Usually, the race goes to the swift, though obviously it can be advantageous to wait as land values usually rise with time and increased population. There is also always a prospect of getting one's project approved before restrictive regulation comes into effect, especially under our late-stage system of regulation.

The reason such a system arose, as I have just suggested, was not to foment competition and produce an array of winners and losers but rather to minimize governmental control of land use and to spur private initiative. The system probably works well enough for professional developers and large landowners who are sophisticated in the operation of regulatory systems and well-positioned to deal with risk. However, it can be devastating for the individual who buys a lot to build a house and is

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50. An analogy on the international scale is the conflict between early and later industrializing societies, where the ambient resources are, e.g., forest clearings for agriculture or contributions to global warming, and the later developing nations claim an equitable right to garner the same (environmentally destructive) benefits that earlier-developing nations took.

51. Notably, the problem is less extreme where the species at issue are fish. Diminished abstractions for the future can be imposed on all those who take water from the habitat (where the priority system does not apply), whereas with land-based species the habitat has usually been irreparably destroyed, and the burden falls only on those who own the remaining fragment of habitat.

unexpectedly confronted with new restrictions that drastically reduce its usefulness for the purpose the owner had in mind.

Moreover, in many situations there is simply no way one can rely on what the Supreme Court denominated “investment-backed expectations” in the *Penn Central* case.<sup>52</sup> While the endangered species situation is perhaps an extreme case, in which listing and articulating habitat requirements for an endangered species often come as a complete surprise to a landowner, many other situations are also highly unpredictable.

Here the actual *Agins* case is exemplary. Not many years earlier, a California law authorized the acquisition of private property by local governments for open space purposes and specifically empowered them to use eminent domain for that purpose.<sup>53</sup> In addition, academic advocates for open space preservation urged for action by compensated regulation.<sup>54</sup> In *Agins*, the Tiburon officials began by planning to buy the land in question rather than to downzone it.<sup>55</sup> *Agins* bought his land in 1968.<sup>56</sup> Only in 1970 did California mandate an open space element as part of the general land use planning process for local governments, and it mandated open space zoning by cities not later than 1973.<sup>57</sup> In that year, Tiburon enacted an open space zoning ordinance, which included the *Agins* land. The ordinance allowed as few as one, and potentially as many as five, houses on *Agins*'s

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52. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

53. CAL. GOV'T CODE §§ 6950–6954 (West 2008).

54. Some scholars have proposed a law “to regulate land use in the manner of zoning and to guarantee the owner of affected land the value of his property in the manner of eminent domain,” saying “[l]and-use controls which can be sustained as noncompensable regulations under the police power are inadequate to accomplish the broader objectives of open-space preservation.” Jan Z. Krasnowiecki & James C. N. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 184 (1961).

55. In 1972 Tiburon hired the firm of Williams and Mocine to prepare an open space plan, which identified *Agins*'s five acres as “indispensable to and necessary for the open space plan” of the city and stated that the *Agins* property be “forthwith purchased” by the city to meet the requirements of its open space ordinance. Brief of Petitioner-Appellant at 28, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No. 79-602).

56. He paid \$50,000 for five acres (in his suit he sought \$2 million as compensation). Brief for the Conservation Foundation et al. as Amici Curiae Supporting Respondents, *supra* note 34, at 15; Brief of Respondent-Appellee, *supra* note 34, at 7.

57. CAL. GOV'T CODE §§ 65560–65565, 65860(a), 66451, 66474 (West 2009); *see also* CAL. CONST. art. XXVIII (repealed 1974) (declaring that the maintenance, preservation, conservation, and proper assessment of open space lands are in the public interest). The open space zone embraced 250 acres, some 15% of its land area in the new one-to-five acres zoning. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 33, at 4. It originally planned to acquire the *Agins* tract and 25 adjoining acres for open space, and eventually purchased a total of 48 acres on the ridge where the *Agins* property lay, but it abandoned its eminent domain case against the *Agins* tract after *Agins* claimed that the rezoning was a taking of his property. Brief for the Conservation Foundation et al. as Amici Curiae Supporting Respondents, *supra* note 34, at 7–8. Presumably, *Agins*'s \$2 million demand for his land was more than the city was able to pay. *Id.* at 15.

five-acre tract based on a permitting process that considered architectural design and environmental reviews.

Some land acquisitions should surely be seen as speculative at a certain point in time<sup>58</sup> (e.g., we have had regulation of wetland development in many jurisdictions since the 1960s and increasing judicial acceptance of it<sup>59</sup>). Surely at some point it is reasonable to require landowners to adapt to changed circumstances.<sup>60</sup> Other situations can fairly be characterized as involving disappointment of perfectly reasonable expectations.<sup>61</sup> Someone buying land in California in 1968 may quite reasonably have anticipated that open space, if and when required, would be acquired by purchase or eminent domain, not by downzoning.

Another troublesome element generated by the system of ambient resource appropriation and late-stage zoning is that the burden often seems to fall on the wrong people, a version of no good deed going unpunished. The endangered species situation provides the ultimate example: we wait until the species is about to become extinct, with the predictable result that the only regulated party is the rare owner who has *not* destroyed the habitat value of his land while everyone else by then has made their land useless for that purpose.

So too in an *Agins*-type case, open space is scarce because all the neighbors have destroyed it by building too densely on their land. Of course, that is also true of even the most conventional downzoning cases, where urbanization generates height and other density limitations. The root

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58. This is the moral hazard problem. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 527–30 (1986) (explaining that people who are assured of compensation have an incentive to continue to invest, though knowing restrictive regulation is highly likely).

59. E.g., *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972); *Comm'r of Nat. Res. v. S. Volpe Co.*, 206 N.E.2d 666 (Mass. 1965).

60. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), is illustrative. In this case, varying ownerships, proposals, and unsuccessful landowner efforts to obtain permission to fill a coastal wetland had been going on since 1962, as the law governing development of such tidal salt marsh lands became ever more restrictive. *Id.* at 614–15.

The more general issue of regulation/adaptation is profoundly important. Sometimes, as with auto emissions, regulation generates adaptation through technological advances, demonstrating that necessity can indeed be the mother of invention. Sometimes, the law allows adaptation over time, as with the amortization of nonconforming uses. See DANIEL R. MANDELKER, *LAND USE LAW* § 5.70 (3d ed. 1993).

61. The notion of reasonable expectations as a legal standard raises a circularity problem. One's "reasonable" expectations depend on how much change in public knowledge and values the law should require one to anticipate. If the marketplace does not accurately account for the prospect of change, must the law respect the market's excess optimism (encouragement of speculative behavior)? See, e.g., *HFH, Ltd. v. Superior Court*, 542 P.2d 237, 246 (Cal. 1975) (holding that when a regulation causes a landowner to receive less than a desired profit on the sale of the land the city cannot be forced to pay the difference between the actual and desired sale price). And, as the above discussion of the ESA indicates, some changes are almost impossible to predict in any specific way.

of the problem is not the specific impact of the regulation on the owner, but the very nature of the time-based appropriation system combined with deferred zoning. The system itself assures that the social cost of dealing with issues like loss of biodiversity, open space, congestion, and the like are not equitably apportioned among those who cause the problem (unlike a nuisance, for example, where he who causes the problem has to fix it).

Moreover, asking taxpayers to compensate the subjects of late-stage regulation would not bring things back into equilibrium. Those who have benefitted from the system are not usually the current residents of the community but are those who profited from pre-regulation development—commonly developers who at some earlier time appropriated more than their space-based share of the ambient resources and are likely to be long gone. In any event, it would truly be a fool's errand to try to track down those responsible for today's problems, such as those who have plowed up the original habitat of the grizzly bear or paved over the habitat of the coastal California gnatcatcher.

#### VI. IS THERE A ROLE FOR FAIRNESS?

As the preceding comments suggest, I do not see any way to undo the basic momentum and consequences of the land management system we have created, which is essentially a competitive appropriation system. Moreover, decades of inconclusive constitutional litigation show that its inequities cannot be systematically undone through doctrinal development.

Probably the best we can do is to recognize that there are instances in which regulated property owners are unduly burdened and should in fairness get some relief from the public. I doubt that workable formal standards can be articulated to identify such cases, but one can point to some specifics that call out for attention:

- Regulation comes later and later in the developmental process, and the number of those affected becomes ever smaller;<sup>62</sup>
- The likelihood rises that there will be little, if any, reciprocity of burden and benefit for those regulated,<sup>63</sup>

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62. This result is in effect a reverse example of spot zoning, where one tract is picked out for more favorable treatment than all the surrounding property, in violation of the standard prohibition on piecemeal zoning. See MANDELKER, *supra* note 60, § 6.27.

63. The Solicitor General's brief in the *Agins* case urged that since the property surrounding *Agins's* tract was zoned the same as his, he would enjoy reciprocity of advantage from the downzoning. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 34, at 27.

- The burden on the regulated will be great;
- The benefits of regulation will inure to those whose activities have generated the need for regulation;
- There will be little or no basis for asserting that the regulated party could/should have anticipated change and was a conscious risk-taker; and
- In the particular case the regulation will cause genuine hardship.

We have devices that address similar matters, notably the variance in land use law, which—though its implementation has been often criticized<sup>64</sup>—is specifically designed to deal with “unnecessary hardship.”<sup>65</sup> The TDR is another device that can be employed to provide some mitigation below the level of constitutional just compensation and can be useful where a desirable restriction falls on one owner, but its benefits accrue to his or her neighbors.<sup>66</sup> A more informal approach has been taken in the negotiation of some Habitat Conservation Plans under the ESA,<sup>67</sup> where local, state, and federal governments have made some contribution to the assembling of sufficient habitat to avoid jeopardy—supplementing the constraints agreed to by the private landowner.

I recognize that governments are not easily persuaded to make uncoerced payments to regulated parties, and that each of the devices I have just mentioned operates in the shadow of constitutional or other legal obligations. But there may be prudence in finding some ways to deal with those regulatory cases that cry out for some relief in the name of fairness. Thus, we can relieve the pressures of regulatory takings litigation, which continues apace in the lower courts notwithstanding the judiciary’s inability to resolve its doctrinal mysteries.

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64. In general, variances have been found to be too generously granted by local governments. See, e.g., Richard F. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959).

65. See MANDELKER, *supra* note 60, §§ 6.42–6.44.

66. A TDR was granted to Penn Central in exchange for its refraining from building a high rise above the architecturally significant Grand Central Station building. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978).

67. Endangered Species Act, 16 U.S.C. § 1539(a)(2).