1991

An Alternative to the United States Supreme Court's Economic-Based Rationale in Takings Analysis

James P. Karp

Follow this and additional works at: http://digitalcommons.law.villanova.edu/elj

Part of the Environmental Law Commons, and the Property Law and Real Estate Commons

Recommended Citation


Available at: http://digitalcommons.law.villanova.edu/elj/vol2/iss2/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Articles

AN ALTERNATIVE TO THE UNITED STATES SUPREME COURT'S ECONOMIC-BASED RATIONALE IN TAKINGS ANALYSIS

JAMES P. KARP†

TABLE OF CONTENTS

I. Introduction ......................................... 254
II. Current Land Use Analysis ........................... 257
   A. Police Power Analysis ........................... 258
   B. Current Takings Analysis ........................ 260
      1. Physical Invasion ............................ 260
      2. Economic Loss ............................... 261
      3. Reasonable Investment-backed Expectations 262
      4. Other Factors ............................... 263
III. Some Proposed Solutions to the Takings Dilemma ... 265
   A. Regulatory Takings Are Rare .................... 265
   B. Substantive Due Process ........................ 267
   C. Existing Use Preference ........................ 269
   D. Natural Use Theory ............................. 271
IV. Another Proposal for Change ........................ 274
   A. Threads from Prior Writers ...................... 275
   B. A New Regulatory Scheme ....................... 276
   C. Justification for the New System ................. 279
      1. Due Process ................................ 279
      2. Regulatory Taking ........................... 281
V. Conclusion .......................................... 283

† Professor of Law and Public Policy, School of Management, Syracuse University.

(253)
One of the marvels of early Wisconsin was the Round River, a river that flowed into itself, and thus sped around and around in a never-ending circuit. Paul Bunyan discovered it, and the Bunyan saga tells how he floated many a log down its restless waters.

No one has suspected Paul of speaking in parables, yet in this instance he did. Wisconsin not only had a round river, Wisconsin is one. The current is the stream of energy which flows out of the soil into plants, thence into animals, thence back into the soil in a never ending circuit of life.

I. INTRODUCTION

THAT the earth and all of its land flows in a never ending circuit like the Round River is a fact beginning to dawn on the human community. In the United States, land has historically been viewed as both an economic commodity and factor of production. Land is also a natural resource, finite and essential. Life on the planet cannot exist without healthy land, air and water. One can survive without oil, coal, television, plastics and fast food, but not without healthy land, air and water systems. We can make value choices to have television or fast food, but it is imperative that relatively clean land, air and water continue to exist.

An impediment to viewing land as an interconnected natural resource is the modern attitude that perceives land solely as an economic entity. The attitude that land is a commodity to be bought, sold and developed to enhance the individual wealth of landowners ignores the essential characteristic of land as a natural resource. This attitude is fostered by the constitutional interpretations made by some courts, especially the United States Supreme Court, which determines land use issues from a single perspective—economic. By the nature of their operation within

1. A. Leopold, A Sand County Almanac 188 (1949).
2. See generally id. at 237-64. Leopold indicates that an intrinsic problem of viewing land as an economic commodity is that most parts of the "land community" have no economic value. Id. at 246. As he explains, when we find a non-economic part of that community threatened, we exacerbate the problem by inventing a subterfuge to give it economic importance. Id. at 247. Such an approach is self-destructing. Id.
3. See Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). In determining when governmental regulatory action constitutes a "taking" of property, the Court stated, 

http://digitalcommons.law.villanova.edu/elj/vol2/iss2/1
the governmental system, courts decide matters through a case by case analysis; therefore, land use law is in some measure made on a parcel-by-parcel basis. This procedure of deciding cases solely from an economic perspective, and on a parcel-by-parcel basis, is the antithesis of what needs to be done regarding a resource that forms the base of our natural systems pyramid.4

Despite the enlightened decisions of some of the state courts,5 land use decisions are too important to be left to the ad hoc decisionmaking of courts. A comprehensive legislative system must be developed to maximize the protection of lands that play an important natural resource role and to minimize landowner misery by creating rules that may not be ideal from the owner's perspective but are known and predictable. The validity of any regulatory system, however, must, in the end, be affirmed by the courts.

Any regulatory scheme must clear several major hurdles in court. A state regulation must first constitute a valid exercise of the police power. To meet this requirement, the regulation must have a legitimate public health, safety or welfare purpose, and that purpose must be reasonably promoted by the regulatory scheme.6 In addition, the courts insist that the otherwise valid exercise of the police power not unduly burden individual property owners.7 These so-called police power elements essentially amount to a substantive due process analysis,8 thereby bringing us to the constitutional hurdles.

claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" are among the “several factors that have particular significance.” Id. at 124.


5. E.g., Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 292 (N.H. 1984) (stating that where land, such as wetlands, has public importance, land may be unavailable for development); Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204, 210 (N.C. 1983) (stating that landowner may be prohibited from new construction which interferes with flood control role land plays); County of Pine v. Dep’t of Natural Resources, 280 N.W.2d 625, 630 (Minn. 1979) (stating position that land must be viewed more interdependently); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761, 768 (1972) (noting that owner has no absolute power to change essential natural character of land for purposes for which land is unsuited).


7. Id. at 76-77.

8. Lawton v. Steele, 152 U.S. 133, 137 (1894). The Court explained that for a state’s exercise of its police power to be justified, it must appear that the interests of the public as a whole require such interference. Id. In addition, the
The Fifth Amendment to the United States Constitution\textsuperscript{9} prohibits the federal government from depriving a person of life, liberty and \textit{property} without due process of law, \textit{and} from taking private property for public use without paying just compensation. These same proscriptions apply to state government action by way of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{10} The land use cases often muddle these prohibitions together, but constitutionally the prohibitions seem to include procedural due process, substantive due process, and "takings law."

Procedural due process requires a normative and fair process in enacting and implementing a regulatory system.\textsuperscript{11} Substantive due process assures that the regulatory system is reasonable and not unduly burdensome on individuals.\textsuperscript{12} The Takings Clause acknowledges that the government can take private property for public use, but must pay just compensation to the landowner.\textsuperscript{13}

The Takings Clause has become more complex than appears on its surface. The clause patently covers situations where the government affirmatively seizes or confiscates the land. The confusion arises when the government does not overtly confiscate the land in this fashion, but merely regulates it. The Court has held that some regulations can rise to the level of being a de facto or regulatory taking requiring the payment of just compensation despite the lack of a physical seizure of the land.\textsuperscript{14} It is in drawing the line between constitutional regulations and unconstitutional regulatory takings that the current problem has arisen. The Supreme Court has been unable to establish discernible criteria for drawing this line, and has operated instead by considering a system of nebulous, ad hoc factors.\textsuperscript{15}

\begin{itemize}
  \item means employed must be reasonably necessary for the accomplishment of the purpose and must not unduly oppress individuals. \textit{Id.}
  \item \textsuperscript{9} U.S. CONST. amend. V.
  \item \textsuperscript{10} \textit{See} Chicago B \& Q.R.R. v. Chicago, 166 U.S. 226 (1897). The Supreme Court held that the Due Process Clause of the Fourteenth Amendment makes the Takings Clause of the Fifth Amendment applicable to the states. \textit{Id.} at 241.
  \item \textsuperscript{11} \textit{LAND USE AND THE CONSTITUTION, supra note 6, at 40-41.}
  \item \textsuperscript{12} \textit{See generally} Looper-Friedman, \textit{Constitutional Rights as Property?: The Supreme Court's Solution to the "Takings Issue"}, \textit{15 COLUM. J. ENVTL. L.} 31, 39-44 (1990).
  \item \textsuperscript{13} U.S. CONST. amend. V.
  \item \textsuperscript{14} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Court in \textit{Pennsylvania Coal} stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." \textit{Id.}
  \item \textsuperscript{15} Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). In addition to the economic factors discussed in note 3, \textit{supra}, the Court also considers the character of the governmental action. \textit{Id.}
\end{itemize}
This Article starts from a basic presumption that land can no longer be seen solely as an economic commodity, thus necessitating a change in the way land use is regulated. Whatever regulatory system is used to affect this change, it must satisfy current constitutional decisional law, or nudge that decisional law only gently in the direction of change. Part II discusses current constitutional law regarding land use, though it will for convenience sake, generally refer to it as "takings law." This Article does not attempt to provide an in depth description or analysis of the current state of the law. That has been done so well, by so many others, that it need not be repeated here.16

Part III discusses some of the writings that provide the ideas and nurturing for the regulatory system proposed herein. Part IV proposes a land classification system that will pass scrutiny under current land use constitutional parameters, but clearly promotes change in those parameters. This system proposes that all land be divided into one of three categories based on its environmental and cultural importance, and that the rules applied by courts in reviewing cases in each category be different as well.

II. CURRENT LAND USE ANALYSIS

Despite declaring the takings area to be one of ad hoc decisionmaking, the courts have developed criteria that are repeatedly applied in these cases. Among the factors which the Court considers are the character of the regulatory action, the total economic loss caused by the action, and the extent of the interference with the owner's reasonable investment-backed expectations.17


17. Penn Central, 438 U.S. at 124.
Subsumed in the character of the regulatory action are two concepts that receive much judicial attention in takings cases. The first concept is whether the regulation constitutes a permanent physical occupation of the land. The second concept is whether the regulation attempts to prevent a public harm (i.e., nuisance), which is a valid goal, or to bestow a public benefit, which is not a valid goal.

In considering the total economic loss criterion, it is the almost universal judicial assumption that a regulation which deprives the landowner of all reasonable economic use is clearly a taking. The total economic loss criterion also provides room for concluding that a regulatory taking may occur where the economic loss is something less than total.

A. Police Power Analysis

Every takings analysis should begin, or more accurately be preceded by, an examination of the validity of the regulation under a police power (or substantive due process) analysis. To be valid, a regulation must promote a public health, safety or welfare interest, must substantially advance that police power interest and must not be unduly burdensome upon individuals.

The sweep of the police power's public health, safety or welfare justification for action is very broad. It is highly unlikely that a thoughtful, reasonably supportable regulation will fail judicial muster. It was believed that in satisfying the second prong of the test, proving a nexus or connection between the regulation and the stated police power purpose was an equally easy burden. If a rational basis for the regulation could be shown, the


19. LAND USE AND THE CONSTITUTION, supra note 6, at 77. A regulation aimed at preventing a harm rather than conferring a community benefit will be more readily subject to deferential judicial review. Id. The view has been termed the "harm-benefit distinction."

20. Id. at 70.

21. Id. at 82. While there is authority for the proposition that not all economically viable use must be denied, the burden of proving that the regulation has deprived the landowner of substantially all economically viable use is a heavy one to satisfy. Id.

22. Lawton v. Steele, 152 U.S. 133, 137 (1894). This three-prong test of substantive due process has become known as the Lawton test.


24. Id. at 143-44.
nexus test was met.

A good argument can now be made that the rational basis test no longer applies in the wake of Nollan v. California Coastal Commission. In that 1987 case, the Court, reviewing an agency action for the existence of a regulatory taking, decided that the agency's regulation must "substantially advance" the agency's purpose to be a valid exercise of its police power. There has been wide-ranging debate about the meaning of the Nollan case in response to the Court's apparent shift from a rational basis test to a "substantial advancement" test. One author indicates that Nollan is a blip on the judicial screen and will have little lasting impact, while another contends that the Court engaged in substantive due process review in Nollan. Still others argue that Nollan establishes an intermediate scrutiny test for land use cases.

The truth is that no one knows what standard, if any, the Court intended to establish, and no one will know until it elaborates on its Nollan decision. This author finds little justification for applying an intermediate scrutiny test for land use cases while applying a less onerous test for other economic-based regulations. It is also unsettling to conclude that the Court will now openly and routinely engage in substantive due process review of land use cases, thereby admittedly second-guessing the legislature. It is comforting to conclude, as does one legal scholar, Professor Sax, that Nollan is an aberration limited to its facts, and nothing more. Sax contends that the Court, rather than establishing a new nexus test, merely concluded that the agency in the case had failed to show any connection at all between the regulation and the stated police power purpose.

The final prong of the police power analysis is met by dem-

---

26. Id. at 834 (citing Agins v. Tibereon, 447 U.S. 255, 260 (1980)).
28. Sax, supra note 23, at 146. Professor Sax contends that the language of Justice Scalia's opinion in Nollan suggests "that Nollan is basically an abuse of authority case, rather than a new departure in property law." Id. at 144.
29. Looper-Friedman, supra note 12, at 48-49 (suggesting that test under Nollan is essentially same as second prong of Lawton test, requiring that exercise of police power be reasonably necessary for accomplishment of its purpose).
30. LAND USE AND THE CONSTITUTION, supra note 6, at 75.
31. Sax, supra note 23, at 143-44. Indeed, Professor Sax advances the argu-
onstrating that the regulation does not place a disproportionate burden on the landowner. A burden is disproportionate if it singles out a particular landowner to bear what should be borne by the community at large.\textsuperscript{32} Courts often use a harm-benefit analysis to decide the matter.\textsuperscript{33} If the regulation is intended to prevent the landowner from doing harm (engaging in a nuisance), the burden will not be considered disproportionate. If the regulation is aimed at securing a public benefit, a disproportionate burden is placed on the individual landowner. No matter how often the harm-benefit analysis is repeated by writers or used by courts, the hazy, subjective line between preventing harm and securing a benefit is no more reassuring than that between beauty and its antagonist. It is notable also that the harm-benefit analysis is used again as part of the ad hoc takings analysis criteria discussed below.\textsuperscript{34}

B. Current Takings Analysis

Once a regulation is acknowledged to be a legitimate exercise of the police power, several ad hoc factors are used by courts in framing their takings analyses.\textsuperscript{35} Each of these factors is part of a mysterious balancing process used by the Court in its review of takings cases. Individual factors do not normally stand alone, but are balanced with other factors to determine the takings answer.\textsuperscript{36}

1. Physical Invasion

If the court finds that the regulation constitutes a physical invasion of the property, this physical invasion standing by itself will lead to a finding that there has been a taking. A good illustration of this principle is provided by \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{37} decided by the Court in 1982.

Teleprompter, operating under a government permit, proposed to place, without compensation, a television cable wire and

\textsuperscript{32.} \textit{LAND USE AND THE CONSTITUTION}, supra note 6, at 77.
\textsuperscript{33.} \textit{Id.} See supra note 19 and accompanying text.
\textsuperscript{34.} \textit{Id.} at 68. The harm-benefit test is one of several ad hoc factors that the Court balances in its takings analysis. While it is useful in determining the character of the government's regulatory action, the distinction between harm prevention and benefit extraction is seldom precise. \textit{Id.}
\textsuperscript{35.} \textit{Penn Central}, 438 U.S. at 124. See supra notes 15, 17 and accompanying text.
\textsuperscript{36.} \textit{LAND USE AND THE CONSTITUTION}, supra note 6, at 70.
\textsuperscript{37.} 458 U.S. 419 (1982).
a one foot wide cable box on the rooftop of a building owned by Loretto. In finding that there had been a regulatory taking, the Court stated that a permanent physical occupation authorized by the government is a taking without regard to the public interest it may serve. In light of the permanent nature of the invasion, the Court did not require the balancing of the minor intrusion upon Loretto's property rights against the relatively important public interest of providing cable television to Manhattan.

Though the physical invasion rule is said to be a per se rule, some uncertainty exists about what constitutes a physical invasion. In Nollan, the Court acknowledged that a state agency can require a landowner to grant a public easement across his beachfront property as a condition for a building permit sought by the landowner. If the Court is concerned about substantive differences between government invasions of private property rights rather than procedural niceties, it is difficult to reconcile Nollan with Teleprompter. Allowing the public continuous access to your beachfront property certainly appears to be a greater physical invasion than a cable box and wire on the roof of an urban building. In terms of the degree of deprivation of property rights, it is arguably not critical that the beachfront landowner requested a permit and the Manhattan building owner did not, nor does it provide analytical comfort that the Court found other grounds (lack of nexus) for denying the public access easement in the Nollan case.

2. Economic Loss

The economic loss factor arose from Pennsylvania Coal Co. v. Mahon, in which Justice Holmes noted that if the diminution in value of the property caused by the regulation is too great, it will constitute a taking. Today, courts generally agree that where a regulation deprives the landowner of all reasonable use of the

38. *Id.* at 434-35.
39. *Id.*
40. *Land Use and the Constitution, supra* note 6, at 79. This per se rule does not turn on whether the physical invasion is solely by the government or by those authorized by the government or that the physical invasion is minimal. *Id.*
41. 483 U.S. at 836.
42. *Id.* at 836-37. The Court explained that such a condition is constitutional if the condition is designed to accomplish a purpose that would be a legitimate exercise of the police power and not a taking. *Id.*
43. 260 U.S. 393 (1922).
44. *Id.* at 415. *See supra* note 14.
property, a taking exists.\footnote{Hodel v. Virginia Surface Mining and Reclamation Ass’n, 452 U.S. 264, 295-97 (1981). In \textit{Hodel}, the Surface Mining and Reclamation Act of 1977 (Act) was challenged as effecting a regulatory taking of property without just compensation because certain mining operations would no longer be financially viable. The Court, however, found that the Act did not “prevent beneficial use of coal-bearing lands.” \textit{Id.}} Little guidance has emanated from the courts on what is a reasonable use versus one that is not, and there is considerable disagreement on how much, short of total diminution, must occur to create a taking.\footnote{\textit{LAND USE AND THE CONSTITUTION}, \textit{supra} note 6, at 82.}

In spite of these ambiguities, a few things can be stated about the economic loss factor with some assurance. Courts rarely consider economic loss in isolation, but rather relate it to the purpose behind the challenged regulation.\footnote{Looper-Friedman, \textit{supra} note 12, at 45.} Second, courts measure the degree of economic impact by examining the property as a whole and not simply the portion regulated,\footnote{\textit{LAND USE AND THE CONSTITUTION}, \textit{supra} note 6, at 69.} arguably unlike the \textit{Pennsylvania Coal} Court which separated surface and sub-surface land rights.\footnote{Looper-Friedman, \textit{supra} note 12, at 45.} Third, the Supreme Court has indicated that diminution in value, or the economic loss factor, may not by itself cause a court to reach the conclusion that a regulatory taking occurred: it is a merely a factor for consideration.\footnote{\textit{LAND USE AND THE CONSTITUTION}, \textit{supra} note 6, at 82.} Fourth, a restriction that “deprives the property owner of the most profitable use of his property is not necessarily enough to establish” that a taking has occurred.\footnote{United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958). The Court noted that the question whether or not a regulation amounts to a constitutional taking is one that properly turns on the particular circumstances in each case. \textit{Id.} at 168. The loss of a profitable use therefore would be considered in addition to other relevant factors. \textit{Id.} See \textit{supra} notes 3, 14 & 15 and accompanying text for these factors.} While these four conclusions offer some foundation regarding the economic loss factor, a great deal of uncertainty remains.

3. Reasonable Investment-backed Expectations

This factor first appeared in \textit{Penn Central Transportation Co. v. New York City},\footnote{438 U.S. 124, 127-28 (1978). The Court explained, citing \textit{Pennsylvania Coal}, that a regulation that substantially furthers important public policies may frustrate distinct investment-backed expectations so as to amount to a taking. \textit{Id.} at 127.} and may be, depending on your reading of it, a grand mystery, a partial repetition of the economic loss factor, or
a simple and obvious concept. Along the lines of the last possibility, the courts, in considering a landowner's reasonable investment-backed expectations, may seek to divine whether he was aware of the regulation prior to making substantial and reasonable investments in the land.\textsuperscript{53} If the landowner was unaware or was given no notice by the regulator, the regulation may constitute a taking under the concept of vested rights.\textsuperscript{54} For example, if the government gave the landowner assurances that expensive improvements being contemplated were legal and not objectionable, but changed its view after the improvements were made, this action would interfere with the landowner's reasonable investment-backed expectations.

No taking occurs where the regulation in question merely interferes with "unilateral expectation or an abstract need" of the landowner.\textsuperscript{55} One would expect, though it is not entirely clear, that a taking would not occur if a person merely owned the land prior to the regulation, but did not undertake costly improvements. It is even less clear as to how this factor is applied in the situation where an investor buys land based on the hope or expectation of making a profit, and its plans are consistent with current zoning and other land use regulations. If subsequently the regulations are changed, thereby making the investor's plans illegal, does that interfere with its reasonable investment-backed expectations? Since it is ludicrous to expect that the Constitution protects investors from interference with their speculative ventures, one would anticipate that the answer is no.

If one concludes, as has one author, that reasonable investment-backed expectations are limited to current uses of the land, or to possible uses given the current condition of the land, then arguing for protection of speculative uses of land would be of minimal assistance to a complaining landowner.\textsuperscript{56} Interpreted in this fashion, this conclusion provides some fodder for the new approach to takings analysis suggested in this Article.

4. Other Factors

Another factor of long-standing credibility in takings analysis, discussed earlier under the police power section, is the dis-
tinction between a regulatory purpose to prevent a public nuisance and one to provide a public benefit.\textsuperscript{57} Whether a regulation prevents a harm or confers a benefit is a determination entirely within the discretion of the reviewing court.\textsuperscript{58} Whether the regulation's demand is that parkland be provided to get subdivision approval or that off-site roads be widened to support a proposed shopping mall, it is the subjective judgment of the decisionmaker whether that regulation prevents a harm or confers a benefit. One can argue it forcefully either way.

If a court concludes that a regulation is intended to prevent a public harm, it will usually uphold the regulation regardless of the reduction in property value caused by it.\textsuperscript{59} In addition, the harm-benefit approach provides courts with a framework for considering non-economic factors in the takings analysis, thus avoiding a shortcoming present in current takings analysis.\textsuperscript{60}

The regulatory takings area is notorious for its ambiguity. It is ill-perceived by many because notwithstanding the ambiguities, the analysis is one founded wholly on economic factors. This is a luxury the planet can no longer afford.\textsuperscript{61}

The need for clarity and change in the area is further dramatized by the Court's recent decisions on the issue of "ripeness." The Court has ruled that takings cases are not ripe for federal court review until property owners have obtained a "final" decision from the regulating agency determining what use can be made of the land, and have been denied all reasonable beneficial use of their property by that agency.\textsuperscript{62} If the Court adheres to these ripeness constraints, the task of clarifying and applying constitutional takings law will fall to the state courts.\textsuperscript{63} Given the minimal guidance currently available from the Court, the poten-

\begin{itemize}
\item \textsuperscript{57} See supra notes 33-34 and accompanying text.
\item \textsuperscript{58} Hunter, supra note 4 at 358. Hunter suggests that "the traditional harm/benefit analysis is malleable to the point of offering no real limits on legislative or judicial value choices. . . ." Id.
\item \textsuperscript{59} Id. at 323-25.
\item \textsuperscript{60} Id. at 330. These factors included the following: what post-regulation uses remained, the regulation's effect on the whole parcel, the property owner's expectations, the arbitrariness of the governmental decision, and whether the landowner received any reciprocal benefits. Id.
\item \textsuperscript{61} Id. at 382.
\item \textsuperscript{62} Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172, 194-95 (1985). Takings claims have also not been considered ripe by courts until the landowner has sought compensation through the procedures of the state. Id. at 194.
\item \textsuperscript{63} Mandelker & Berger, A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings, 42 LAND USE L. & ZONING DIG. 3, 4 (1990).
\end{itemize}
tial for inviting further inconsistency is great. The need for clarity and change has not gone unheeded in academe, however, and the next section discusses some of its proposed changes.

III. SOME PROPOSED SOLUTIONS TO THE TAKINGS DILEMMA

Though the courts, especially the United States Supreme Court, have muddled along with ad hoc decisionmaking in takings analysis, some writers have suggested a more systematic approach. One of the foremost authorities in the land use field, Norman Williams, is not optimistic about the Court's working toward a systematic solution on its own. He suggests that as of the late 1980's, eight of the nine justices (excepting Stevens) did not understand the complex land use issues, and exhibited no interest in learning.64 It is likely, therefore, that the solution will come from the state courts, perhaps using one or more of the ideas suggested by academics, including those discussed below.65

A. Regulatory Takings Are Rare

This may be a slight overstatement, but in a recent review of the current state of takings law, Professor Joseph Sax suggests that the debate about the appropriate analysis is much adieu about very little.66 He rejects the notion that the trilogy of 1987 Supreme Court cases has turned the area on its legal ear. He contends that Nollan is an extreme case because there was no legitimate showing of a connection between the state interest and the condition in the permit67 and that Keystone Bituminous Coal Association v. De Benedictis68 is a peripheral, poorly reasoned case which is primarily the product of the Court's reluctance to over-

64. Land Use and the Constitution, supra note 6, at 91. Williams notes that the "long, rich state experience in the land use field has not been reflected in Supreme Court opinions, thus reflecting the Court's lack of interest in this area." Id.
65. As noted above however, leaving the task of deciding constitutional takings claims to the state courts under the Court's present fact-sensitive analysis involves its own problems of inconsistency and insufficient guidance. See supra note 63 and accompanying text.
67. Id. at 143-44.
68. 480 U.S. 470 (1987). The Supreme Court upheld a Pennsylvania law prohibiting coal mining that would result in subsidence beneath certain structures. The regulation affected approximately 2 percent of the existing coal. A 5 to 4 majority sustained the law as necessary to protect the public interest in health, the environment, and the fiscal integrity of the area. Id. at 487-88.
turn the Pennsylvania Coal$^{69}$ case.$^{70}$ In addition, Professor Sax
does not find troubling the Court's decision in First English
Evangelical Lutheran Church v. County of Los Angeles,$^{71}$ declaring that
just compensation is due a landowner for temporary regulatory
takings, since there are few instances where a landowner actually
loses all economic use of the land.$^{72}$

Sax argues that one cannot find a single modern case in
which the Court held a legislatively-enacted regulatory scheme to
be a taking.$^{73}$ He does identify, however, cases where a taking
was found through judicially decision—such as the physical inva-
sion cases (Teleprompter$^{74}$ and Nollan$^{75}$), and a few cases where the
means greatly exceeded the legislative goal (Hodel v. Irving$^{76}$).$^{77}$
Based on this record, Sax contends that the Court is no less likely
to approve a regulatory scheme today than it was in 1954 when it
wrote the Berman v. Parker$^{78}$ opinion,$^{79}$ establishing the legitimacy
of regulations based on the broad concept of "public welfare."$^{80}$
In support of his position he cites a number of broad regulatory
schemes found to be legitimate in recent years—such as open
space zoning (Agins v. City of Tiburon$^{81}$), billboard regulation (Met-
tromedia v. City of San Diego$^{82}$), wetland protection (United States v.

$^{69}$ Pennsylvania Coal, 260 U.S. at 393. See supra note 14 and accompanying
text.

$^{70}$ Sax, supra note 23, at 144-45.

$^{71}$ 482 U.S. 304 (1987). The Court in First English considered the constitu-
tionality of an interim flood plain ordinance prohibiting rebuilding on the claim-
ant's land. While the Court remanded the question of whether the regulation
constituted a taking, it held that a landowner would be entitled to just compen-
sation for the loss incurred between enactment and invalidation of an unconsti-
tutional law if the regulation was a taking. Id. at 320.

$^{72}$ Sax, supra note 23, at 145.

$^{73}$ Id.

$^{74}$ Teleprompter, 458 U.S. at 419.

$^{75}$ Nollan, 483 U.S. at 825.

$^{76}$ 481 U.S. 704 (1987). Legislation enacted to abolish fragmentary inter-
ests in Indian land allotments effectively forfeited interests when other means
might have permitted owners to benefit without infringing on the legislative pur-
pose. Id. at 718.

$^{77}$ Sax, supra note 23, at 145.


$^{79}$ Sax, supra note 23, at 146.

$^{80}$ Berman v. Parker, 348 U.S. at 26. The Court held that "[t]he concept of
the public welfare is broad and inclusive." Id. at 33. Given this sweeping defer-
cence to determinations of public welfare, Professor Sax notes that except in situa-
tions that are "utterly" lacking in justification, the Court is likely to accept
legislative goals in taking cases. See Sax, supra note 23, at 146.

$^{81}$ 447 U.S. 255 (1980).

Riverside Bayview Homes\textsuperscript{83}, historic preservation (\textit{Penn Central}\textsuperscript{84}), pesticide regulation (\textit{Ruchelshaus v. Monsanto}\textsuperscript{85}), endangered species (\textit{Tennessee Valley Auth. v. Hill}\textsuperscript{86}), and strip mine land restoration (\textit{Hodel v. Virginia Surface Mining and Reclamation Ass'n}\textsuperscript{87}).\textsuperscript{88} He finds further support for the Court’s hands-off approach in two non-land use cases involving a rent control scheme (\textit{Pennell v. City of San Jose}\textsuperscript{89}), and a pension protection law (\textit{Connolly v. Pension Benefit Guaranty Corp.}\textsuperscript{90}).

Given the limited holdings and deferential approach exhibited in the Court’s recent opinions, Professor Sax’s argument seems persuasive. The unsettling impact of these decisions, however, is that the important area of constitutional takings law is left to the whim of ad hoc decisionmaking. In addition, the possibility that the state courts may now be the important judicial players in the takings game, due to recent interpretations of the “ripeness doctrine,”\textsuperscript{91} reinforces the need for a unifying theme.\textsuperscript{92}

For purposes of this Article the strength of Professor Sax’s argument lies in his conclusion that a regulatory system, albeit broad and innovative, is unlikely to be labelled a regulatory taking by the Court. If enacted in a planned fashion and supplied with a sound public purpose rationale, the broad regulatory system proposed in this Article is likely to withstand judicial scrutiny.

B. Substantive Due Process

Professor Susan Looper-Friedman argues that recent case law, except for \textit{First English}, appears to fit neatly into a substantive

\begin{itemize}
\item \textsuperscript{83} \textit{474 U.S. 121 (1985)}.
\item \textsuperscript{84} \textit{438 U.S. 104 (1978)}.
\item \textsuperscript{85} \textit{467 U.S. 986 (1984)}.
\item \textsuperscript{86} \textit{437 U.S. 153 (1978)}.
\item \textsuperscript{87} \textit{452 U.S. 264 (1981)}.
\item \textsuperscript{88} Sax, \textit{supra} note 23, at 146.
\item \textsuperscript{89} \textit{485 U.S. 1 (1988)}.
\item \textsuperscript{90} \textit{475 U.S. 211 (1986)}.
\item \textsuperscript{91} \textit{See supra} notes 62-63 and accompanying text.
\item \textsuperscript{92} If takings law has not changed much over recent years, perhaps Sax has.
\end{itemize}

In a 1964 article, he suggested a theory called enterprise arbitration to resolve the area’s uncertainty. Sax, \textit{Takings and the Police Power}, 74 \textit{Yale L.J.} 36 (1964). He argues that when the government seeks to enhance its resource position, it is acting in its enterprise capacity and must pay just compensation. \textit{Id.} at 63. Conversely, if the government is regulating to arbitrate or avoid private disputes (e.g., zoning to separate conflicting uses), it is acting in its arbitral capacity and owes no compensation regardless of the degree of private harm. The difficulty with Sax’s theory is similar to that discussed previously regarding the harm-benefit distinction. \textit{Id. See supra}, note 32 and accompanying text. It is very difficult to draw the line between the governments enterprise and arbitral activities.
due process analysis. Although *First English* focuses on the appropriate remedy when a temporary taking is found, the other cases, argues Looper-Friedman, are not based on a takings claim, regardless of the Court's insistence on classifying them as such. She suggests that the error is a compounding of Justice Holmes refusal in *Pennsylvania Coal* to discuss substantive due process with his metaphorical use of the word "taking."  

Looper-Friedman uses the three prong test from *Lawton v. Steele* for substantive due process analysis and neatly puts each of the recent Court cases onto one of the prongs. As explained earlier, the *Lawton* test requires that the state regulation must advance the interest of the public rather than any particular class of persons, the means used must be reasonably necessary to attaining the public goal, and the means must not unduly burden the regulated individual. She contends that because the so-called takings cases can be explained under the due process clauses of the Fifth and Fourteenth Amendments, the question of whether a government regulation can ever violate the Fifth Amendment's takings clause is wholly unaddressed.

Looper-Friedman's article seems to suggest that we may not have "progressed" at all from the pre-*Pennsylvania Coal* days. The current case law may be consistent with the nineteenth century *Mugler v. Kansas* decision, which held that if procedural and substantive due process protections are accorded by the government, the regulation is valid without regard to the Takings Clause. The Court, despite its takings verbiage, has been silent on the point.

A substantive due process pigeon-hole would provide the currently labelled takings cases with an analytical framework superior to ad hoc decisionmaking. However, one wonders if it is realistic at this late date to expect the Court to recognize that for

93. Looper-Friedman, supra note 12, at 56-57.
94. Id. at 39-44. Looper-Friedman states that some commentators have suggested that Justice Holmes' discussion of a "taking" in *Pennsylvania Coal* was not intended to refer to the Takings Clause at all. Id. at 42. Instead, it is believed that Justice Holmes employed the word "taking" only in a metaphorical sense in his attempt to avoid a discussion of substantive due process. Id.
95. 152 U.S. 133 (1894).
96. Looper-Friedman, supra note 12, at 42-49.
97. *Lawton*, 152 U.S. at 137. According to Looper-Friedman, this three-prong test essentially requires the following: (1) the *end* must be a proper one; (2) the *means* must be appropriate; and (3) the *end* must justify the *means*. Looper-Friedman, supra note 12, at 42 (emphasis in the original).
98. Looper-Friedman, supra note 12, at 62.
the past seventy years it has been metaphorically distracted by Justice Holmes' reluctance in *Pennsylvania Coal* to use the words "substantive due process." In any event, Professor Looper-Friedman provides a credible rationale for explaining the prior "takings" cases that would allow the courts to move on to a new Takings Clause analysis without offending traditions of stare decisis. In this way, a fresh judicial approach for the Takings Clause would enhance the acceptability of any regulatory system proposed to end the confusion in the area.

C. Existing Use Preference

Professor John Humbach contends that the current land ethic is one of autonomy and change. No other society appears to have left the fate of its land so completely in the hands of private owners. He recognizes, however, that the public attitude toward relatively unfettered land development is changing, and development is often greeted with suspicion and hostility. Humbach urges a new land ethic based on planning and stability.

The ethic of planning and stability would be attained through a change in current zoning laws. Traditional zoning serves the goal of consolidating like uses and separating incompatible ones; zoning has not been used, however, to steer development away from undeveloped areas entirely. Humbach advocates creating *existing use zones*, in which the current use to which the land is naturally adapted would be viewed as the appropriate use of that land. The existing use zones are not appropriate for urban

100. *Id.* at 668-69. The Court stated, "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.*

101. Humbach, *supra* note 55, at 341. Humbach states that this ethic no longer produces the best results and is being replaced by a new, emerging land ethic. *Id.*


104. *Id.* at 349.

105. *Id.* Humbach explains that the creation of existing use zones is necessary to save familiar countryside and natural areas because we cannot rely on individual initiatives to decide where our land is developed. *Id.*
areas, but are best-suited for relatively undisturbed areas in which the community wishes to prevent development. Thus, in the existing use zone the presumption would run against the modification of the current land use.\footnote{106}

Humbach notes that although a government regulation cannot take away "fundamental attributes of ownership,"\footnote{107} the right to develop land is not one of these fundamental attributes, as is made clear in the \textit{Penn Central}\footnote{108} case.\footnote{109} What the Takings Clause guarantees is compensation for the deprivation of a gainful economic return from the land. Land which is used, or capable of being used, for traditional activities such as farming, ranching or forestry should easily meet the standard of providing a gainful economic return.\footnote{110} A regulation protecting these existing uses would have a deflationary impact on land prices, and might deprive owners and investors of their opportunity for a speculative profit. The constitution does not, however, guarantee the right to develop or assure the right to make a speculative profit on the sale of property.\footnote{111}

Humbach argues that existing use zoning is consistent with the ad hoc factors considered by the Court in takings cases. First, it does not physically invade the land. In addition, it causes no economic loss, because the landowner can continue to make the same use of the property as was made in the past.\footnote{112} Although the legally unprotected speculative profit may be lost, the reasonable investment-backed expectation of the investor or landowner should take into account the fact that regulatory change is normal. Landowners are not immune to changes in regulation affecting their land investment until such time as they obtain vested rights through expenditures based upon an actual, approved development plan.\footnote{113}

This author strongly agrees with Humbach that a new land

\footnote{106. \textit{Id.} at 349-50.}
\footnote{107. \textit{Id.} at 351. Such attributes include the right to exclude others. \textit{Id.} at 351 n.36.}
\footnote{108. 438 U.S. at 124 (quoting \textit{Pennsylvania Coal}, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").}
\footnote{109. Humbach, \textit{supra} note 55, at 352.}
\footnote{110. \textit{Id.} at 360.}
\footnote{111. \textit{Id.} at 360-62. The fact that the owner could make a greater profit by developing the land is not dispositive under a Takings Clause analysis. \textit{Id.} at 360.}
\footnote{112. \textit{Id.} at 363.}
\footnote{113. Humbach, \textit{supra} note 55, at 368. An expectation that there will be no
ethic which promotes planning and stability is necessary. The use of existing use zoning has a great deal of appeal and promise for accomplishing that end. One potential drawback, however, is that existing use zoning may be misused by communities for the purpose of maintaining the status quo, without having the sound land ethic underpinnings for doing so. It is Humbach’s stated intention, and should be each community’s as well, that the critical question in existing use zoning is where, not whether, development should take place. The discussion in the next section attempts to go one step further in the development of a new land ethic by establishing some parameters for deciding which lands should not be developed.

D. Natural Use Theory

Mr. David Hunter combines principles of ecology with the natural use theory emanating from the landmark Wisconsin case, Just v. Marinette County. He proposes, as does Humbach, a new land ethic. Referring to the basic principles of ecology, he points out that land, like the air and the water, is a critical ecological resource. Land is a finite resource intricately tied to an array of natural systems. As a result, Hunter argues that land should not be perceived or legallyregulated on a parcel-by-parcel basis.

This fundamental difference between land and other forms of economic property prohibits traditional decisionmaking’s balancing of the public interest, as determined by society’s value choices, against fundamental property rights of individual landowners. Creating an ethic favoring the protection of land, says Hunter, is not a matter of social value choices, but is one compelled by the essential role land plays in ecological systems. It is a regulatory change between purchase and actual development of land is simply not a reasonable “investment-backed” expectation.

114. Id. at 342.
115. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
117. Id. at 313-17. Hunter notes that recent environmental crises, such as the pesticide scare of the 1960’s, the oil crisis of the 1970’s, and the current deterioration of the ozone layer are “vivid example[s]” of the “complex, unpredictable and potentially catastrophic effects posed by our own disregard of the environmental limits to economic growth.” Id. at 314. The finiteness, added to human dependency on the environment, points to the “unquestionable result” that human activities will have to be constrained.
118. Id. at 318. Hunter suggests that land cannot be viewed as existing in isolated parcels because a landowner’s obligations cannot be limited to the property boundaries.

Published by Villanova University Charles Widger School of Law Digital Repository, 1991
matter of ecological imperative. Protection of ecologically important lands is as basic to survival as maintaining breathable air and potable water. Landowners must, therefore, come to understand that along with the assortment of rights that accompany land ownership comes the duty to be a steward of the land. Humbach writes of a land ethic changing from one preferring change and development to one emphasizing planning and stability. Similarly, Hunter writes of a perspective changing from one favoring unchecked growth and development to one entrenched in stewardship and conservation.

Hunter finds a legal haven for his adaptation of land ecology principles to land use regulation in Just v. Marinette County. In this case, the Supreme Court of Wisconsin upheld a county shoreland zoning ordinance that severely restricted the development of wetlands contiguous to protected streams. The court acknowledged the interrelationship between the wetlands and other shorelands with the purity of the water and other natural resources, such as the opportunity to fish or to observe scenic beauty. As a result, the court held that an owner of land "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."

Humbach similarly pointed out that although there is a protected right to reasonable economic use of land, there is no con-

119. Id. at 314-15.
120. Hunter, supra note 4, at 319. According to Hunter, the key concept of the land ethic is the idea of stewardship. Id. He provides the following:

Stewardship. . .refers to management, a management which uses no more of the available resources than needed. . ., which does not allow damage to go unattended. . ., which includes a proper dominion. . ., and which looks out for others' needs. . .. Wealth, power, or resources are held in trust and include serious social responsibilities.

Id. at 319 (quoting A. Fritsch, Science Action Coalition, With A. Fritsch, Environmental Ethics: Choices For Concerned Citizens, 248 (1980)).
121. Humbach, supra note 55, at 341. See supra notes 101-02 and accompanying text.
122. Hunter, supra note 4, at 319-20.
123. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
124. Id. at 26, 201 N.W.2d at 772.
125. Id. at 16-17, 201 N.W.2d at 768.
126. Id. at 17, 201 N.W.2d at 768. The court stated that the exercise of the police power must reflect the protection of the natural uses of the land. "[W]e think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses." Id.
The court in *Just* states that the reasonable economic use of the land may be confined to that which is consistent with the natural character of the land. Hunter goes one step further in proposing that where the nature of the land is such that its protection is an ecological imperative, any reasonable economic use must be balanced against the duty of stewardship.

Hunter states that the foremost impediment to the protection of ecologically important lands is the current interpretation of the Takings Clause as focusing only on economic rights associated with land. He proposes that the federal navigational servitude and the public trust doctrine be expanded and used as the legal vehicles for incorporating the principles of protecting ecologically imperative lands into the current land use ethic.

The recognition of some lands as critical natural resources subject to the concept of stewardship, as proposed by Hunter, is an essential ingredient to the change needed in takings law and in land development regulation in general. The use of existing legal doctrines, like the navigational servitude and public trust doctrines, is a tried and traditional method of changing outmoded legal doctrine. This author, employing the ideas of Hunter and the other authors discussed in this section, will propose a different solution.

128. *Just*, 56 Wis. 2d at 17, 201 N.W.2d at 768. See *supra* note 126 and accompanying text.
130. *Id.* at 316.
131. *Id.* at 360. The federal navigational servitude doctrine vests property rights in navigable waters with the United States under a general commerce power source of authority. *Id.* Hunter explains that the doctrine basically is "an interest which permits the federal government to displace or destroy state-recognized property rights in navigable waters . . . without having to pay just compensation." *Id.* For a brief explanation of Hunter's proposed expansion of the doctrine, see *infra* note 133 and accompanying text.
132. *Id.* at 367. The public trust doctrine allows states to avoid constitutional takings claims when they are merely fulfilling their obligations as trustees of the public's interest in private lands, especially property underlying navigable waters. *Id.*
133. Hunter, *supra* note 4, at 360-78. Generally, Hunter argues that expansions of these two doctrines would act as effective alternatives to the traditional takings doctrine and would instead reconcile takings analysis with ecological principles. *Id.* at 367-78.
IV. ANOTHER PROPOSAL FOR CHANGE

A change in the law of takings is necessary for several reasons. The landowner, the government regulator, and the planet are not benefitted by an ad hoc decisionmaking system that is more akin to roulette than law-making. Some degree of certainty, even if not ideal from the perspective of any of the various individual interests, is better than the proverbial "shot in the dark." As always, the function of the regulator initially, and the courts ultimately, is to balance the public interest against the private interest. The key is to determine which is the weightier concern; the landowner's economic interest in land as both a commodity and factor of production, or society's natural resource interest. While some degree of uncertainty is intrinsic in any social balancing process, a significant amount of doubt can be eliminated.

As mentioned previously, land is different from other forms of property, and must be treated differently. It plays a critical role in forming the base of the ecological pyramid. Because not all land plays a critical ecological role, the law should differentiate between types of land. Lands, important to the earth ecosystem or life on the planet, must have their natural resource value emphasized whereas the private economic interest of the landowner must be de-emphasized. Courts have long held that private property owners cannot expect to cut the public off from access to the sea and other important navigable waters. It is equally, if not more, unacceptable for private landowners to expect to use their lands in a fashion that threatens life on the planet, or even significantly degrades the quality of human life in their communities.

If it is accepted that some degree of certainty is better than ambiguity in takings law, that life interests supersede private property interest, and that these concepts are not assured by the current law, then the takings law must change. In light of the unusually slow and cumbersome nature of affecting social change through case by case judicial decisionmaking and the rapid rate of depletion of important ecotypes, a comprehensive legislative system of change is preferable, even necessary. What this Article proposes is first, a skeleton for a comprehensive regulatory scheme that should survive analysis under current takings law,

134. Id. at 336.

135. Id. at 360-61. Hunter notes that historically, the federal government has been vested with the right to regulate navigable waters and the underlying land, thereby denying private property interests. Id. at 360.
and second, a shift away from purely economic analysis in takings cases.

A. Threads from Prior Writers

Amidst the great amount of writing on the takings issue,\textsuperscript{136} the works of a few writers have been singled out for attention in this Article because they each provide a building block for the proposal made herein. Before setting forth this proposal, a brief summary of these authors' views is necessary.

Professor Sax carefully documents that where the government has adopted a comprehensive regulatory scheme, it is rare, except in narrow circumstances, for the Court to find that a taking has occurred.\textsuperscript{137} To secure the right of passage through the shoals of takings law, communities should adopt a comprehensive regulatory scheme and carefully justify the reason for such a scheme. If all communities enacted regulatory schemes with common ingredients, the new norm would minimize takings disputes, planetary anguish, and bad land investments.

If significant change in takings law is going to take place, courts must ultimately play a role. Judicial respect for stare decisis must be recognized. Courts are usually reluctant to adopt a new position unless it can be reconciled with their prior rulings in such a way as to give the appearance of consistency. Professor Looper-Friedman asserts that the so-called takings cases can all be explained as substantive due process cases,\textsuperscript{138} or arguably as cases simply reviewing the validity of the exercise of the police power. Though there may be judicial cringing in some quarters about acknowledging that they have engaged in an inquiry into the wisdom of the law, in reality it is done in the highest judicial echelons.\textsuperscript{139} A consistent rationale is, therefore, available for prior “takings” rulings, freeing the courts to travel a different path.

Professor Humbach also provides important underpinnings for the legal changes proposed herein. He claims the roulette-like takings law, and the roulette-like freedom given the market place to steer development must end. His goals of planning and

\textsuperscript{136} See supra note 16.
\textsuperscript{137} Sax, supra note 23, at 145. For examples of these comprehensive regulatory schemes, see supra notes 81-90 and accompanying text.
\textsuperscript{138} Looper-Friedman, supra note 12, at 44-49. See supra notes 93-98 and accompanying text.
\textsuperscript{139} Nollan, 483 U.S. at 838-39.
stability give rise to a presumption favoring the existing use of land, at least for ecologically or community-determined critical areas. Equally important is his point that there is no constitutionally protected right to develop land, and that if the land can be bought and sold in the open market, it must have some value and therefore some reasonable use. Even if one retains the current economics-based analysis, Humbach capably makes the case for protecting important lands. If, however, one rejects the use of economics-based analysis commonly applied throughout the land use field, the case for protecting ecologically valuable lands can be more easily made.

Mr. Hunter established that all land is not equal, and cannot be treated as if it is. He notes that the finite nature of land and its intricate role in the many life support systems make it a type of property that needs to be subdivided before regulation. Ecologically important lands give rise to the duty of being a steward of that land, thereby limiting the rights that may otherwise exist with property ownership. In the long run, a new land ethic must arise among landowners; but in the nearer term, the law must change to foster the growth of that new land ethic.

B. A New Regulatory Scheme

Ideally each state should undertake, or require its individual communities to undertake a systematic study leading to a statewide comprehensive land use plan. A classification system for land throughout the state would be a major part of that plan. Though the land classification system can be developed outside a broad comprehensive plan, and may for political reasons have to be, the preparation of the classification system as a part of a comprehensive regulatory system will probably eliminate the threat of a constitutional challenge to the regulatory scheme as a taking without just compensation. Several states, such as Oregon, have already developed such plans, and others are in the process.

140. Humbach, supra note 55, at 350.
141. Id. at 351.
142. See supra notes 104-106 and accompanying text.
143. Hunter, supra note 4, at 314. See supra note 117 and accompanying text.
All land should be divided into three classes: ecologically imperative lands, community-critical lands, and economic-priority lands. The ecologically imperative lands, as described by Hunter, play a vital role in protecting life systems, and their importance is scientifically verifiable. In large measure the lands are placed in this category based on scientific data and not on the social values of the regulator or its constituency. It would be naive to think these simple declaratory statements sweep away all ambiguity. There are various levels of evidence available at any point in time proving a scientific fact, so the category may expand or contract as scientific evidence becomes available. The ultimate decision to include or exclude lands from the ecologically imperative class based on such scientific evidence must lie with government. Given the degree of restriction to be placed on owners of this land, the decision as to the type of lands put into this classification should be made at the state level.

It may be impertinent for this author, who does not have a science background, to propose the types of land that might be classified as ecologically imperative. The temptation to do so, however, is overwhelming. Serious consideration must be given to wetlands, prime agricultural lands (essential human habitat), lands that protect water supplies (streams and aquifers essential for human and other life to survive), tropical forests (essential to the quality of the air supply), the critical habitat of non-human species, and lands essential for maintaining biological diversity. Coastal areas and riparian forests may be included as well, if not already covered by the above list. The United States government and some of the states have already adopted a "no net loss of wetlands" policy, perhaps making wetlands an unchallenged entrant into the category. These lands would be identified and mapped, akin to wetlands mapping done in some states, so that the public may become aware of the location of protected lands.

The restriction on the use of ecologically imperative lands is simply that no development is permitted that would interfere with the natural resource role played by the land. In short, the natural resource value of these lands would have primacy, and their commodity value would be minimized. An exception might be created for the landowner who can prove an extraordinary justification; an onerous burden that would be satisfied by proof

146. The term was coined by D. Hunter, supra note 4, at 316.
that a compelling private interest outweighs the public interest. This exception would not be a loophole for returning to an economic-based ethic, and an economic justification alone would rarely, if ever, satisfy the burden of proof. Long-term survival and short-term prudence dictate that economic considerations are irrelevant in preserving ecologically important lands.

The second category of land is community-critical areas. These lands are necessary to protect the quality of human life. They are not scientifically essential to earth's life support systems, but they have special importance to the state, region or community. The decision to include lands in the community-critical category would be made by the state or local government based upon pre-determined criteria.

Lands included in the community-critical category might be any of the potentially ecologically imperative lands mentioned above which do not meet the scientific threshold for inclusion in that category. Other candidates include scenic vistas, historic landmarks, and open space needed to prevent congestion. The lands in this category would also be inventoried and mapped to minimize public uncertainty and conflict.

The restriction on community-critical lands would reflect an administrative, legislative and judicial presumption favoring perpetuation of the existing use. As with the prior category no restriction on development is imposed, except that which is necessary to protect its community-critical purpose. Because there is a presumption favoring the existing use, the private interest must substantially outweigh the public interest to justify development which would reduce or destroy the community-critical purpose. The natural resource and community value of these lands would be considered more important than its economic-commodity value.

Some communities may believe that the burden on community-critical lands—but not ecologically imperative lands—created by this type of regulation may be too onerous for landowners to bear. The impact on individual landowners may be reduced by such devices as reduced property taxes, transferable development rights, and paid acquisition of conservation easements. Arguably, the decision to provide some form of compensation should be based upon the concept of fairness within the Due Process Clause, and not on the need to pay just compensation under the Takings Clause.

The third category of lands, economic-commodity lands,
would include all other lands. Regulation of these lands would not differ from the current system of regulation. With ecologically imperative lands and community-critical lands removed from the overall land pool, however, much less strain and anxiety would be created by the ad hoc takings rules currently in place, since much of the current litigation centers around protecting ecological values and community quality of life values. Many of the regulatory schemes aimed at protecting wetlands, farmland, coastal areas and the like, would be handled within the first two categories of land.

C. Justification for the New System

The Fifth Amendment to the United States Constitution provides that a person cannot be deprived of property without due process of law, and that private property cannot be taken for public use unless just compensation is paid. The intent of the Due Process Clause and the Takings Clause is to prevent the government from depriving individuals of property rights arbitrarily. The creation of a comprehensive regulatory system for land use would further this goal of eliminating arbitrary governmental conduct.

1. Due Process

If the government conforms to the standards of procedural due process in enacting the regulations, it assu res fair treatment as to legal process. If the government carefully establishes the public purpose to be served by the regulations, and makes the connection between the purpose and regulatory scheme, the enactment will constitute a valid exercise of the police power. Protecting ecologically imperative lands that aid in maintaining life support systems and community critical lands that facilitate the quality of human life is clearly a valid regulatory purpose. Preventing development where it is likely to destroy the public purpose which the lands serve is the substantial connection between the end and means of the regulation.

Even if there is an otherwise valid exercise of the police power, substantive due process requires that the regulatory system not unduly burden the private landowner.148 Under the proposed regulatory system, the landowner is free to make any use or undertake any development so long as that use or development

148. Lawton v. Steele, 152 U.S. at 133.
does not interfere with the ecological imperative or community-critical value of the land. Nevertheless, the restriction on development may greatly reduce the investment value of the land. Though the speculative investment value placed on the land by the owner may be sharply curtailed, the regulatory system does not reduce the value of the land in its existing state. A person may invest in stocks, bonds, gold, silver or land in the hope or speculative expectation that those assets will increase in value, but neither the market system nor the law guarantees that enhancement. In this way, a regulatory system that limits or even eliminates that speculative gain, but leaves the land with its existing value, does not unduly burden the private landowner.

Perhaps the speculative investment value (i.e., the right to develop) presumed to exist by American land investors, though not rising to the level of a substantive legal right, does mandate greater protection than the previous argument allows. However, any economic fairness rights pale in the light of the purpose behind the proposed regulatory system. The regulations are in part intended to safeguard land that is essential to the survival of life on the planet. That right to a viable planet is more fundamental and more deeply entrenched than any entitlement to a profit from a land investment. What good is profit without life? The fairness argument weakens under these circumstances.

The fairness argument can be made in several other ways. One can argue that the burden of the regulatory system falls more heavily on those in the community who own ecologically imperative and community-critical lands. One can hardly contest the accuracy of the argument, but the yoke of any regulatory scheme inevitably rests unevenly. This disproportionate burden is not accepted by the courts as a basis for striking regulations.\textsuperscript{149} An anecdote may serve to illustrate the point. DuPont invested millions of dollars in developing and marketing chlorofluorocarbons (CFCs) internationally.\textsuperscript{150} DuPont and a few other companies share a very lucrative market. Several years later it was discovered that CFCs are the main culprit in reducing the earth's protective ozone shield. The continual reduction of the ozone layer will have significant, perhaps catastrophic impact on human health. If DuPont and its fellow manufacturers are required by regulation to discontinue the production of CFCs, is that in a due process sense unfair to DuPont, or a taking of their property with-
out just compensation? DuPont, and others similarly situated, are not likely to seriously make these arguments. It is equally unreasonable for a landowner to expect to develop lands in the face of threats to the earth's or to a community's life support system.

As to ecologically imperative lands, the argument can be made that the proposed regulations may place heavier burdens on those living outside urban areas. Just as urbanites, by opting to live in the city, have acquiesced in the heavier tax burden placed on them for public safety, for example, their non-urbanite brethren, by choosing to live outside the city, must assume the weightier burden that some of their land may not be able to be developed. Stated more positively, owners of these lands are entrusted with their stewardship and conservation.

One can argue that a comprehensive regulatory scheme may be fair as to those who invest in land after the regulations are in place, but not as to those who purchased under the former regime relying on the historically reinforced notion that there is a right to develop. The DuPont example again seems appropriate. There were no regulations on the use of CFCs when DuPont invested millions of dollars in their production and marketing. Yet, it does not seem "fair" for DuPont, or in our case for individual landowners, to continue to engage in activity that is life-threatening and poses a threat of substantial reduction in community welfare. Furthermore, landowners cannot expect a status quo in land use regulation. The history of this century has shown that there is a continual evolution toward greater regulatory restraint on an owner's freedom to use his land.

2. Regulatory Taking

The second constitutional proscription relevant to land use cases is the Takings or Just Compensation Clause. Some of the arguments made under the Due Process Clause are applicable to the takings analysis as well. The discussion in this part, therefore, will be confined to the ad hoc factors used by the Court in deciding takings cases.

This proposed regulatory system in no way constitutes a physical invasion of the land. All the fundamental attributes of ownership—the rights to use, to exclude and to dispose of it—are retained. The right of use may be limited to existing uses, or at least to uses not invasive of the public interest underlying the regulatory system. Given the history of the Court, and given that no
physical invasion exists, it is unlikely that the Court will find that a
taking has occurred.

The second factor considered by the courts is the economic
loss, or diminution in value element.151 Some courts have held
that a significant reduction in value may constitute a taking, but
the majority view is that all reasonable use must be taken.152 Us-
ing terms like "significant" and "reasonable" adds little guidance
as to where lines should be drawn. Courts rarely consider the
economic loss factor without taking into account the purpose be-
hind the regulation.153 The purpose served by the proposed reg-
ulatory scheme is to protect ecologically imperative and
community-critical lands. These purposes are lofty ones and
should withstand an enormous reduction in property value before
rising to the level of a regulatory taking. Even under the minority
rule which requires only a "significant" diminution in value, the
significance of the reduced development rights pales when com-
pared to the public purpose served.

If the regulatory system takes all or most of the development
rights from the landowner, reasonable use may still be retained.
A very effective argument can be made that using the land in a
manner consistent with its natural character is a reasonable use.
For example, if the landowner of a wetland is limited to using it
for wetland uses (e.g., fishing, hunting, birdwatching, nature
sanctuary, water retention area), then that is by its nature the
most effective use for that land. The wetlands have been
"honed" by the ecosystem for a millennia for just such a use.

The regulatory system proposed here clearly down-plays the
primacy of economic considerations with regard to ecologically
imperative, and to a lesser degree, community-critical lands.
Confining lands to their ecologically or community designated
purpose, however, does not eliminate the economic value of the
land. Wetlands and coastal lands, albeit rigidly regulated by state
law, continue to be bought and sold on the open-market, though
probably at reduced prices. As demonstrated above, a reasonable
use is not synonymous with development rights.

The third factor considered by the courts pertains to the rea-
sonable investment-backed expectations of the landowner. As
stated previously the precise nature of this factor is unclear.154 It

151. See supra notes 43-50 and accompanying text.
152. Looper-Friedman, supra note 12, at 45.
153. Id.
154. See supra notes 52-56 and accompanying text.
seems, however, that it is an attempt to prevent the government from precluding development through regulation after the landowner has made a significant investment in undertaking the development. Once the proposed regulatory system is in place, landowners would be charged with knowledge of the limitations placed on development by the system. Any investments made subsequent to the adoption of the regulatory scheme would not create reasonable investment-backed expectations.

As to those who purchased prior to the effective date of the regulatory system, the currently prevailing state rule should apply. No vested rights exist until the approval stage (e.g., building permit stage). If the land is of the ecologically imperative type and the right to develop has vested, the government must pay just compensation.

V. CONCLUSION

The legislatively enacted comprehensive regulatory system proposed by this Article has the major advantage of adding clarity to the area of the "constitution and land use." As demonstrated above, this system of dividing land into three categories should pass constitutional muster. In addition, the system puts landowners on notice as to what is likely to be permitted on their land and what is not. Most importantly, however, it begins the crucial process of developing an ethic that views land as an essential element in the earth's life support system. It does not turn away from the concept of growth, economic or otherwise, but rather advocates environmentally sustainable growth. The opportunity to build a lasting foundation for our society will pass us by if we do not seize it. "To get under way, we need only stop resisting the push, and embrace the pull, of building a sustainable society."

Perhaps it was best said by Aldo Leopold when he wrote, "[a] land ethic, then, reflects the existence of an ecological conscience, and this in turn reflects a conviction of individual responsibility for the health of the land. Health is the capacity of the land for

155. LAND USE AND THE CONSTITUTION, supra note 6, at 81.
156. See Humbach, supra note 55, at 365-69.
157. L. BROWN, C. FLAVIN, S. PASTEL, STATE OF THE WORLD 1990, 190 (1990). As the goals of our materialistic society focus more and more on amassing personal and natural wealth, it becomes more readily apparent that a movement toward a lasting society depends on a transformation of these individual priorities and values. Id.
158. Id.
self-renewal. Conservation is our effort to understand and preserve this capacity."\textsuperscript{159}

\textsuperscript{159} A. Leopold, \textit{supra} note 1, at 258.