



Spring 2010

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Recommended Citation

Joseph L. Sax, *Land Use Regulation: Time to Think about Fairness*, 50 Nat. Resources J. 455 (2010).
Available at: <https://digitalrepository.unm.edu/nrj/vol50/iss2/10>

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Land Use Regulation: Time to Think About Fairness

ABSTRACT

After nearly three decades struggling with the problem, the U.S. Supreme Court may finally have given up the effort to formulate clear doctrinal lines to identify regulatory takings. The theoretical battle appears to be over, at least for the present, with no winners. There are definitely losers though—landowners who are victims of inequity, if not of constitutional wrongs. Why are we in this situation? Because it is an inescapable product of the land use system we have created. To promote unconstrained private initiative by landowners, we allow owners to consume limited ambient resources like open space and habitat in a version of a prior appropriation system so that 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. INTRODUCTION

For more than a century, the courts have struggled with the tension between the need for the state to regulate the use of property and the claimed constitutional right of property owners to have continued entitlement to previously lawful uses respected and protected.¹ As strange as it may seem in light of the importance of this so-called “regulatory takings” issue, it was not a question that the Founding Fathers considered at all. Even though there was a good deal of government regulation even in colonial times, scholars have shown that the “takings” clause of the U.S. Constitution was directed only to direct public expropriations of property, such as the taking of land for a fire station or a military base.²

The reason for this gap in the Constitution’s coverage has never been fully explained. Perhaps it was that the scope and nature of regula-

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1. See generally ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* (1999).

2. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992).

tion at the time was well-established and accepted, and the role of regulatory government was thought to be quite stable, so that while property owners' use rights were limited, their reasonable expectations were rarely, if ever, disappointed. Alternatively, perhaps it was simply that even those who wrote the Bill of Rights did not think of everything. In any event, modern times have brought a wide range of regulatory laws that dramatically changed the rules of the game from the owner's perspective. These laws include urban zoning, child labor laws, minimum wage laws, rent control, and—more recently—endangered species protection, coastal zone management, open space requirements, and the like.

Whatever the historical explanation may be, it is today nearly universally accepted that some regulatory laws, even though they do not formally transfer ownership of property to the state, should be considered as constitutional takings requiring that the owner be paid "just compensation." An uncontroversial example would be a law zoning a private tract of land "for public school use only," or requiring an owner to allow the public to use his or her land as a park, making it available for picnics, athletics, and other such activities.³

The result is that courts are now called upon to decide which regulations should be viewed as acceptable governmental activity—though it makes property less useful or valuable to its owner, and which regulations should be viewed as effectively taking the property for public use and thus must be compensated. Courts and academic writers have struggled mightily, but inconclusively, over this question.⁴ Would a law enacting liquor prohibition be a taking as applied to a beer manufacturer who is left with a stock of unsellable alcoholic beverages? Is it a taking to prohibit the continued use of property to keep pigs and chickens as the neighborhood shifts from farming and the property finds itself in the path of urbanization? Can the owner of a historic building be obliged to keep it in place, though she could earn much more by demolishing it and replacing it with a high-rise? What of the landowner whose property is critically important habitat for a wildlife species on the verge of extinction?

The U.S. Supreme Court has shifted one way and then the other on these and similar questions. Towards the end of the nineteenth cen-

3. See, e.g., *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951) (city put private land in plat of future public parks, and prohibited compensation for any private improvements thereon).

4. See, e.g., Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); FRED BOSSELMAN et al., *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* (1973). Scores, if not hundreds, of subsequent articles have addressed the issue.

tury, it tended to uphold government regulation and deny compensation. Then, in the period up to the New Deal, it struck down much social legislation as expropriative of property rights. After the so-called “switch in time” during the FDR era, the Court became more sympathetic to regulation, only to shift again starting around 1980. In recent decades, the more conservative majority on the Supreme Court has shown that the Court is, again, quite sympathetic to the constitutional claims of property owners.⁵

As the Supreme Court has moved one way and then another, its approach to the problem has also varied. At times it has sought to articulate relatively objective rules to govern the cases (e.g., the degree of economic loss to the owner) while at other times it has set out open-ended standards that left a good deal of discretion to the decider (e.g., does the law disappoint reasonable investment-backed business expectations). Currently, the Court appears to have relented in its effort to find objective rules, and has returned to a more open-ended, soft-doctrine approach.⁶

All these judicial shifts, along with the Court’s inability to find any satisfactory constitutional approach to the problem, suggest that the desirability of looking beyond constitutional law for an understanding of the “regulation v. property” issue. Perhaps these matters are best understood as presenting issues of fairness, rather than formal legal rights. The following pages are intended to re-focus thinking away from legalisms and toward a more equity-based paradigm in approaching a problem that has baffled and frustrated the courts.

II. THE SUPREME COURT’S APPROACH TO THE PROBLEM

Regulatory takings cases in the Supreme Court began to turn up in the late nineteenth century, as industrialization, urbanization, and population heterogeneity grew. The Court at the time either took the position that these disputes were the inevitable consequences of those changes, or that they were political—rather than legal—problems. The general notion then was that one must adapt to changing times and values (prohibition,⁷ rent control,⁸ urbanization⁹) and learn to contend with the fact that legislatures sometimes act imprudently. As Justice Holmes put it with his inimitable succinctness: “[T]hat the states might be so fool-

5. The leading precedent of the contemporary and more conservative Supreme Court is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

6. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

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

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

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

ish as to kill a goose that lays golden eggs for them, has no bearing on [the regulated party's] constitutional rights."¹⁰ While an occasional regulatory takings case would attract the Court's attention,¹¹ it evinced no interest in exploring takings law in terms of doctrinal development, saying that there were "no rigid rules" or "set formula[e]" available to tell where regulation ended and a taking began.¹²

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,¹³ and then intensified with the appointment 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. The Court granted review of an unusual number of them in the ensuing two decades. The emergence of a well-organized, legally astute property rights movement was undoubtedly an important factor as well. Whatever the exact explanation for this judicial history, constitutional adjudication has failed to provide clear guidance in regulatory takings cases. It is time to consider viewing these claims in terms of fairness, rather than strict legal entitlement.

In a much-quoted statement, the Supreme Court once asked, 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."¹⁴ The question is a good one. It is worth asking how it happens that a particular burden happened to fall where it did, since in the most unsettling regulatory taking cases (unlike a nuisance case, for example) 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 is that the problem the regulated party is obliged to resolve is *not* one that has been created by him, but one created by his neighbors.

10. *Erie R.R. Co. v. Board of Pub. Util. Comm'rs*, 254 U.S. 394, 410 (1921). Notably, the much-cited Justice 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' regulatory taking opinions sustain the regulation as non-compensable. See Sax, *supra* note 4.

11. See, e.g., *Goldblatt v. Town of Hempstead N.Y.*, 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. See, e.g., *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (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).

12. *Goldblatt*, 369 U.S. at 594; *Caltex*, 344 U.S. at 156.

13. Justice Scalia was appointed in 1986. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, was decided in 1978.

14. *Armstrong*, 364 U.S. at 49.

I shall use as an example a situation drawn from a famous case that arose in the Town of Tiburon, though the actual case, *Agins v. Tiburon*, was more factually convoluted than my hypothetical suggests.¹⁵ Until the late 1960s this town, just north of San Francisco, remained quite undeveloped. Over 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 remaining substantial tracts of remaining open land. A principal tract was the landowner's, Agins, five-acre parcel, which was purchased in 1968. It was rezoned by the town and development on the lot was restricted to a maximum of 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, therefore, it was not yet possible to determine the economic burden Agins would have to bear. Agins' lawyers had, 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 attempt to cast some light on this question by taking an unconventional path, considering how—rather than why—we end up with such outcomes.

III. AMBIENT RESOURCES, SPACE, AND TIME

I begin with what I 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 gets used up by landowners through development and use of land. While land development itself does not physically emit anything outside its boundaries, in contrast to

15. Tiburon consists of nearly 1,700 acres. 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 3 percent of the land. Despite the zoning, the town did decide to acquire, rather than down-zone, to achieve its open space. 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. Agins' brief said that the city issued bonds for a total of \$1.25 million for all purchases of open space in the city. Joint Appendix at ¶¶ V, VI, *Agins v. Tiburon*, 447 U.S. 255 (1980). See *infra* text accompanying notes 32–36 for more factual descriptions of the *Agins* case.

air or water discharges, 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 the loss of openness. A more familiar version of the issue (analogous to an *Agins*-type case) are the now-common height, setback, and density limits imposed in urban areas,¹⁶ though their economic impact is usually less severe than large-lot, open space zoning.

In each of these situations, it is 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 from the outset to allocate an equal share of each of these exhaustible resources to each acre of land; for example, to allot to each landowner a certain amount of developmental density.¹⁷ 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 or density or air capacity would be equitably allocated in advance.¹⁸

If one thinks about the issue this way (landowners appropriating ambient resources), one's focus shifts to land rights in terms of space; that is, fairness would imply use rights equally distributed spatially. From that perspective, it seems that a hypothetical open space owner is being treated unfairly if he has not had his fair share of an ambient resource (open space) to use. This is basically the way property rights advocates perceive the problem (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

16. The classic examples are *Welch v. Swasey*, 214 U.S. 91 (1909) (height) and *Gorieb v. Fox*, 274 U.S. 603 (1927) (setback).

17. Nothing would prevent them from trading such development rights among themselves, in the manner of TDRs (transferable development rights), so nothing in such a system would require uniformity of use. A version of this notion was first suggested by the late Professor Donald Hagman, who wrote *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* (1973).

18. 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 is 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.

taken. They say you must accommodate to the circumstances and constraints of the time when you choose to use your property, and that what might have been permissible earlier—such as more dense development—may not now be permissible in a more urbanized or densely developed environment, or when public values change.¹⁹ From that perspective, a landowner is not being treated unfairly in comparison to his 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 contrasting perspectives of land rights seen through the frameworks of space or the framework of 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 use his or her land consistently with the then-operative rules.

The different postures of time and space also suggest different reactions to the common notion that property ownership must include the right to use it for some economically profitable purpose.²⁰ 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. Considered in the framework of time however, it could be argued that the owner had an opportunity to make a profitable, or more profitable use, but unlike others, he or she let that opportunity pass. While the choice of waiting might pay off handsomely, it also might not.

IV. 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

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

20. 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 v. South Carolina Coastal Council*, “[T]he 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. . . .” 505 U.S. 1003, 1029–30 (1992). Although no one knew it was harmful earlier, Scalia’s explanation is that the desired use “was *always* unlawful” (i.e., harmful to health or safety). *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.

both a space-based and a time-based system. Water is a classic example of an ambient resource that can be used up, either in the sense that the available supply is totally abstracted leaving a riverbed dry, or legally limited in the amounts that may be abstracted in order to protect water quality. To review how our water rights systems work, in the East we generally follow the riparian system, which is space-based. In the West we generally follow the appropriation system, which is time-based.²¹

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 of the river based on its spatial identity (the size and location of its tract, regardless of the time of its use).²² The water use right is effectively built into the land, and is shared among all riparians. Some riparian owners, consequently, may have to reduce their use if there is not enough left for a newly demanding riparian. Conversely, under the 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.²³ Under that system, space means nothing and time means everything, and land ownership provides no entitlement to water.

Water law is the rare property regime where our legal system has explicitly confronted the time and space distinction in regards to the use of an ambient resource. It illustrates that either approach to property

21. For a detailed explanation of the two systems, see, e.g., A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* (2008).

22. The dominant theory is that each riparian owner's right is correlative. See *Mason v. Hoyle*, 14 A. 786 (Conn. 1888); *Half Moon Bay Land Co. v. Cowell*, 160 P. 675 (Cal. 1916). There are in practice many variations of riparianism, and in some a time-based element comes into play, so that a later riparian who cannot show that an existing user's use is unreasonable may be left without a share of the water. See also *RESTATEMENT (SECOND) OF TORTS* § 855 (1979). Sometimes the doctrinal system is contractually changed, as by consents not to sue in the case of riparianism, and arrangements for shortage-sharing in the case of prior appropriation. Such arrangements evidence a felt need for more equitable (shared) allocation.

23. The system can be somewhat more complex than this. While there is no doubt that first-in-time operates in regards to private use rights, there has been a question whether, when fish survival is threatened and existing uses must be reduced, 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.*, 182 Cal. App. 3d 82 (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.

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 water is simply out of luck, regardless of the impact on the value of his land.

As a matter of strict legal theory, one may say that water is different because it has always been considered a public resource, rather than a right embedded in land ownership—even in a riparian system.²⁴ My purpose here, however, is not to suggest a strict parallel, but to illustrate alternate ways of thinking about ambient resources and to suggest that one may appropriately consider them as embedded in landownership, or as free-floating resources available for appropriation. Yet, as far as I know, the legal system has not directly addressed these issues for resources other than water, with the possible exception of wildlife.²⁵ The ambient air is classically considered un-owned and un-ownable, 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.²⁶ Conversely, we seem not to have addressed things 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),²⁷ but that has never formally been given independent status from the acreage to which it is constituent.

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 limitations on the use of those resources, while at some later time a community determines that acceptable limits have been reached, and further appropriation is limited or prohibited. The newer landowner, or the late developer, is then left in the same position as one who comes to appropriate water in a western

24. See *Hudson Country Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

25. Laws restricting private land use to protect wildlife habitat go back at least to the seventeenth century. See ERIC T. FREYFOGLE & DALE D. GOBLE, *WILDLIFE LAW: A PRIMER* 212 (2009); see also *Cawsey v. Brickey*, 144 P. 938 (Wash. 1914).

26. 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. §§ 7501–7515 (2006).

27. 16 U.S.C. §§ 1531–1544 (2006).

state, only to find that the available supply has been fully taken by prior appropriators.²⁸

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. That 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 probably several 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.²⁹ So the prior appropriation system I have just described is no accident. It grows out of a deep political conviction about how the shape of the landscape should be determined and by whom. The result is that our land use lawmaking is basically what I would call late-stage regulation, with restrictions coming only when the ambient resource in question is nearly exhausted,³⁰ as illustrated by *Agins*-type cases.

V. THE SYSTEM WE HAVE CREATED

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

28. The government commonly builds 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.

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

30. An analogy on the international scale is the conflict between early and later industrializing societies, where the ambient resources are, for example, 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.

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 unexpectedly confronted with new restrictions that drastically reduce its usefulness for the intended purpose.

The actual *Agins* case is exemplary in this regard. 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.³¹ In addition, academic advocates for open space preservation were urging action by compensated regulation,³² and the Tiburon officials began by planning to buy the land in question, rather than to downzone it.³³ *Agins* bought his land in 1968.³⁴ In 1970, California mandated 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 1973.³⁵ In that year Tiburon enacted an open space zoning ordinance, which included the *Agins* land, allowing as few as one, and potentially as many as five, houses on the five-acre tract, with such determinations based on a permitting process that considered architectural design and environmental reviews.

31. CAL. GOV'T CODE §§ 6950–6954 (Deering 2010).

32. Jan Z. Krasnowiecki & James C.N. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 184 (1961), 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.”

33. In 1972 Tiburon hired financial and planning consultants. The financial consultants advised them to purchase 30 acres of undeveloped land, including the *Agins* parcel. Tiburon subsequently acquired a number of properties by negotiation, but never purchased any of the property that the financial consultants considered. Brief of the Conservation Foundation et al. Amici Curiae as Support of Appellee, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No. 79-602), 1980 WL 340016 at *7–8.

34. He paid \$50,000 for five acres, while in his suit he sought \$2 million as compensation.

35. CAL. GOV'T. CODE §§ 65,560–65, 65860(a), 66,451, 66,474 (Deering 2010). *See also* CAL. CONST. art. XXVIII. The open space zone embraced 250 acres, some 15 percent of its land area in the new one-to-five acres zoning. Tiburon originally planned to acquire the *Agins* tract and 25 adjoining acres for open space, and eventually it 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 its property. Presumably *Agins* wanted much more for his land than the city was able to pay.

Some land acquisitions should surely be seen as speculative at a certain point in time,³⁶ and at some point it is also reasonable to require landowners to be adaptive to changed circumstances.³⁷ Other situations can fairly be characterized as involving disappointment of perfectly reasonable expectations.³⁸ Someone buying land in California in 1968 might quite reasonably have anticipated that open space, if and when required, would be acquired by purchase or eminent domain, not by down-zoning.

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 will be the rare owner who has *not* destroyed the habitat value of his land, while everyone else has made their land useless for that purpose through use.

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

36. This is the moral hazard problem. People who are assured of compensation have an incentive to continue to invest, though knowing restrictive regulation is highly likely. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 520 (1986). Surely it is time to stop compensating people who invest in biologically sensitive wetlands, which have been restrictively and increasingly regulated since the 1960s. See, e.g., *Commissioner of Natural Res. v. S. Volpe & Co.*, 206 N.E.2d 666 (Mass. 1965).

37. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), is illustrative, where with varying ownerships and proposals, 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.

The more general issue of regulation and 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 allow allows adaptation over time, as with the amortization of non-conforming uses. See DANIEL R. MANDELKER, *LAND USE LAW* § 5.70 et seq. (3d ed. 1993).

38. 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). And, as the above discussion of the ESA indicates, some changes are almost impossible to predict in any specific way.

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.

To further complicate the issue, asking taxpayers to compensate the subjects of late-stage regulation would not bring things back into equilibrium since those who have benefited from the system are not usually the current residents of the community. Unfortunately, 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—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 gnat-catcher. With a system that encourages the appropriation of ambient resources but fails to provide a mechanism to compensate subjects of late-stage regulation, what are we to do?

VI. IS THERE A ROLE FOR FAIRNESS?

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

We need to recognize that there are instances in which regulated property owners are unduly burdened and should, in fairness, get some relief from the public. The experience of the Supreme Court in regulatory takings cases demonstrates that no workable formal standards can be articulated to identify cases of unfairness, nonetheless, one can point to some specifics of regulation that call out for attention:

- Regulation comes later and later in the developmental process, and the number of those affected becomes ever smaller.³⁹
- The likelihood rises that there will be little, if any, reciprocity of burden and benefit for those regulated, as happens

39. 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 37, at §§ 6.27 et seq.

when almost all nearby property has already been developed without restrictions.⁴⁰

- The burden on the regulated will be great.
- The benefits of regulation will inure to those whose activities have generated the need for regulation. That is, those who have already fully developed their land, but will benefit from the imposition of restrictions on neighboring property.
- There will be little or no basis for asserting that the regulated party could or 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,⁴¹ is specifically designed to deal with “unnecessary hardship.”⁴² The transferable development right (TDR)⁴³ 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 its neighbors.⁴⁴ A more informal approach has been taken in the negotiation of some Habitat Conservation Plans under the ESA,⁴⁵ 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. Relocation payments, not required by the

40. The Solicitor General’s brief in the *Agins* case urged that since the property surrounding Agins’ tract was zoned the same, Agins would enjoy reciprocity of advantage from the down-zoning. Brief for the United States as Amicus Curiae, *Agins v. Tiburon*, 447 U.S. 255 (1980) (No.79-602).

41. 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).

42. See MANDELKER, *supra* note 37, at §§ 6.42 et seq.

43. The TDR permits an owner who is prohibited from using some of its preexisting developmental rights in a congested area, to take that quantum of density and add it to the owners’ development rights on another site.

44. 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.*, 438 U.S. 104 (1978).

45. Endangered Species Act §10, 16 U.S.C. § 1539(a)(2) (2010). For example, where additional undeveloped land is needed to protect habitat, the government supplemented what the landowner must do by contributing land available from a closed military base; or the government arranged with a local government to manage some of its open space land as protected habitat, to fulfill part of the obligation the law formally places on the private landowner.

Constitution, were provided to owners forced to move as a result of urban renewal projects. A Missouri statute allows a condemnee to get an extra payment of 50 percent of fair market value when property is taken that has been in a family for more than 50 years. This payment is defined in the statute as heritage value.⁴⁶ Finally, there is a long history of statutory relief for those whose property is not taken, but who are disadvantaged by public projects, such as loss of access resulting from the laying out or discontinuance of highways.⁴⁷

VII. CONCLUSION

For better or worse, and in contrast to many other countries, America's reluctance to engage in long-range land use planning, and to diminish the autonomy of landowners, has produced a situation of late-stage public governance. That situation has, in some instances, thrust an undue portion of the burden of programs like open space, coastal, and biodiversity protection on the relatively few landowners who still have undeveloped or pristine land available. In the interest of fairness, such burdens should have been more widely spread among landowners in the affected community.

The effort by owners to achieve such re-distributive fairness through constitutional litigation has thus far proven unsatisfactory. Decades of court cases have shown that constitutional doctrine cannot provide a satisfactory solution for a problem that is too case-specific for the doctrinal rules that the courts have used, such as percentage of economic loss or categorization as a traditional nuisance.

The lesson of this experience suggests that we look to other models for assuring fairness to landowners, while maintaining the legitimate and necessary authority of the state to regulate land use in accordance with contemporary problems and present-day community values. We have a variety of flexible but workable tools, such as the variance and the habitat conservation plan, that provide the necessary flexibility and case-specificity that issues such as fairness require. We should begin looking to them as an alternative to regulatory takings lawsuits.

While governments are not easily persuaded to make voluntary payments to regulated parties, and while each of the devices mentioned

46. See State ex rel. C.F. White Family Partnership v. Roldan, 271 S.W.3d 569, 573 (Mo. 2008) ("‘Heritage value’ is defined in section 523.001.2 as the value assigned to any real property, including but not limited to real property owned by a business enterprise with fewer than one hundred employees, that has been owned within the same family for 50 or more years, *such value to be fifty percent of fair market value.*") *Id.* (bold & italics in original).

47. See, e.g., Home for Aged Women v. Commonwealth, 89 N.E. 124, 128 (Mass. 1909).

in this article operates in the shadow of constitutional or other legal obligation, there is much to be said for seeking some new and more effective way to deal with cases that cry out for relief in the name of fairness.