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### Land Use Regulation: The Weak Link in Environmental Protection

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#### Recommended Citation

A. D. Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 Wash. L. Rev. 651 (2007).

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## LAND USE REGULATION: THE WEAK LINK IN ENVIRONMENTAL PROTECTION

A. Dan Tarlock\*

*Abstract:* Professor William Rodgers is one of the handful of legal academics who have shaped and influenced environmental law since it was created out of whole cloth in the late 1960s. The staggering quantity, quality, breadth, and creativity of his scholarship are perhaps unrivaled among his peers. It is easy to criticize the gap between the environmental problems that society faces and the inadequate legal tools and institutions that we have created to confront them. Professor Rodgers has always been able to see both the deep flaws in environmental law and the possibilities for more responsive legal regimes.

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“I come no more to make you laugh,” William Shakespeare, Henry VIII, Prologue.

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## I. INTRODUCTION: PROPERTY IN LAND, NOT GREENED TO THE SAME EXTENT AS AIR AND WATER

The sustainable use of land is crucial to the future success of many environmental initiatives. We recognize that the planet consists of three interrelated natural resources: air, water, and soil. Of the three, land has remained more resistant to environmental protection duties compared to the other two planetary life support systems, air and water. The regulation of private land use to achieve environmental protection objectives remains the weakest link in modern environmental law.<sup>1</sup> Many of the major environmental challenges such as the control of non-point source water pollution, the conservation of biodiversity, and the limitation of automobile emissions, including carbon dioxide, are at the core of land use regulation problems. Yet, in the main, we continue to develop and abuse land, regardless of environmental stresses that development causes. As environmental protection once again rises on the political agenda, the need to address the gap between land use regulation and environmental protection is becoming more critical; the regulatory gap impedes or cancels much of the progress that we have made to improve the conditions of our air sheds and watersheds—let alone confront the linked challenges of biodiversity conservation and adaptation to global climate change.

The reasons for the gap are multiple. The mismatch between physical problem areas and the crazy-quilt and increasingly dysfunctional overlay of political jurisdictions is supported by a deep-seated resistance to land use regulation. This contrasts with the wide-spread, if superficial, acceptance for the regulation of air and water. These factors are reflected by the difference in the property law regime for land versus that of air and water. Air and water are and always have been common property resources, and users have never had any expectation of exclusive control. Regulation simply canceled the custom of using them as sinks, but the state “took” no property from polluters because there were never firm common law rights to degrade air. In addition to the limitations

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1. A discussion of the role of federal and state lands in environmental protection is beyond the scope of this brief essay.

imposed on air and water pollution by the doctrine of nuisance, the right to use water has always been an incomplete one.<sup>2</sup>

Land is another story: it has resisted heroic academic efforts to green it. The United States has successfully carved up the heritage of our land base into a series of private, exclusive entitlements,<sup>3</sup> limited federal control largely to retained public lands, and enshrined the idea that land should be controlled at the lowest level of government, if at all. This process began with the English settlement in New England, and it continues unabated. Western property law has a fundamental bias toward the exploitation of all natural resources, especially land. The legislative process has generally operated—at least until recently—to reinforce the expectation that there will be few limits on resource exploitation. Our property law is a product of the legacy of late Roman legal thought and remains rooted in the idea of exclusive dominion subject only to the duty not to cause a nuisance. For example, this view lies behind the Supreme Court's dismissal of the argument that the purchaser of highly regulated wetland property assumes the risk of development denial with the quip, "[t]he [s]tate may not put so potent a Hobbesian stick into the Lockean bundle."<sup>4</sup> Locke himself might be surprised that his labor theory has now incorporated the Roman law right of *ius abutendi*, the right to destroy property. Both the common law and the police power temper this discretion, but the bottom line is that it is still much harder to limit activities that degrade ecosystems than to limit air, soil, and water as waste disposal sinks.

This essay examines the reasons for the regulatory gap and suggests some possible steps that can be taken to close it. It is a modest effort to apply the spirit and vision of Professor Rodgers to the fiendishly difficult problem of integrating land use and environmental law. It examines the assumptions that were made about land use at the dawn of environmental law in the mid-1960s, the frustration of these expectations by events since the late 1960s, and some—I hope—provocative suggestions to recapture the early hope of the full integration of land use regulation with the project of environmental protection.

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2. In re Water Use Permit Applications for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch, 9 P.3d 409, 492–95 (Haw. 2000).

3. See generally Eric T. Freyfogle, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003).

4. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

## II. THE EXPECTED GREENING OF LAND IN THE MYTHIC 1960s

### A. *The Hope of Rationality in the 1960s*

During the formative period of environmental law in the now mythic 1960s, the expectation was that land would be subjected to comprehensive environmental regulation along with air and water. Environmental law and environmentalism are usually portrayed as the immediate by products of the turbulent late 1960s because the movement gained instant political legitimacy from 1968–72. But, many of the deeper roots and influences have been ignored. A crucial root is the rationalism and optimism of the administrations of John F. Kennedy and the pre-Vietnam War administration of Lyndon B. Johnson. Our first major environmental law, the National Environmental Policy Act of 1969 (NEPA),<sup>5</sup> illustrates the expectation that all resources would be subjected to the discipline of scientific environmentalism.

NEPA was drafted and enacted at the height of one of the most turbulent periods of twentieth century social unrest,<sup>6</sup> but in fact, it reflects the hopes, however naive, of the more earnest and optimistic early 1960s. From 1961–69, the Department of Interior was run by one of our greatest secretaries of Interior, Steward Udall. Udall was also our most thoughtful public figure to adopt environmentalism with the possible exception of former Vice President Albert Gore. Secretary Udall's 1964 book, *The Quiet Crisis*,<sup>7</sup> written with the assistance of the great western environmentalist and novelist, Wallace Stegner, is a seminal book because it popularized Aldo Leopold's "Land Ethic" and Rachael Carson's work on the dangers of pesticide use, and it urged the adoption of holistic environmental thinking as a public policy norm. More generally, the Kennedy and Johnson administrations sought to adapt the expert New Deal administrative state to address new mid-twentieth century values such as environmental protection.

Land use was an integral part of the foundational thinking in the early 1960s that produced the environmental movement. The main idea was that the "environment," i.e., the protection of natural ecosystems, was a

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5. 43 U.S.C. § 4331 *et seq.* (2006).

6. See generally Todd Gitlin, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987).

7. Stewart L. Udall, *THE QUIET CRISIS* (with an introduction by John F. Kennedy) (1963).

suitable public policy focus, and thus Congress could mandate a consistent, comprehensive protection strategy through the entire federal bureaucracy. Secretary of Interior Stewart Udall set out to revive and adapt the public land-focused conservation tradition to the new emerging, more comprehensive environmental consciousness. This said, it is important to note that Udall's thinking about land was squarely in the evolving conservationist tradition: governments should devote more and more land to wilderness and acquire land for open space.

The modern environmental movement inherited the early twentieth century preservation movement's idea that sacred and spectacular nature should not be disturbed by human intervention. This idea was reflected, for example, in the Wilderness Act of 1964.<sup>8</sup> Modern environmentalism soon moved from the spiritual and aesthetic to the scientific by making the relatively new idea of the inherently stable ecosystem, rather than sacred space, the focus of protection.<sup>9</sup> Writing about the rise of environmentalism in the 1950s and 1960s, Richard N. L. Andrews observed, "[t]he most revolutionary element of the new public consciousness was the powerful new awareness of the environment as a living system—a 'web of life' or *ecosystem*—rather than just a storehouse of commodities to be extracted or a chemical machine to be manipulated."<sup>10</sup> The ecosystem construct is a major advance, but it came at the expense of the ability to articulate a popular, new land ethic.

*B. Three Crucial Assumptions About Land and Land Law and Its Role in the Environmental Protection Project*

As the rational environmentalism of the 1960s evolved, at least three further crucial assumptions about land were made. These assumptions and efforts to integrate environmental protection and land use are now buried in history, with one exception, or have been supplanted by changes in the law. The first assumption was that land use regulation would occur with minimal control from state and federal courts. The Supreme Court had not decided a zoning case since 1928 and thus had

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8. 16 U.S.C. §§ 1131–1136(2)(c) and 16 U.S.C. § 1131(c) (2006) (defining wilderness as an area "where the earth and its community of life are untrammelled by man.").

9. See generally Michael J. McCloskey (then Chairman of the Sierra Club), *Changing Views of What the Wilderness System Is All About*, 76 DENVER L. REV. 369 (1999) (discussing differences between the "natural" and ecological views of the function of the national wilderness system).

10. Richard N. L. Andrews, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 202 (1999).

not fleshed out Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>11</sup> *Pennsylvania Coal* created the concept of a regulatory taking as opposed to a title expropriation, but Justice Holmes's characteristically flip statement that regulation that goes "too far" did not yet have the chilling effect that the Supreme Court's taking jurisprudence continues to exert on land use regulation.<sup>12</sup> The threat of the use of the Fifth Amendment to invalidate both air and water pollution standards, as well as land use regulations, was recognized, but Supreme Court intervention in environmental protection, including land use, was not considered a major threat. For example, an early Council on Environmental Quality Report asserted that the takings clause applied only to expropriations of title, not regulations.<sup>13</sup>

The second assumption was that there would be federal land planning guidelines. Senator Henry Jackson of Washington State was the embodiment of rational environmentalism in the 1960s. He wanted to balance, not stop, development with environmental protection and mitigation. Under his chairmanship, the Senate Committee on Interior and Insular Affairs issued a report in 1972 that criticized the delegation of state planning and regulation to local governments.<sup>14</sup> In 1973, the Committee reported out S. 268, the National Land Use Policy and Planning Assistance Act, which provided grants to states to develop a planning and regulatory process that included the control of "areas of critical environmental concern."<sup>15</sup> The bill suffered the fate of almost all post-New Deal efforts to bring ecological and hydrological rationality to irrational political boundaries: intense local and state opposition. It was narrowly defeated in 1974, and any effort for general federal land use planning disappeared from the political agenda, never to reappear.

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11. 260 U.S. 393 (1922).

12. Richard J. Lazarus, *Thirty Years of Environmental Protection Law in the Supreme Court*, 19 PACE ENVTL. L. REV. 619, 637 (2002).

13. Fred Bosselman, David Callies, and David Banta, THE TAKING ISSUE 238-83 (1973).

14. Senate Committee on Interior and Insular Affairs, *National Land Use Policy: Background Papers on Past and Pending Legislation and the Roles of the Executive Branch, Congress and the States in Land Use Planning and Policy*, 92nd Cong., 2d Sess. (1972).

15. *Id.* § 203(3)(A). There is no constitutional constraint on federal regulation of land use related to interstate commerce. See *Hodel v. Indiana*, 481 U.S. 704 (1987). However, the current Supreme Court has invoked interference with state land control as a justification for a presumption that Congress has not authorized a regulation. *Solid Waste Mgmt. Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (Section 404 of Clean Water Act construed to exclude regulation of isolated wetlands because of doubts about Congress's power to do so under Commerce Clause).

The third assumption was that states would use federal support to claw back their delegated land use regulation powers. Hawaii, Oregon, and Vermont would lead the way toward the progressive centralization of land use planning at the state or regional level. The American Law Association adopted a Model Land Development Code in 1976, which authorized state review of developments of regional significance and the use of land use controls to regulate air and water pollution.<sup>16</sup>

### III. WHAT HAPPENED TO FRUSTRATE THESE EXPECTATIONS

#### A. *Fragmented, Problem Oriented Federal "Land" Use Legislation*

In place of general federal land use planning law, state and local land use laws were left in place, with some minor exceptions, such as cellular towers, but federal regulatory programs were selectively superimposed over them. The most well known example of this selective superimposition is the Coastal Zone Management Act of 1972.<sup>17</sup> In return for adopting plans for coastal areas, states can deny development authority to federal activities and licenses that are inconsistent with the state's program.<sup>18</sup>

We have an incomplete federal program of "sensitive land" protection. Activities such as the filling of a wetland<sup>19</sup> or the development of the habitat of a listed endangered species require a federal permit in addition to compliance with all state and local regulations. These activities can trigger innovative local land use regulatory programs. For example, section 9 of the Endangered Species Act<sup>20</sup> prohibits the "taking" of a listed species, and taking can include habitat modification that puts a species at risk.<sup>21</sup> In a few states, such as California and Texas, the fear that section 9 would stop all land

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16. MODEL LAND DEV. CODE § 7-204 (1976).

17. 16 U.S.C. § 1451 *et seq.* (2006).

18. *New Jersey v. Delaware* (Orig. 134 Report of Special Master, Apr. 16, 2007), available at <http://www.supremecourtus.gov/docket/SpecMastRpt/SpecMastRpt.html>. (Coastal Zone Management Act permits Delaware to deny LNG terminal in its portion of bed of Delaware River).

19. The criteria include a showing of no practical alternatives, and this may require an inquiry into the availability of alternative locations under local land use plans and regulations for the activity.

20. 16 U.S.C. § 1538(a)(1)(B) (1973).

21. *Babbitt v. Sweet Home Chapter of Cmty for a Great Or.*, 515 U.S. 687, 696-708 (1995).



development has led to federal-state-local cooperation to develop multiple species habitat protection plans that require the regulation of private land, as well as habitat acquisition. Beyond these programs, federal regulation is weak. NEPA applies to the “built environment,” so most large federal facilities that will trigger development in developing areas must prepare an impact analysis or statement that examines the growth impacts on the surrounding areas and explores alternatives. NEPA, however, has had very little impact on local land use policies. Thus, proponents of biodiversity conservation and other environmental objectives are forced to try and adapt existing land use regulations to this end.<sup>22</sup> They face the endless problem of fitting round pegs into square holes.

### *B. Growth Unabated*

For decades, planners and students of urbanization have decried the economic, environmental, and aesthetic costs of sprawl. The reality is that there are almost no incentives for local communities, except a few developed, wealthy ones, to place substantial barriers in the way of continued urbanization.<sup>23</sup> The United States continues to grow in absolute numbers and to consume land far in excess of the amounts needed to accommodate this growth. Growth management, or its current incarnation, “Smart Growth,” is simply growth accommodation. Smart Growth and its legacy, new urbanism, try to make growth a bit more compact and clustered around transportation hubs where available. Urban settlement patterns in the United States reflect the broader social divides in twenty-first century America. Some cities and older “upscale” suburbs are “europeanizing” by developing denser, mixed use, street-oriented environments, while the majority of Americans live in ever expanding suburban areas, happy to drive everywhere. And, the Quiet Revolution has become a counter revolution. Most land use remains local or, at best—as in the Seattle region—quasi-regional.

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22. See generally, e.g., Robert B. McKinstry, Jr. et al., *BIODIVERSITY CONSERVATION HANDBOOK* (Environmental Law Institute 2006).

23. See generally Jonathan Levine, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE* (2006).

### C. *The Supreme Court "Over" Interested Itself in Zoning*

In the late 1970s, after almost five decades of silence, the Supreme Court began to review local zoning decisions under the First and Fifth Amendments. Forests have been cut down to support the commentary on the Court's new taking jurisprudence because *Lucas v. South Carolina Coastal Council*<sup>24</sup> threatened to introduce a new "Lochner Era" of selective judicial invalidation of a wide range of local land use regulation. Although subsequent Supreme Court opinions have narrowed and isolated *Lucas*,<sup>25</sup> the Court's taking jurisprudence still exerts a chilling effect on environmental regulation for three reasons. First, stringent regulations may trigger either the *Lucas* per se rule or be found to be a taking under the *Penn Central Transportation Co. v. City of New York*<sup>26</sup> balancing test. Second, the Court still remains hostile to the very foundation of environmentalism: the idea that the fundamental unit to be protected is the ecosystem, rather than the arbitrary parcel and political boundaries into which we have carved the surface of the planet. This perspective can lead to a more expansive view of damage from activities on parcels that adversely impact either the functioning of the ecosystem or the services that it provides. Finally, the Court has either expressly or impliedly shifted much of the burden of justifying land use regulations, especially exactions, to local governments.<sup>27</sup> The presumption of validity on which the pre-Rehnquist Court land use law was based continues to be invoked but it is increasingly being weakened by courts.

## IV. INTEGRATING LAND USE AND ENVIRONMENTAL REGULATION

The difficulties of integrating land use regulation with environmental protection start with the lack of a coherent vision of a mixed urbanized and non-urbanized landscape. We have only two coherent landscape visions. In the United States, we have either fenced off landscapes from

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24. 505 U.S. 1003 (1992).

25. Most notably, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (reversing an earlier "substantially advances legitimate state interest" test because it is a due process, not takings, inquiry); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (holding that a reasonable moratoria on land development does not constitute a taking).

26. 438 U.S. 104 (1978).

27. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

development under public land laws, such as the wilderness system, or through public and private acquisition of open space, or we have tolerated (encouraged) endless low-density development. Landscapes have traditionally been seen as canvases to be improved upon by human intervention.<sup>28</sup> The net result is that all land use has been seen as a transitional stage in an endless process of dynamic change.<sup>29</sup> In contrast, European planning has had a more static, integrated view of the built landscape. It has proceeded from a vision of a compact and dense city, surrounded by a tranquil and well-ordered countryside. This is not the case in the United States: we have primarily defined our cultural heritage as our rugged, isolated wilderness landscapes,<sup>30</sup> not human settlements.<sup>31</sup> It is a wonderful vision but totally useless to deal with an urban and urbanizing country. Some specific efforts to remedy this problem follow.

#### A. *Round Pegs in Square Holes Redux*

The most realistic integration scenario is simply the continuation of the present system. Local governments with the political will to pursue

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28. See Simon Schama's fascinating discussion of the didactic functions of sixteenth and seventeenth century palace gardens. Simon Schama, *LANDSCAPE AND MEMORY* 268-81 (1995).

29. My colleague Fred Bosselman has characterized Illinois land use law as the product of nineteenth century attitudes that "caused its residents to view land itself simply as another form of capital that could be made 'abstract, standardized and fungible' through the an 'alchemy' of commodification." Fred P. Bosselman, *The Commodification of 'Nature's Metropolis: The Historical Context of Illinois' Unique Zoning Standards*, 12 *NORTHERN ILL. L. REV.* 527, 531 (1992).

30. Joseph L. Sax, *MOUNTAINS WITHOUT HANDRAILS* 5-26 (1980).

31. There is a long tradition of growth management in the United States which reflects the European preference for compact, orderly development that results in a clear urban-rural demarcation, but its impact is spotty at best. See generally Timothy Beatley and Kristy Manning, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY, AND COMMUNITY* (1997). The root problem is that compact landscapes are alien to the American experience. The settlement patterns of Central Europe produced clustered villages surrounded by individual fields and common pastures. Urban centers developed around the old Roman centers, and the Koeingsburgen (royal cities) Cities were walled religious and commercial centers with well-defined limits that grew slowly until the eighteenth century. The rise of the nation-state after the Peace of Westphalia gave rise to the modern theory of city planning, and the model of the orderly city remains the dominant vision in Europe and among American planners. Many buildings were destroyed in the Thirty Years' War and theories of the ideal town emerged. E. A. Gutkind's *URBAN DEVELOPMENT IN CENTRAL EUROPE* 197 (1964). The history of pre-twentieth century history of city planning is a history of platting. John Reps, *TOWN PLANNING IN FRONTIER AMERICA* (1965). The low density tradition has been carried out as people move further and further out from the city center in what a leading historian has called the Crabgrass Frontier. Kenneth T. Jackson, *THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

environmental objectives will continue to adapt a body of law primarily designed to curtail the presumed nuisance-like characteristics of a use within a small geographic area to the broader project of environmental protection.<sup>32</sup> The mismatch between the geography of scale of problem areas, such as the Puget Sound ecosystem, and local political jurisdictions would seem to be an insurmountable barrier, but incremental solutions are advanced as the only realistic choice.<sup>33</sup> On the plus side, continued large-scale public and private land acquisition will ameliorate some of the jurisdictional mismatches.

*B. Environmental Protection Overlays or Special Protection Areas*

The regulation of land for environmental purposes is extremely difficult because there are no accepted baselines against which change can be measured. The problems of air and water baselines are hard enough, but it is possible to develop relatively coherent models of the resource minus specified amounts of degrading pollutants. It is possible to estimate many of the adverse environmental impacts of land development, but it is not easy to move from projected impact to a regulatory standard.

The development of land use baselines in the frontier culture of America is primarily a cultural problem rather than a technical one. In response to environmentalism, land use law has developed a new category of fragile or environmentally sensitive lands. In some areas, new legal regimes have been superimposed over existing ones to make environmental protection the dominant land use objective. The conceptual basis of these efforts is the concept of carrying capacity. Ian McHarg, the late, noted landscape architect, developed the concept in the late 1960s to serve as an upper limit on land development.<sup>34</sup> The idea is well-entrenched in environmental planning, but examples of successful implementation remain rare.

The best example of the use of carrying-capacity as the regulatory baseline is the 1980 Tahoe Regional Planning Compact.<sup>35</sup> It mandates

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32. These efforts are detailed in John R. Nolan, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2005).

33. Jamison E. Colburn, *Localisms Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L. Q. 945, 991-1001 (2006).

34. See generally Ian L. McHarg, *DESIGN WITH NATURE* (1969).

35. Pub. L. No. 96-551, 94 Stat. 3233 (1980).

the development of “environmental threshold capacities” for land development in the Tahoe Basin. Developers must demonstrate that the proposed development will not impair progress toward the air, soil, and water standards designed to preserve the exceptional quality of Lake Tahoe. In addition, private land conservancies in California and Nevada, along with the United States Forest Service, have been active in land acquisition and withdrawal to complement regulation. However, the price for this success is high, both in terms of economic opportunity costs and social-environmental opportunity costs. A leading landscape planner has observed that

The general effect of the thresholds and the embodied Land Capability System has been to freeze the historic pattern of land use, and to dramatically limit new development to pre-existing lots and commercial parcels. This is not because the old pattern is desirable . . . [but] [r]e-shaping the pattern to better fit land capabilities and transit objectives through TDR [Transferable Development Rights] or similar tools is nearly out of the question because the impacts would come from further raw-land disturbance.<sup>36</sup>

### C. *Toughen Supreme Court Takings Jurisprudence*

Many in the environmental community argue that property needs to be “greened”; that is, the Supreme Court and state courts should expand the category of externalities that a government can constitutionally regulate to include off-site ecosystem impairment. I offer a slightly different take on the greening project by focusing on a related problem: United States land use law creates too many incentives to assume bad, predictable risks of environmental degradation and very few incentives to avoid the consequences of the risk. Efforts to design more environmentally sustainable landscapes must impose the economic doctrine of moral hazard on public and private land use decisions.

Economists and students of natural disasters have long argued that it is economically irrational to encourage people to locate in the face of danger, such as a flood plain or vulnerable hurricane zone, and then demand to be compensated when damage occurs. However, both law and a long history of charity toward the victims of fate have created the

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36. Robert H. Twiss, *Planning and Land Regulation at Lake Tahoe: Five Decades of Experience*, *BIG PLACES, BIG PLANS* 83, 93 (2004).

expectation that the inefficient assumption of risky land use choices will be rewarded, not penalized. Economists call taking inefficient risks with the expectation that the government will foot the bill the moral hazard problem. Of course, there are important differences among types of location choices and disasters. However, with few exceptions, all levels of government encourage and reward landowners for moral hazards and the law rewards risk takers who should instead be penalized.

The incentive to assume risks starts with the Fifth Amendment to the federal constitution and continues through the well-justified expectation that the federal government will compensate the victims of a wide range of natural disasters. The long history of the construction of flood control projects and a federal flood insurance program that still encourages building in high-risk areas are prime examples of the creation of perverse incentives to take bad risks underpinned by the Fifth Amendment. The fundamental problem is not with the basic idea of helping victims of natural disasters, but with our inability to distinguish between protecting deserving victims and subsidizing risk takers. The political process is, of course, endlessly open to blunt efforts to create incentives to minimize the damages caused by extreme natural events in advance of their occurrence.<sup>37</sup>

The idea that land owners have no responsibility to avoid moral hazards is built into the constitutional conception of property and lies at the heart of *Lucas v. South Carolina Coastal Council*<sup>38</sup> and subsequent cases, most notably *Palazzolo v. Rhode Island*.<sup>39</sup> *Lucas* held that a complete elimination of the value of property for development can be a categorical taking and applied a categorical taking analysis to a state beachfront set back statute.<sup>40</sup> It recognized that there is a limited class of common background exceptions to title,<sup>41</sup> such as the duty not to use

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37. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 221 (Gerald Korngold & Andrew P. Morriss eds., 2004) (detailing how efforts to protect South Carolina's fragile beaches were rolled back after *Lucas* contrary to the theory that takings law promotes the adoption of efficient regulatory programs).

38. 505 U.S. 1003 (1992).

39. 533 U.S. 606, 627 (2001).

40. S.C. Code § 48-39-250 *et seq.* (2006).

41. See generally Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. L. REV. 321 (2005) (surveying the post-*Lucas* cases and finding that the background limitation defense is growing). Many of the examples of the defense's use involve resources, such as water, fishing quotas, and public land mining, where the expectation of exclusive dominion has always been lower than it has for land.

one's property to cause a nuisance, but it refused to accept the state's rationale that the regulation prevented the destruction of other property during hurricanes. Most of the critical environmental commentary has focused on the Court's hostility to the idea of environmental regulation unaccompanied by full compensation. However, the plurality's rejection of the state's damage prevention argument illustrates that the modern notion of property remains rooted in the notion of exclusive dominion, subject only to the duty not to cause a narrow class of "common law" nuisances.<sup>42</sup>

#### D. *Fix Ecosystems Not Problems*

Driven by the need to avoid the full force of the EPA, we have embarked on a series of land and water management experiments to "fix" a problem: the survival of a listed species. The object of the fix is to allow the maximum development consistent with the conservation of the minimum number of a species. These "fixes" are large experiments (with no control group) and take various forms, from ad hoc stakeholder groups convened to work cooperatively together to solve the problem within existing statutory schemes, to those, such as the Everglades restoration, with a specific statutory regime. It is too early to assess the success of these experiments and opinion is divided. On the pro side, these experiments have been hailed as important first steps to bioregionalism and as examples of "modular regulation." Modular regulation is seen by some as the logical evolution of the post-modern state, which can no longer be effectively governed from the top. The con argument is that experiments substitute process<sup>43</sup> for substance and reflect the loss of national political will to confront hard environmental problems at the federal level.

In my opinion, all these experiments are built on a fatal assumption: process will lead to harmony and long term ecosystem protection. But most regulatory decisions are still relatively small-scale, individual adjustments. The result can be analogized to fitting the pieces of a jigsaw puzzle together with no expectation that a clear picture will ever

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42. For an argument that the common law of nuisance can adapt to ecosystem service provisions, see J.B. Ruhl, Steven E. Kraft, Christopher L. Lant, *THE LAW AND POLICY OF ECOSYSTEM SERVICES* (2007).

43. I have characterized them as "third best solutions," that is, solutions with a high risk of failure. A. Dan Tarlock, *Three Challenges for Professor Nolan*, 23 *PACE ENVTL. L. REV.* 697, 702-04 (2006).

emerge. We should start by defining the substantive goals of the process. The goal should be a map that, within the constraints of fixed settlement patterns, designates remaining functioning ecosystems and identifies the indices of function to be maintained.<sup>44</sup> Once the map is fixed, we need some combination of incentives and constraints to maintain the identified systems over time. First, we need a variant of the once-model Oregon land planning system. Oregon's 1973 law imposed substantive state planning goals on local communities,<sup>45</sup> but no good deed goes unpunished, and in 2004 the law was eviscerated by an initiative measure.<sup>46</sup> Second, we need financial incentives similar to what New Jersey used to spur the construction of low and moderate income housing. New Jersey courts repeatedly held that all communities had to provide a fair share of opportunities to construct low and moderate income housing.<sup>47</sup> But, it was not until the state passed legislation allowing developing communities to shift up to fifty-percent of their obligations to developed areas that compliance with the fair share mandate began in earnest.<sup>48</sup> In the Puget Sound region, cities such as Seattle could meet their fair share of Puget Sound ecosystem conservation duties by paying for needed land acquisitions in rural areas.

Implementation of such a scheme is perhaps impossible in today's political climate, but if we are to make any progress in integrating land use and federal environmental law, we have to demarcate more clearly and narrowly where development can and cannot go. The decades-long argument that regulation should be subordinated to planning has borne some fruit and there are many large-scale planned communities being built in growing areas, and these proposals are built on these developments. The New Jersey solution to fair share housing duties, criticized as it is, illustrates that we need to provide small political units some flexibility in complying with ecosystem restoration mandates. And

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44. Efforts to do have spawned intense debates among scientists. See John Copeland Nagle & J.B. Ruhl, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 340–50 (2006).

45. Or. Rev. Stat. § 197.005-860.

46. Measure 37, which allows property owners to claim the difference between the value of the property before and after regulation, was upheld by the Oregon Supreme Court. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308 (Or. 2006). See Edward J. Sullivan & Carrie A. Richter, *A Taste of Ashes-The MacPherson Decision and the Future of Oregon's Planning Program*, 58 *PLANNING AND ENVIRONMENTAL LAW*, No. 4, p. 3 (2006).

47. *S. Burlington County NAACP v. Township of Mount Laurel (II)*, 456 A.2d 390, 418 (N.J. 1983).

48. N.J. Stat. Ann. §§ 52.27D-301 *et seq.* (2006).



as many participants at the conference emphasized: it's the money and land acquisition, stupid.