

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-1989

Law and a New Land Ethic

John A. Humbach

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Land Use Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

John A. Humbach, Law and A New Land Ethic, 74 Minn. L. Rev. 339 (1989),
<http://digitalcommons.pace.edu/lawfaculty/95/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Law and a New Land Ethic

John A. Humbach*

As open space comes under increasing development pressure, existing-use zoning provides a direct and forthright way to preserve the line between urban and non-urban land use. Ultimately it may be the only practical means for protecting high-demand or sensitive areas such as wetlands, coastlines, lakeshores, floodplains, stream corridors, and pristine reservoir watersheds. This Article reviews the viability of existing-use zoning under United States Supreme Court interpretations of the Constitution's takings clause. It concludes that nothing in those interpretations disallows this straightforward approach to preserving our country's familiar patterns of land use and development.

When the settlers came to colonize America, they came for land — for land to practice their faith, land to escape the heavy hand of hierarchy, and land to call their own. Beyond a doubt they prized the land to call their own. When the thirteen colonies organized the United States, their Bill of Rights included no fewer than four separate provisions aimed specifically at protecting private interests in property.¹

One of the new nation's first imperatives was to populate

* Professor of Law and Associate Dean for Academic Affairs, Pace University School of Law.

1. The third amendment limits the federal government's power to quarter soldiers "in any house, without the consent of the Owner." U.S. CONST. amend. III. The fourth amendment protects "the right of the people to be secure in their persons, houses, papers and effects." U.S. CONST. amend. IV. The fifth amendment provides two general property protections: the requirement of due process before government action deprives a person of property, and the requirement of just compensation when the government takes private property for public use. U.S. CONST. amend. V.

The Supreme Court also has applied the contract clause of the Constitution, art. I, § 10, to protect private property interests from government interference. *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (noting that "[p]rior to the ratification of the Fourteenth Amendment, [the contract clause] was . . . the primary constitutional check on state legislative power"); *Appleby v. City of New York*, 271 U.S. 364, 396-403 (1926) (holding that the city's attempt to promote navigation over tidal property previously conveyed by the city to individuals was unconstitutional impairment of contract); *cf. Wilson v. Iseminger*, 185 U.S. 55, 60-65 (1902) (reasoning that state law changing statute of limitations for property owners' ground rent claims did not unconstitutionally impair contracts reserving rent as long as owners had an opportunity to preserve their rights).

the vast western spaces, to harness the wilderness to the arts of humankind. Americans did not want their land to stay the way it was. As pioneers pushed the frontier westward, their shared vision of the future was progress through change. Decisions about where and how to alter the land were, and still mostly are, left to individual owners. The nation was built by private initiatives on privately held land.² The American land ethic grew as an ethic of owner autonomy and change.

The American landscape has been transformed. Instead of a great wilderness, America's land is now a groomed and cluttered place. The remnant wild lands lie in isolated bits in the east and in larger fragments farther west.³ The natural landbase that supported roughly one million native americans is today a greatly modified resource that supports nearly 250 million. But we can no longer live from the natural land.⁴

2. See generally COUNCIL ON ENVTL. QUALITY, 1985 ENVTL. QUALITY: THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY 33-54 (1985), noting that:

[T]he main policy thrust into the early 20th century was to transfer land from federal ownership to private individuals, developers and selected industries such as railroads. . . . [The goals for the land transfers were] largely left to the new owners and developers, and the workings of the free marketplace. . . .

. . . .

. . . Congress clearly believed the vast public domain would be more valuable to the growing nation if it were transferred to the hands of those who could develop it. There was no detailed plan for development prepared by economists, scientists, or anyone else. . . . The main guidelines appear to have been that the lands should be settled rapidly, at little or no cost to settlers, and that the new ownership should be predominantly private and widely distributed.

Id. at 35, 38.

3. Wilderness lands designated within the National Wilderness Preservation System total about 90 million acres in 474 units ranging in size from 36 acres to over 7 million acres. *A Twenty-fifth Anniversary Vision for the Future of the Nation's Wilderness*, 52 WILDERNESS No. 184 at 6 (Spring 1989) (including map insert showing locations). Many other wild and semi-wild lands still remain. In contrast, the 48 contiguous states include 1.3 billion acres devoted to crops, grasslands, pastures, range, and "other" uses, including urban, transportation, parks, defense, and industrial. COUNCIL ON ENVTL. QUALITY, *supra* note 2, at 40.

4. Were it not for enormous infusions of petroleum, for example, the American landbase already might not be able to feed the people who populate it. The finite petroleum resource plays several key roles in enhancing agricultural productivity: It fuels farm machinery and fertilizer production, see WORLDWATCH INST., 1987 STATE OF THE WORLD 130-32 (1987), and is essential for transporting food products from farms to population centers. *Id.* at 51.

After millennia of living off our "income" (the world's renewable resources), human population has reached the point where survival requires an ever greater depletion of our planet's non-renewable "capital" — something

As the character of the land has evolved, so too has the vision of the future. Now, more and more, neighbors view development with suspicion and even hostility. "Excessive" development conjures up images of cities sprawling until their suburbs meet, swallowing up the countryside in between.⁵ Americans increasingly would like to keep our country looking much the way it is — to harness not the dwindling wild lands but rather the bulldozers of land profiteers.⁶ To many, in short, the old land ethic of autonomy and change no longer can produce the best results. A new land ethic, an ethic of planning and stability, has emerged.⁷

As the new land ethic has gained momentum, citizens have pressed to share in the decisions about growth. The spread of zoning and environmental regulation⁸ is proof that the American landbase is seen, more than ever, as a shared resource of all. The permanence and immobility of land make it a very

that cannot, presumably, go on forever. R. ORNSTEIN & P. EHRLICH, *NEW WORLD NEW MIND* 45-48 (1989).

5. In the thirty-one county area around New York City, for example, the amount of developed land increased by more than 30% between 1964 and 1985, while the population grew only 5%. REGIONAL PLAN ASS'N, *WHERE THE PAVEMENT ENDS* 4, 14 (1987).

6. For a discussion of some of the origins of concern and variety of problems associated with inadequately controlled development, see R. HEALY, *LAND USE AND THE STATES* 4-6, 15-34 (2d ed. 1976). The competing views on land use reform also receive detailed description in F. POPPER, *THE POLITICS OF LAND-USE REFORM* 56-75 (1981). Popper notes, in one colorful example, that horrified Oregonians even coined a new term, "Californication," to describe "the California-style destruction of the environment" that they see as threatening to creep up the coast from the south. *Id.* at 58.

7. According to Aldo Leopold "[a]n ethic is a differentiation of social from anti-social conduct." A. LEOPOLD, *A SAND COUNTY ALMANAC WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER* 217-18 ([Ballantine] 1966). Leopold's essay criticizes the traditional land-use ethic "still governed wholly by economic self-interest." *Id.* at 224. He advocates instead a land ethic under which all living "members of the land community . . . should continue as a matter of biotic right, regardless of the presence or absence of economic advantage to us." *Id.* at 226.

The new land ethic referred to in the text, an ethic of planning and stability, is neither the old ethic criticized by Leopold nor, precisely, the new one proposed by him. It is, however, clearly more compatible with the latter: People no longer find it so easy to believe that "the parable of the talents teaches us that undeveloped land is a sin." P. JAMESON, *ADIRONDACK CANOE WATERS: NORTH FLOW* 92 (2d ed. 1984) (quoting Kenneth Durant).

8. See D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 378-80 (2d ed. 1986); see also Kusler, *Regulating Sensitive Lands: An Overview of Programs*, in *LAND USE ISSUES OF THE 1980S* 128-53 (1983) (describing some approaches in the reported 94 new development control statutes enacted between 1965 and 1977).

special kind of commodity. Decisions about land use effectively determine for everyone what our communities and countryside will look like and the quality of life that our land will sustain. The use of private land is never an entirely private affair.

Although citizens may react negatively toward particular projects, both the population and the demand for material consumption grow. Development is inevitable because developers are entrepreneurs whose products all enjoy. The real issue is not *whether* to develop but *where*. The need is not to stymie growth but to create comprehensive land-use plans that will maintain a balance between open lands and areas of more urbanized use.

The development expectations of land entrepreneurs often present a significant challenge to the aspirations of the new land ethic.⁹ The conflict is rooted in our tradition that all private land presumptively is fair game for some type of "improvement" or another. At least partly because of this conflict, no doubt, comprehensive planning in the United States usually has not included planning for privately owned permanent open space.¹⁰ Despite the general embrace of land use planning, restrictions on land use still are sometimes seen as contrary to the fundamental premise of land ownership.¹¹ Americans still prize having a place to call their own, and we do not like to share the decisions on how we should use our particular pieces of the national landbase.¹²

9. See generally R. HEALY, ENVIRONMENTALISTS AND DEVELOPERS: CAN THEY AGREE ON ANYTHING? 1-5 (1977) (discussing efforts of environmentalists and developers to blame each other for national housing problems, and calling for joint problem solving).

10. See F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION 795-96 (1984) (discussing changing role of land use regulations from the early 1900s, when society viewed increases in land use density as desirable and inevitable, to the late 1900s, when society focused instead on preservation of natural qualities of the ecological environment). For an excellent review of open-space zoning, see 5 N. WILLIAMS, AMERICAN PLANNING LAW §§ 157.01-158.42, at 383-529 (rev. ed. 1985).

11. See, e.g., R. EPSTEIN, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 265 (1985) (emphasizing that "[z]oning stands in stark contrast to a system of private property, which allows a single owner . . . to decide how to use his plot of land"); see also *id.* at 63-73, 263-73 (criticizing Supreme Court's eminent domain cases for failing to recognize the essential incidents of ownership: possession and use); B. SIEGEN, PLANNING WITHOUT PRICES 29-38 (1977) (arguing that land use regulations adversely affect individual property rights); cases cited *infra* note 13.

12. In a highly critical jurisprudential appraisal of American land-use laws, Professor Lynton K. Caldwell observed that "no other society appears to have gone so far in leaving the fate of the land to the discretion of the private

Strong claims are made for private rights to control private land.¹³ Litigants and legal commentators seriously debate whether governmental bodies, by mere regulation, can constitutionally require owners to preserve longstanding patterns of land use and open space.¹⁴ The protection of property rights in

owner." Caldwell, *Rights of Ownership or Rights of Use? — The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 762 (1974). Caldwell concludes, however, that the benefits of this system are mixed, working mostly to the detriment of those whose preference is stability: "The present status of land ownership . . . is beneficial chiefly to developers and speculators . . . [T]o the individual home owner mere ownership offers little more than the illusion of security." *Id.* at 767.

13. *Id.* at 767. Recent cases narrowly interpreting the government's power to restrict land to open space use include: *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1483 (11th Cir. 1988) (a civil rights action holding that city ordinance rezoning property to prohibit industrial use was unconstitutional taking where property owner was previously authorized to put such property to individual use); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986) (suggesting that depriving owner of right to fill wetlands may be a taking because "the balancing of public and private interests reveals a private interest much more deserving of compensation"); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 396 (1988) (suggesting that depriving owner of right to fill wetlands may be a taking unless owner has some remaining use); *Karches v. City of Cincinnati*, 38 Ohio St. 3d 12, 21, 526 N.E.2d 1350, 1357 (1988) (reasoning that riverfront zoning ordinance that changed classification of property to prohibit commercial use was an unconstitutional taking because it denied the owner beneficial use and did not advance substantially a legitimate state interest); *Allingham v. City of Seattle*, 109 Wash. 2d 947, 952, 749 P.2d 160, 163 (1988) (holding that ordinance requiring private owners to retain or restore certain lots to their natural state effected a taking). The Supreme Court has not yet directly addressed this issue.

14. For authority supporting the government's power to restrict land use to open space, see *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1381-82 (Fla.) (upholding ban on wetlands development where proposed use would adversely impact environment), *cert. denied*, 454 U.S. 1083 (1981); *Sibson v. State*, 115 N.H. 124, 126-30, 336 A.2d 239, 240-43 (1975) (reasoning that denial of permit to fill salt marshland was within state's police power and "did not depreciate the value of the marshland"); *Just v. Marinette County*, 56 Wis. 2d 7, 17-18, 201 N.W.2d 761, 768 (1972) (stating that "an owner of land has no absolute and unlimited right to change the essential natural character of his land"); see also F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKINGS ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* 168-75 (1973) (the classic study of land use regulation since colonial times, concluding that the "myth" of the takings clause limits regulation far more than actual court decisions); Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KAN. L. REV. 539, 553-62 (1986) (setting forth conflicting case law. For authority casting doubt on government's power to restrict land use to open space, see cases cited *supra* note 13; see also Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1, 3 (1989) (arguing that Supreme Court's "lax construction of the takings clause demands correction"); Klock & Cook, *The Condemning of America: Regulatory "Takings" and the Purchase by the United States of America's Wetlands*, 18 SETON HALL L. REV. 330, 339-54 (1988) (discussing in-

the Constitution's takings clause¹⁵ is seen as a barrier to regulations that would preserve private land "as is."¹⁶ If these claims are well-founded then American land use planning may have reached its constitutional limit. The new land ethic may run aground on fundamental law.

These claims, however, are extravagant. No such private sovereignty in the use of land was ever premised in law, certainly not in the common law with its *sic utere tuo ut alienum non laedes*.¹⁷ The claims, moreover, are inconsistent with the social obligation of property that is inherent in the structure of American law.

PROPERTY LAWS AS PUBLIC INTEREST LAWS

It is a fundamental axiom of American constitutionalism that government exists to serve the public good. It is empow-

creased governmental regulation protecting nation's wetlands, and Supreme Court decisions holding that such regulations are takings when they deny owners a viable economic use of their land).

15. U.S. CONST. amend. V reads, in pertinent part: "nor shall private property be taken for public use without just compensation." Although widely regarded as a doctrinal patchwork, the Supreme Court's holdings under the so-called takings clause are in fact an operationally coherent body of law, as I have described previously in Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 279-89 (1982).

16. See, e.g., cases cited *supra* note 13. A regulation limiting land use can result in a compensable taking under the fifth amendment even if the regulation does not take away ownership or title as such. In the last ten years, the Supreme Court has fixed upon two oft-repeated tests that determine whether particular actions of government effect a compensable taking.

One of these formulations states that a land-use regulation will result in a compensable taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted). In its other formulation, the Court attaches "particular significance" to three factors: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); see also Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311, 317-23 (1987) (discussing relationship between the two takings tests).

17. "Use what is yours so that others are not injured" for centuries has been the fundamental maxim of the law regulating the relations of landowners who share the same physical environment. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.5, at 42-43 (1986) (stating that "property rights are not really exclusive in the sense of giving the owner of a resource the absolute right to do with it what he will"). For a discussion of the modern law of nuisance, see D. MANDELKER, *LAND USE LAW* 94-106 (2d ed. 1988); W. PROSSER & W. KEETON, *TORTS* 616-30 (stud. ed. 1984).

ered to enact laws only in the public interest.¹⁸ Property rights are the creations of laws,¹⁹ and the law of property must, like all other law, serve a public purpose.

Because property law exists to serve the public good, the legal contours of private ownership do not necessarily include everything that yields a private economic advantage.²⁰ On the contrary, legal property rights are shaped and limited by the many competing needs of the general welfare.²¹ The legislative

18. "[T]o justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference." *Lawton v. Steele*, 152 U.S. 133, 137 (1894); see also *Eubank v. Richmond*, 226 U.S. 137, 142-44 (1912) (reasoning that a statute giving certain property owners the power to establish building lines at their discretion is outside the state's police power because the statute permitted owners to act solely for their own interest); *Northwest Paper Co. v. Federal Power Comm'n*, 344 F.2d 47, 51 (8th Cir. 1965) (citing *Reichelderfer v. Quinn*, 287 U.S. 315, 321 (1932), for the proposition that "[s]tatutes said to restrict the power of the government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest").

Although a monarchy, for example, might exist to serve purely private interests, this discussion assumes that American governmental bodies, state and federal, may not. The so-called guarantee clause, which "guarantees" a republican form of government, may provide textual support for this assumption. U.S. CONST. art. IV, § 4. Because the guarantee clause is non-justiciable, however, we do not have the advantage of definitive judicial exposition of its content. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 108 (3d ed. 1986).

19. "Before laws were made, there was no property; take away laws and property ceases." J. BENTHAM, *THEORY OF LEGISLATION* 113 (5th ed. 1887). The *fact* of possession existed before property laws, but this differs significantly from the legal *right* to property. Possession in fact — simple, deliberate dominion and control — requires no legal imprimatur to exist, and considerations of public good or general welfare do not limit its existence. By the same token, however, the law does not protect absolutely the fact of possession. Rather, possession is protected only conditionally, under those circumstances provided by the law of property.

Various other sources of property may be conceivable philosophically — such as custom, sociobiology, or the divine — but law protects only the *legal* rights of property.

20. The mere fact that an economic interest may be valuable does not make it a property right. "[N]ot all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945).

The Court in *Willow River* held that private riparian rights in navigable streams are not co-extensive with the economic advantages of riparian ownership. *Id.* The owner's legally protected title is qualified by the paramount public interest, in this instance the public interest in navigation. *Id.* at 507.

21. As Justice Holmes stated in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908):

and common law delimiters of private owners' autonomy, taken together, are a social obligation of property that legally qualifies the private property right.²²

To say that the law's protection of private property must promote public ends certainly does not mean that property rights do not exist to serve private concerns. Sometimes — and the domain of property is an archetypal instance — the public interest can best be served only by advancing private interests. This may occur because private economic pursuits tend to benefit the public secondarily,²³ and it occurs whenever particular kinds of private interest are so widely shared as to make them prime objects of governmental protection.²⁴ Indeed, to govern

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. It sometimes is difficult to fix boundary stones between the private right of property and the police power, . . . [b]ut it is recognized that the State . . . has standing in the courts to protect the *atmosphere, the water and the forests* within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.

Id. at 355 (emphasis added).

22. "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (citing *Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877)).

"[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affect recognized real property interests.'" *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

The social obligation of property implicit in the United States Constitution is explicit in other constitutions, for example, the more recently written constitution of the Federal Republic of Germany: "Property entails obligation. Its use shall also serve the public good." GRUNDGESETZ [GG] (CONSTITUTION) (W. GER.), art. 14, § 2, *translated and quoted in* R. DOLZER, PROPERTY AND ENVIRONMENT, THE SOCIAL OBLIGATION INHERENT IN OWNERSHIP 17 (International Union for the Conservation of Nature Environmental Policy and Law Paper No. 12, 1976).

For an excellent comprehensive review of the history and modern judicial recognition of the social obligation of property, see Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529, 531 (1989) (suggesting that "the expectations of all property owners must include the element of public welfare").

23. See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161 (1896) (approving taxpayer subsidies to a private irrigation supply, reasoning that "to bring into cultivation these large masses of otherwise worthless lands would seem to be a public purpose . . . not confined to the landowners").

24. Cf. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (reason-

in the public interest — “adjusting the benefits and burdens of economic life to promote the common good”²⁵ — may precisely mean to choose which private interests to favor.²⁶

Judging from the near universality of private property rights, it is safe to conclude that some extremely compelling public interests are advanced by the creation and protection of legal property. Foremost perhaps is the public interest in economic efficiency. People more likely will sow when they are assured that they can reap and enjoy the fruits of their efforts. The alternative, true communal ownership, also has the disadvantage of providing an incentive to abuse resources.²⁷ Finally, private property rights serve the important interest everyone has in privacy itself, by providing an exclusive place of resort for home and rest.

The public interests advanced by private property autonomy are not, however, the only legitimate public interests that should be served by government. The interests advanced by owner autonomy are not even the only legitimate public interests relating to privately held land. There is, for example, the interest shared by all in the appearance and character of our national landbase, in the quality of life that it can provide, and most importantly, in its ability to sustain our population. The social obligation of property promotes those public interests that purely private rights cannot.²⁸

Where the private autonomy of ownership would clash with the greater public good, that is where the private rights in

ing that even though “[t]his is the case of a single private house . . . [n]o doubt there is a public interest even in this”).

25. *Penn Central*, 438 U.S. at 124.

26. See, e.g., *Miller v. Schoene*, 276 U.S. 272, 279 (1929) (holding that “the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public”).

27. Hardin’s eloquent treatment of this problem probably is the most famous. Hardin, *Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

28. Private allocations of property rights fail to address problems of economic externalities and “market failure” (due to high transactions costs) that prevent many costs and benefits of economic choices from being accurately weighed. See Calabresi & Melamud, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1106-15 (1972) (noting the need to qualify and supplement purely property entitlements with liability rules and inalienability rules [non-tradeable government regulatory protections] in order to achieve many societal goals); see also Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 *HARV. ENVTL. L. REV.* 311, 313 (1988) (arguing that the “external ecological effects private land-use decisions can have” also must be considered in takings cases).

property come to an end and the social obligation of property begins. Were it not for this public interest boundary on private property rights, the laws created to protect property could become powerful instruments to *defeat* public welfare. A government empowered to act only in the public interest never could have constitutionally conferred such an extensive measure of property ownership.²⁹

In the discussion that follows, the chief concern is the limitations that the takings clause of the Constitution imposes on the government's legislative power to contain and channel land development. The interests that the takings clause protects are legal rights in property.³⁰ The axiom of discussion is that the legal rights of property are bounded by the public interest.

EXISTING-USE ZONING AND LANDSCAPE PRESERVATION

Even in regions of comparatively dense population, most land could be used more intensively. Vestigial open space still stretches between urban centers. True megalopolises, with suburbs stretching end-to-end for hundreds of miles, may be America's destiny, but that destiny is not here yet. If there is

29. It does not follow, of course, that the courts should perform reviews of property rights and strike down those found to be excessive. Ordinarily the elected legislatures, or administrative bodies acting pursuant to legislative authority, determine where and how to strike the balance between private and public interests. Nevertheless, for constitutional purposes, the concept of property hardly can be deemed to include measures of private sovereignty that should have been beyond the power of a public-interest government to confer originally — even if judicial review is unavailable to attack the excesses affirmatively.

In sum, legislative or judicial acts that curtail private advantages for the public good should raise no questions under the takings clause if the law purporting to confer the particular advantages would otherwise impermissibly abridge the public interest. Laws beyond the scope of legislative power can confer no private rights, so there is nothing to be taken.

30. For purposes of the fifth amendment, the definition of property "will normally obtain its content by reference to local law." *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943); see *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (applying local law rule to riparian lands); *United States v. Fox*, 94 U.S. 315, 320 (1876) (holding that state law determines the validity of devise of real property); see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (stating that "nor as a general proposition is the United States, as opposed to the several states, possessed of residual authority that enables it to define 'property' in the first instance"). The Constitution itself neither creates nor defines the dimensions of property interests. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

If the Constitution protects non-legal "rights" as property, the Supreme Court has been notably silent about it.

the will to do so, Americans still can preserve the essential character of our communities, regions, and nation.³¹

Traditional zoning serves the goals of consolidating like uses and separating incompatible uses, but zoning traditionally has not been employed to channel development away from certain areas altogether. To save the familiar countryside and the natural areas between developed centers, new building activity must be directed away from the open terrain: It must be steered into, or next to, those places where development exists already. Development never will be geographically contained, however, if we continue to rely on individual initiatives to decide where our land is developed. If the trends to date are a guide, random fragments of development eventually will crop up almost everywhere unless something is done to keep our larger open areas in their *existing uses*.

Zoning codes designed for cities and other developed centers are typically a complex of detailed use, minimum area, and structural restrictions.³² Their complexity is necessary to rationalize development in locales that are accepted as being subject to dynamic land-use change. By contrast, *existing-use zoning* can be as simple as a regulatory prescription that, within the existing-use zone, the lawful uses of each piece of land are the uses for which the parcel already is reasonably adapted. The place for existing-use zoning is not in cities but in non-urbanized settings, where the planning objective is to avoid dynamic changes in patterns of land use. Existing-use zoning is suited, in other words, to those relatively undisturbed locales

31. The concern at hand is the mix between undeveloped and developed land, not other socio-economic characteristics of land use patterns such as the mix between rich and poor or the racial mix of land users. Traditional land use planning devices such as zoning have proven unfortunately effective in perpetuating racial, economic, or other invidious discrimination — for example, by imposing large lot size requirements that allow some to enter while creating prohibitive barriers to others. See *Warth v. Seldin*, 422 U.S. 490, 498-501 (1974) (holding that non-residents lack standing to challenge such barriers); F. POPPER, *supra* note 6, at 11 (noting that “many relatively wealthy white suburban communities also used their zoning laws to keep out unwanted minorities and the poor”). The problem of invidious discrimination ultimately can be addressed only by appropriately prescribing *what kinds of* development should occur in those areas selected for development (affordable housing, mixed income housing, or other options). This Article instead concerns the means to enforce a governmental decision that any development at all is inappropriate for some land areas, and accordingly development should be channelled to other areas better suited for growth.

32. See generally D. HAGMAN & J. JUERGENSMEYER, *supra* note 8, at 20, 39-88, 190-97 (discussing the history and future of zoning, sources of zoning power, and the purposes and types of zoning).

where the normal presumption runs against active modifications of land use anyway.

Even admitting the possibilities for rezoning and variances, existing-use zoning effectively shifts the burden of justification when owners apply to modify the uses of their land. Existing-use zoning places the burden on those who stand to profit by imposing change rather than on those who wish to retain the character and qualities of the land. This shift, in itself, is a major advance over the traditional zoning approach that presupposes and, in effect, endorses development of all land in one way or another. Existing-use zoning provides, in short, a mechanism to let communities keep what they have — both the prevailing uses of private land and the character of its surroundings.³³ It promotes a new land ethic of stability in land use patterns, except where changes in use would serve a compelling public interest.³⁴

33. Professor Lefcoe writes that even strict limitations on private development rights do not:

diminish the strength of private ownership. In removing the prerogatives from the land promoter and home builder, the law places new rights in the hands of occupiers and homeowners. It favors the owner who has made an investment in a building and, perhaps, a way of life, over the real estate entrepreneur. By diminishing the right to develop, the law enhances the right to present use and enjoyment.

Lefcoe, *The Right to Develop Land: The German and Dutch Experience*, 56 OR. L. REV. 31, 32 (1977).

34. This comprehensive land use planning, necessary to preserve the overall character of the country, is well known in Europe, which reached the stage of dense population long before the United States. The Federal Republic of Germany, for example, channels new construction and developments to existing intense-use areas or to lesser developed areas that are particularly suited for more intensive use. The state permits existing uses to continue indefinitely on the remaining land, which constitutes the greater part of the country. Undeveloped land outside of designated *Bauland* (building-land) areas is set aside to remain, more or less permanently, what it always has been — open space. *Id.* at 31-55; R. DOLZER, *supra* note 22, at 33-45.

Lefcoe noted while flying over Germany:

In corridors that could have been developed with thousands of one-family houses, there is forest (almost invariably without the second homes which mar Northern California) and farm land . . . There are no billboards even along the ribbons of the Autobahn. All of this has been achieved with minimal public intervention because private landowners have no right to build in undeveloped areas.

Lefcoe, *supra* note 33, at 46.

In upholding the West German land use regulation program against constitutional challenge, the German Constitutional Court wrote:

We cannot agree with plaintiff's argument that the market for rural land must be as free as the transfer of all other forms of 'capital.' The fact that the given soil is vital for society and cannot be enlarged does not allow entrusting its use to the incalculable market of free forces

Zoning for existing use supposes that such use generally is suitable, and that, as a general matter, owners are not currently wasting the potential of their land. In the open space areas that existing-use zoning would preserve, existing legal uses might include agriculture, forestry, watershed, hunting, fishing, viewshed, "buffer," and non-consumptive outdoor recreation. These certainly are not economically wasteful uses: People have long sought to acquire and hold open lands precisely for these kinds of beneficial use. Nevertheless, the potential that such uses have for yielding a *financial* return can be far less than the financial potential of uses that follow development. In exchange for protecting the character of an owner's surroundings, existing-use zoning takes away development rights.

TAKING DEVELOPMENT RIGHTS IS NOT IN ITSELF A "TAKING"

There may be "fundamental attributes of ownership"³⁵ that government cannot take without paying just compensation,³⁶ but the right to develop land is not one of them.³⁷ In

and the complete discretion of the individual; a just legal and social order leaves no choice but to assert the public interest in the land more strongly than in other fields of property.

R. DOLZER, *supra* note 22, at 33 (translating and quoting the German Court).

35. *Agins v. Tiburon*, 447 U.S. 255, 262 (1980).

36. The right to exclude others is "universally held to be a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (describing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *accord* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-37 (1982). The state can cut down even the right to exclude others, however, to the extent that it is not "essential to the use or economic value" of the property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980); *see also* *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (holding that abolition of both the power to devise and possibility of descent is a "taking").

37. Indeed, at common law, the property owner had no absolute right to develop land. Construction on non-fee interests was subject to the doctrine of waste, including so-called ameliorative waste, which essentially prohibits life and leasehold tenants from modifying the physical character of the reversion or remainder. *See* 5 R. POWELL, *REAL PROPERTY* §§ 56-3 to -8, -17 to -19 (1989). Furthermore, all lands, fee and non-fee alike, were (and are) subject to the limitations of the common law of nuisance, which prohibits any otherwise lawful land use that substantially and unreasonably interferes with the reasonable use of neighboring land. *See* 1 F. HARPER, F. JAMES & O. GRAY, *TORTS* 76-119 (2d ed. 1986). Other lands, such as lands under boatable waters, were subject to prohibitions on any improvement that impeded passage of boats and vessels. *See* Hargrave's *Hale, De Jure Maris et Branchiorum Ejusdem*, ch. III, *reprinted in* S. MOORE, *A HISTORY OF THE FORESHORE* 374-75 (1888).

For a short history of Anglo-American land use regulation from the Norman Conquest in 1066 until the early twentieth century, see Large, *The*

Penn Central Transportation Co. v. New York City,³⁸ the Supreme Court made it clear that the Constitution permits taking development rights without compensation.³⁹

Penn Central posed the question whether New York City

Supreme Court and the Takings Clause: The Search for a Better Rule, 18 ENVTL. L. 3, 6-10 (1987) (noting that "despite occasional editorializing [to the contrary] there has never been any absolute right of land ownership in any organized society"). For a comprehensive historical treatment of the same subject, see F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 14, at 51-138 (1973).

38. 438 U.S. 104 (1978).

39. The Court noted that, in any event, the owners exaggerated the impact of the existing use regulation in *Penn Central*. *Id.* at 136 n.33. For one thing, the owners might have succeeded in getting approval for some more limited use than the one they had proposed. The landmarks statute in *Penn Central* also provided that the development rights could be "transferred" to other parcels, a sweetener that mitigated the financial burdens the law imposed. Neither of these points, however, appear to be essential to the Court's decision. *Id.* at 136-37.

As a means of preserving open space, the transfer of development rights (TDR) came under a major constitutional cloud in the subsequent case of *California Coastal Comm'n v. Nollan*, 483 U.S. 825 (1987). In *Nollan* the Supreme Court considered whether applicants for a building permit could be constitutionally required to convey a public easement over their land as a condition of the permit. The Court held that a condition cannot be attached to the granting of a building permit "unless the permit condition serves the same governmental purpose" as the ban on building without a permit. *Id.* at 837.

Prior to *Nollan*, it appeared possible to steer development from one area to another by inducing landowners to "transfer" the development rights from parcels to be kept "as is" to other parcels in "receiving" zones located elsewhere. Under such a TDR program, government could, for example, give developers an incentive to buy up rural development rights by letting them build more densely on their urban parcels than the zoning laws otherwise would allow. The question raised by *Nollan* is whether government can force developers to transfer development rights before it will permit them to develop their "receiving" land to the maximum possible legal density.

For TDR to work as a land preservation technique, the nominal zoning density for the "receiving" parcels has to be substantially less than the government really expects to permit. Otherwise, the government has nothing that it can rationally "waive" as a bonus to developers who finance the purchase of development rights on lands that the government wants to see preserved. In *Nollan*, however, the Court specifically condemned such "leveraging of the police power [by] stringent land-use regulation which the State then waives to accomplish other purposes. . . ." *Id.* at 837 n.5.

There must, in the words of *Nollan*, be an "essential nexus" between the burden restrictions impose and the legitimate government purpose the restrictions are intended to advance. *Id.* at 837. That "essential nexus" is lacking in TDR but is always present when existing-use zoning is employed to preserve an area's traditional character. This is because existing-use zoning takes away development rights from certain lands for the purpose of preserving the existing character of those same lands. By contrast, TDR takes away development rights from certain lands for the purpose of preserving the existing character of *other* lands.

could validly apply its landmark preservation law to prohibit proposed further development of the site occupied by a designated "landmark" — Grand Central Terminal. In effect, the Terminal site was zoned for existing use. The owner, however, desired to construct a high-rise office tower in the airspace above it. In upholding the city's power to prohibit the proposed development of the airspace, the Supreme Court noted that the landmark preservation law "does not interfere in any way with the *present* uses" of the land, even though it "restricted . . . the exploitation of property interests."⁴⁰ The Court held that the landmark designation:

not only permits but contemplates that [the owners] may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law *does not interfere with what must be regarded as Penn Central's primary expectation* concerning the use of the parcel.⁴¹

The Court deemed the longstanding use to be a reasonable use for constitutional purposes.⁴²

Recently, in *Nollan v. California Coastal Commission*,⁴³ the Supreme Court again confirmed that government may take development rights by regulation without paying compensation. The Nollans, private owners, sought a permit to build on their oceanfront land.⁴⁴ The permitting authority was willing to grant the permit only on the condition that the Nollans grant an easement allowing the public to cross their land.⁴⁵ The Court struck down the easement condition because the condition did not advance the same governmental purpose as the permit requirement. In its reasoning, however, the Court confirmed that, in pursuit of a legitimate public purpose,⁴⁶ the

40. *Penn Central*, 438 U.S. at 136 (emphasis added).

41. *Id.* (emphasis added) At another point, the Court similarly emphasized that its holding was based on the owner's "present ability to use the Terminal for its intended purposes and in a gainful fashion." *Id.* at 138 n.36.

42. "[O]n this record," the Court stated, "we must *regard* the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." *Id.* at 136 (emphasis added). Because the only "evidence" of the Terminal's profitability showed that the existing use was *not* profitable, *id.* at 119-20, the Supreme Court must have *deemed* the landmarks law to allow a reasonable return based solely on the fact that the law allowed the land to remain in its longstanding use.

43. 483 U.S. 825 (1987).

44. *Id.* at 828.

45. *Id.* at 829.

46. In *Penn Central* the owners did not deny that the city had a justifying public purpose for taking the development rights; namely that the "objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal." 438 U.S. at

state "unquestionably would be able to deny the Nollans their [building] permit if their new house (alone or by reason of cumulative impact produced in conjunction with other construction) would substantially impede these purposes."⁴⁷ Despite the economic importance of the right to develop land, the Supreme Court in *Nollan* and *Penn Central* has left no doubt that a permanent restriction to existing uses is not per se a compensable taking.

THE CONSTITUTIONAL RIGHT TO A PROFIT

Although *Penn Central* makes clear that there is no constitutional right to develop land, the Supreme Court repeatedly has asserted that a compensable taking would occur if land-use regulations deny an owner "economically viable use."⁴⁸ In a

129. The Court cited a number of cases in which it had recognized "that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Id.*

47. *Nollan*, 483 U.S. at 837. The Court's one qualification was that the denial could not "interfere so drastically with the Nollans' use of their property as to constitute a taking" by virtue of its economic impact. *Id.* at 836. The economic impact test to determine a taking is the topic of the remainder of this Article.

48. A land-use regulation effects a taking if it "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In *Penn Central*, the Court said only that a use restriction on real property may "perhaps" constitute a taking "if it has an *unduly harsh impact* upon the owner's use of the property." 438 U.S. at 127 (emphasis added). More recently, however, the Court has referred to this "impact" factor in takings analysis by quoting the "denies . . . economically viable use" formulation of *Agins*. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (rejecting claim that state statute requiring 50% of the coal beneath certain structures to remain underground effected a taking); *Nollan*, 483 U.S. at 834 (invalidating state's conditioning grant of building permit on property owner's transferring beach access easement to the state, because the condition failed to further the same substantial government interest as the permit requirement); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 296 (1981) (reasoning that enactment of statute limiting surface coal mining operations was not shown to "prevent beneficial use of coal-bearing lands").

The Court in *Agins* presented a two-pronged test of regulatory takings. See *supra* note 16. In addition to the "economically viable use" criterion, the Court stated that a use-regulation results in a taking if it "does not substantially advance legitimate state interests." *Id.*

This Article focuses on the "economically viable use" prong of the *Agins* two-pronged test. Only the value-diminishing aspect of use regulations has been problematic from a constitutional standpoint. No one seems to quarrel with the proposition that "under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property." *Keystone Bituminous*, 480 U.S. at 491. See Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J.

parallel line of cases, the Court similarly has insisted that a regulation's "economic impact" and the extent of interference with "investment-backed expectations" are factors having "particular significance" in takings analysis.⁴⁹ Although the Court never has specified what it means by the concept of economically viable use, it seems a fair surmise that it has something to do with profit. Without at least a *potential* for profit, it is difficult to imagine how a use can be considered "viable" in any normal economic sense. Thus, although owners do not have a constitutional right to develop their land, the dicta suggest the possibility of an even broader constitutional right — the right to put property to profitable use.⁵⁰

ENVTL. L. & POL'Y 139, 146-47 (1988) (stating that the Court "has in recent years effectively approved a very broad range of permissible regulatory acts, as long as they leave some economically viable use to the owner").

In *Agins*, for example, the unanimous Court commented approvingly on local regulations designed to discourage the "premature and unnecessary conversion of open-space land to urban uses." 447 U.S. at 261. "The specific zoning regulations at issue are exercises of the city's police power to protect [its] residents . . . from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate." *Id.* Among the public interest objectives of the zoning provisions at issue were "protecting against . . . air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Id.* at 261 n.8; see also *Penn Central*, 438 U.S. at 129 (upholding "land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city").

49. *Penn Central*, 438 U.S. at 124; see also *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (upholding Aid to Families with Dependent Children requirement that children's support payments be assigned to the state, as having, in reality, no adverse economic impact on claimant's investment-backed expectations); *Hodel v. Irving*, 481 U.S. 704, 713-14 (1987) (invalidating a provision of the Indian Land Consolidation Act that abrogated an individual's rights to pass on property to heirs or devisees); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (stating that statute requiring withdrawing employers to pay proportional share of plan's unfunded vested benefits was not a taking).

50. The Court's dicta sometimes explicitly refer to profit, suggesting, for example, that a use regulation would effect a taking if the uses remaining to the owner are not "gainful," *Penn Central*, 438 U.S. at 138 n.36, or "productive," *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 n.4 (1985), or if they are "commercially impracticable . . . to continue." *Keystone Bituminous*, 480 U.S. at 495-96. In *Penn Central*, the Court "regarded" the longstanding existing use as giving the owner the opportunity "not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment." 438 U.S. at 136; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) (stating that "[a]lthough deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking . . . it is clearly relevant" (noting *Andrus v. Alard*, 444 U.S. 51, 66 (1979))).

The suggestion that there is a constitutional right to make a profit from property traces back to Justice Holmes' famous "advisory opinion"⁵¹ in *Pennsylvania Coal Co. v. Mahon*:

For practical purposes, the right to coal consists in the right to mine it. What makes the right to mine coal valuable is that it can be exercised *with profit*. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.⁵²

Ever since *Mahon* the Supreme Court has nominally adhered to its dictum that a use regulation can effect a taking if the curtailment of use has an over-severe impact on the owner's economic interest in the property. Rather than stress profits as the *sine qua non* of "economically viable use," however, the Court has said that the "interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."⁵³ Rather than actually ever finding an "economic impact" taking,⁵⁴ moreover, the Court has hemmed

51. As the Court later called it in *Keystone Bituminous*, 480 U.S. at 484.

52. 260 U.S. 393, 414 (1922) (citation omitted) (emphasis added).

53. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). The Court reversed the district court's holding that a prohibition on commercial transactions in eagle feathers was a taking because the prohibition wholly deprived the owners of the opportunity to earn a profit from relics incorporating the feathers. The Court suggested, highly conjecturally, that the owners "might exhibit the artifacts for an admissions charge." *Id.*; accord *Loretto*, 458 U.S. at 436 (stating in dicta that "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking").

In an analogous ratemaking context, the Court recently reiterated the rule allowing price control regulations to "limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (emphasis added). Although imposing a "confiscatory" rate is a taking of property under the fifth amendment, the Court noted that the affected owners "have not contended, nor could it be seriously argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory." *Id.* At least in the ratemaking context, owners therefore clearly do not have any constitutional right to receive a profit over and above their costs. Indeed, the Court has left open the question of whether owners necessarily are entitled even to recover their costs. *Id.* at 254 n.7.

54. Neither of the two "regulatory takings" found by the Supreme Court to date were based on economic impact, both instead were based on the failure of the governmental action to substantially further legitimate state interests. *Nollan v. California Coastal Comm'n*, 438 U.S. 825, 837 (1987); *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987); see *supra* note 46. Both of these cases probably are better understood as turning on an application of traditional "economic due process" analysis. See *Humbach*, *supra* note 16, at 341-47 (concluding that "traditional economic due process review was at least part of what the Supreme Court was doing in several of its takings cases").

In *Mahon*, 260 U.S. at 414-16, the Supreme Court said that the use restriction in question went so far as to constitute a "taking." The holding in *Mahon*,

the economic impact test with a daunting array of limitations.

One important limitation is the principle that a compensable taking does not result merely because a use restriction "deprives a property owner of the most profitable use of his property."⁵⁵ Similarly, the fact that a regulation renders substantial portions of a landholding useless will not establish a taking as long as the property as a whole retains economically viable use.⁵⁶ As the Court explained in *Andrus v. Allard*, "denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of

however, was premised on economic due process analysis and not the takings clause. *Id.* at 413. The Court subsequently declared that the portion of the *Mahon* opinion discussing the takings clause was merely an "advisory opinion." *Keystone Bituminous*, 480 U.S. at 484.

55. *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); accord *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (stating that denying property owners the most profitable use of their property is not "dispositive" in taking cases); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (reasoning that property owners still were able to obtain a "reasonable return" on their property); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (holding that "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional"); see also *Pennell v. City of San Jose*, 108 S. Ct. 849, 852-53 (1988) (refusing to rule a city rent control law facially invalid on a takings clause claim).

Indeed, the quotation in the text severely *understates* the power of government to prohibit property uses without effecting a taking or raising a right to just compensation. The Court has used terms such as "complete destruction," "wholly useless," and "nearly the same effect as the complete destruction of [the owner's] right" in describing the line between regulation and taking. *Penn Central*, 438 U.S. at 127-28 (citing respectively *Armstrong v. United States*, 364 U.S. 40, 48 (1960), *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922)). In a recent case upholding a right of compensation for temporary regulatory takings, Justice Rehnquist appeared to accept that, to constitute a taking, a regulation must deny the landowner "all use" of the property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

56. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-98 (1987) (holding that coal required by law to remain unmined did not "constitute a separate segment of property for takings law purposes"); *Penn Central*, 438 U.S. at 130-31 (stating that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"); accord *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (upholding set-back restrictions and stating that "zoning laws prescribing . . . the height of buildings . . . and the extent of the area to be left open for light and air . . . are, in their general scope, valid under the federal Constitution"); see also *Deltona Corp. v. United States*, 657 F.2d 1184, 1192-93 (Ct. Cl. 1981) (upholding use regulation prohibiting construction on part of a parcel, even though the prohibition caused "some diminution in value" of owners' land), *cert. denied*, 455 U.S. 1017 (1982).

property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."⁵⁷

It is not enough, moreover, that a regulation's economic impact merely is severe. For a regulatory taking to occur a regulation must interfere with an owner's "reasonable, investment-backed expectations."⁵⁸ There is, accordingly, no taking if a regulation only interferes with a "unilateral expectation or an abstract need."⁵⁹ Perhaps most importantly, the onus is on the owner to show concrete facts indicating that the regulation leaves no possibility of economically viable use⁶⁰ — a "heavy

57. 444 U.S. 51, 65-66 (1979); accord *Keystone Bituminous*, 480 U.S. at 497. In *Andrus*, the Court held that a total ban on selling or otherwise trading in eagle parts did not result in a compensable taking even though the owners retained only the rights to possess and transport the property. 444 U.S. at 67-68.

58. The "investment-backed expectations" factor first appeared in *Penn Central*, 438 U.S. at 124, 127-28. The Court adopted the wording, if not the concept, from Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967) (stating that the Court will inquire "whether or not the measure can easily be seen to practically deprive the claimant of some distinctly perceived, sharply crystallized investment-backed expectation"). In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court treated the "investment-backed expectations" factor as an independent test, holding that the regulatory deprivations in *Monsanto* did not constitute takings in those circumstances when the owner's expectations were deemed to be not "reasonable." *Id.* at 1005-14; accord *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (stating that employers required to fund a proportionate part of a multi-employer pension fund from which they were withdrawing "had sufficient notice . . . that withdrawal itself might trigger additional financial obligations"). Sometimes, as in *Penn Central*, the Court refers to the expectations in question as "distinct investment-backed expectations." 438 U.S. at 124 (emphasis added). More recently, the Court has chosen the phrase "reasonable investment-backed expectations." See, e.g., *Keystone Bituminous*, 480 U.S. at 495 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *Monsanto*, 467 U.S. at 1005. The difference in wording, however, is without any apparent intended difference in meaning. See generally Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3, 29-37 (1987) (discussing lower federal court and state court decisions that applied the investment-backed expectations factor in takings analysis).

59. *Monsanto*, 467 U.S. at 1005 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

60. See, e.g., *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 349-52 (1986) (declining to reach takings question because holdings of lower courts left open "possibility that some development will be permitted"); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (noting that parties presented "no evidence . . . that the prohibition of further mining will reduce the value of the lot in question"); see also *Pennell v. City of San Jose*, 108 S. Ct. 849, 857 (1988) (stating that the case did not "present a sufficiently concrete factual setting for the adjudication of the takings claim"); *Williamson v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985) (holding claim not ripe because

burden"⁶¹ to prove a negative that has evolved into a limitation of practically insurmountable proportions.

In view of these limitations, the Supreme Court is not likely to hold that a land use regulation is a taking on economic impact grounds except, in its words, "under extreme circumstances."⁶² Laws to preserve open space and natural areas, however, can present the "economic impact" issue in a new and significantly more extreme regulatory context than most land use regulations of the past.⁶³

property owners had failed to apply for zoning variance); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-98 (1981) (reasoning that "constitutionality of statutes ought not be decided except in actual factual setting that makes such a decision necessary").

61. *Keystone Bituminous*, 480 U.S. at 493.

62. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

63. Regulations prohibiting the filling of wetlands, for example, have met with a mixed reception. Compare *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 311, 197 A.2d 770, 773 (1964) (stating that "change of zone to flood plain district froze the area into a practically unusable state"); *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970) (holding that restriction on filling wetlands deprived landowners of "reasonable use of their property"); *Morris Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 557-58, 193 A.2d 232, 243 (1963) (noting that land use was "rendered practically impossible by the almost prohibitory filling and removal regulations") with *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1382 (Fla.) (upholding denial of development permits on the ground that property owner's development "would result in an adverse impact on the surrounding area"), *cert. denied*, 454 U.S. 1083 (1981); *Just v. Marinette County*, 56 Wis. 2d 7, 17-18, 201 N.W.2d 761, 768 (1972) (stating that "an owner of land has no absolute and unlimited right to change the essential natural character of his land").

Justice Brennan expressed considerable doubt about the constitutionality of preserving open space and scenic vistas by regulation, without compensation, in his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting):

From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

Id. at 652-53 (emphasis added).

Notably, however, Justice Brennan used words suggesting that, to constitute a taking, the impingement of the regulation must leave no use, or virtually no use, whatsoever. *Id.* (requiring that regulation must "deprive [the owner] of all beneficial use" and "completely deprive the owner of all or most of his interest"). Similarly, Justice Rehnquist recently described inverse condemnation of property by referring to government acts that "destroy its value entirely." *First English Evangelical Lutheran Church v. County of Los Ange-*

Land use regulations prior to the 1970s primarily consisted of zoning and subdivision controls that accepted the premise that regulated land should be legally available for development in some manner or another.⁶⁴ In contrast, a comprehensive plan designed to *balance* open space with more intensive uses, and to steer new development exclusively to designated building areas, would do much more. The whole idea of balance is to preserve a line between urban and non-urban, to keep development from polka-dotting the entire landscape. A balance can be achieved only if the natural, open space, or even wilderness characteristics of the countryside can be retained. For a comprehensive plan to preserve appreciable blocks of open land, the property of many owners must remain "as is."

As *Penn Central* demonstrates, profit and preservation are not per se incompatible. As long as the land can provide the owner with a "gainful" economic return in its existing use,⁶⁵ Supreme Court precedent permits regulations that prohibit owners from enlarging the existing intensity of use. Regulations that keep land in such traditionally gainful uses as farming, ranching, or forestry, therefore, should easily withstand challenge under the takings clause. The fact that the owner could make a greater profit in a more developed use is, in the words of the Court, "not dispositive."⁶⁶

Although *Penn Central* held that the land's existing use was a constitutionally sufficient use, the existing use in question was, to be sure, the owner's "*primary* expectation concerning the use of the parcel."⁶⁷ The more difficult case, not yet squarely faced by the Court, would be posed by the owner who buys with no desire whatever to maintain the existing uses of the land — whose interest in the land is solely as a development site.

PERMISSIBLE LIMITATIONS ON LAND USE AND THE MARKET "RATCHET"

The pattern is becoming familiar: A speculator buys a

les, 482 U.S. 304, 316-17 (1987) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871) (emphasis added)).

64. See F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION 795-96 (1984) (noting that increases in land use densities once were seen as inevitable and desirable).

65. See *supra* note 50.

66. *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

67. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 135-36 (1978) (emphasis added).

piece of undeveloped land — for example, a legally protected wetland. The purchase price far exceeds the value of the land in its current and historic use. Rather, it reflects the worth of the land as a potential development site.⁶⁸ The buyer applies for the permits required in order to fill the wetland and build, and perhaps for rezoning or a variance from current land-use restrictions. Because the buyer paid an elevated price, the land cannot possibly provide a reasonable financial return in its natural wetland condition. Stressing this, the buyer argues that denying the permits would be a “taking.”⁶⁹ If the government wants to preserve the wetland, the argument goes, it can do so, but only if it is willing to purchase the land at the price the land can command as a development site.⁷⁰

Lands that owners have been content to hold as natural or open space for decades now are being sold at prices several times their value in their existing or historic uses.⁷¹ Open

68. Although the selling price of such land presumably would be less than the land's value as an already approved development site, market bidding for prized development locations easily could cause the selling price to reflect at least part of the anticipated development site value.

69. See, e.g., *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 383-84 (1988) (involving plaintiff's taking claim based on denial of permit to develop wetlands, thus substantially decreasing the value of the property). The planning board, zoning appeals board, or other governmental decision-making body may be strongly disinclined to approve the development. The developer can sue for money damages, however, and even impose personal liability on the government officials who deny the permits if the court later holds such denial to be unlawful. See, e.g., *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988) (awarding property owner damages when zoning measures were deemed “confiscatory”). This puts the balance of power heavily on the side of the developer. See Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385, 385 (1988) (discussing “social, legal, and political impacts of multimillion dollar lawsuits filed against citizens or groups for advocating a viewpoint on a public issue in a governmental decisional process”); Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506, 506 (1988) (noting attempts to use civil tort action to stifle political expression and how such lawsuits affect political values and participation in American society).

The balance of power can have a strong influence in outcomes. Because a recovery of damages by the developer could be a personal catastrophe for local officials, the tilt presumably favors development in all cases falling in the arguable or “borderline” category.

70. The root of this argument is the famous broad dictum of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Court stated: “[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Id.* at 416.

71. See, e.g., GOVERNORS TASK FORCE ON NORTHERN FOREST LANDS AND USDA FOREST SERV., NORTHERN FOREST LANDS STUDY REPORT 9 (Draft of

space or "raw" land can command high prices because buyers are willing to pay not merely for the land's present adaptations for use, but also for its development potential. The market value of land can have, in other words, two distinct components: the basic existing-use value and a development-site premium.⁷² As buyers speculate on development potential, the market value of open land escalates.⁷³

Regulations designed to preserve the existing character of land will tend, if anything, to deflate land prices. These regulations strip the land of its speculative value based on development potential. For long-term owners, the effect of preservation regulations is to reduce the opportunity to make a speculative profit. For more recent buyers, those who paid the escalated prices, use regulations may even cause a substantial capital loss. Either way, the economic impact can be dramatic.⁷⁴

Oct. 5, 1989), writing of the development threats to the 26 million acres of forest running across the northern tier of Maine, New Hampshire, New York, and Vermont:

[T]he market value of forest land for recreation and development continues to rise, in some places far exceeding the value of the land for timber production. . . . Buyers are willing to pay prices many times higher than the value of the land for growing timber. Lakeshore, river frontage, scenic ridges, and land with access to major highways command the highest prices and are in greatest demand. . . . As timberland owners respond to changing economic conditions, tracts of land that are more valuable for uses other than timber production are being sold to people with different interests.

72. Only the existing-use value represents the social opportunity cost of developing land for a new and different use and, in a perfect market, no developer should have to pay more than this existing-use value. Nevertheless, because parcels of land are not fungible or movable, land markets probably never can operate so "perfectly" as to prevent the occurrence of development site premiums. In any case, it is a familiar phenomenon that lands that appear to be good prospects for near-term development tend to be priced higher than the values they would have based solely on their existing uses. Development site premiums thus probably are the norm for development site lands. See generally A. SCHMID, CONVERTING LAND FROM RURAL TO URBAN USE §§ II-III, at 24-34 (1968) (discussing development site prices in rural development).

The NORTHERN FOREST LANDS STUDY REPORT, *supra* note 71, at 22, provides a dramatic example:

[A large real estate corporation] bought forest land with no lakeshore or water access for \$100 per acre. [The corporation] then subdivided it and marketed it as vacation property for more than \$300 per acre. . . . The change in the market value was not accompanied by any change other than subdivision.

73. NORTHERN FOREST LANDS STUDY REPORT, *supra* note 71, at 22.

74. The economic impact of existing-use zoning can be dramatic, but it also can be exaggerated. Exaggeration is particularly likely if prices from a few actual sales for development are simply extrapolated to all comparable un-

Apart from their dampening effect on speculative prices, however, preservation regulations effect no real change. Indeed, real change is precisely what such use regulations are intended to prevent. They leave the land's *existing-use value* intact because the land can continue to provide exactly the same benefits after the adoption of the regulations as before. Even so, the benefits from the existing uses may seem economically inadequate if the owner paid — or could have exacted — a development site price for the land. The critical question is whether, by eliminating *speculative* values, preservation regulations constitute a compensable "taking."

As we have seen, a mere reduction of land value, speculative or otherwise, does not constitute a taking;⁷⁵ the regulation

developed lands in the geographic market. Such a global extrapolation would be valid only if, in the particular geographic market, there are buyers who are ready to purchase all the comparable undeveloped lands at development site prices at once — a most unlikely situation.

Where open country is being converted to developed uses at a rate of a few percent per year, it could take decades for all the open space to actually yield its potential development site value. For most parcels, the high improbability of immediate development means that the *present* development-site value is far less than the potential development-site value. To obtain the true present value, it is necessary to discount the potential development-site value by a factor that takes full account of the probable delay in actually realizing on the potential. Cf. Treas. Reg. § 1.170A-14(h)(3)(ii) (1989) (stating that a valuation of development rights "must take into account . . . an objective assessment of how immediate or remote the likelihood is that the property . . . would in fact be developed").

Consider, for example, a relatively fast growing county at an urban edge in which farm acres are being subdivided and developed at a (fairly high) rate of 2% per year. Even if some farms in the county are being sold to developers at 500% of their agricultural values, any given farmer would have, on average, only a 2% probability of collecting that 500% "value" in any given year. Based on these numbers, existing-use zoning would cause only an average 10% diminution of the true *present* values of the developable farm lands in the market area ($2\% \times 500\% = 10\%$).

By taking proper account of the market's limited absorption capabilities, the real economic impact of existing-use zoning turns out on average to be only a few percentage points of value. Isolated parcels may sustain demonstrably greater losses in value — for example, parcels that are already under contract to sell at development site prices. The impacts on these parcels would be offset, however, by even greater discounting on other parcels whose selection by the market lottery is even further deferred. See *Akers v. Commissioner*, 799 F.2d 243, 245 (6th Cir. 1986) (analogizing the comparison between potential development value and actual realized development value as "the difference between the worth of a gravid or potentially gravid sow and the postpartum worth of a sow-cum-shoats").

75. "The decisions," according to the Supreme Court, "uniformly reject the proposition that diminution in property value, standing alone, can estab-

must deny an owner "economically viable use" of the land.⁷⁶ Although the concept of economically viable use frequently has been cited as a criterion of "taking,"⁷⁷ the Supreme Court never has equated it with financial profitability as such. There is good reason for avoiding any such equation, and that reason is plain enough: Whether a particular remunerative use of land is financially profitable depends on how much the owner has paid for the land.⁷⁸

Even land in its natural state can provide a respectable fi-

lish a 'taking.' " *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

The Court reasoned:

[I]mpairment of the market value of real property incident to otherwise legitimate government action ordinarily does not result in a taking. At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 15 (1984) (citations omitted); see also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (stating that "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").

Even while vigorously urging (in a dissenting opinion) a comparatively larger protection of private property rights, Justice Rehnquist accepted that there would be no taking if the regulations merely made the property in question "of little value" but did not completely extinguish the value." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513-14 (1987) (Rehnquist, J., dissenting).

76. See *supra* notes 48-49 and accompanying text.

77. See *supra* note 48.

78. Profitability is, in other words, a relative concept, with profit depending on the *relationship* between the amount of return and the amount of investment. The Supreme Court has recognized that, for purposes of takings clause analysis, it is hopelessly circular to establish the value of a regulated asset by simply capitalizing the asset's projected returns when the very issue at hand is determining a fair return. *Duquesne Light Co. v. Barasch*, 109 S. Ct. 609, 616 n.5 (1989) (reasoning that "capital assets [could not] be valued by the stream of income they produced because setting that stream of income was the very object of the rate proceeding").

Even when owners receive more cash back than they put in, there still may not be an economic "profit." The return must exceed the amount needed for amortization of invested capital. This further return must equal at least the amount the owner could have received from the next best alternative use of the capital invested, or there still is no economic profit on the deal. An asset that does not depreciate in value, like land, presents a special case. There is no amortization of the investment. In the case of non-depreciable land, therefore, economic profitability wholly depends on there being a net return in excess of the "opportunity cost," the amount that could have been received from the next best alternative use of the capital. See generally R. POSNER, *supra* note 17, § 1.1, at 9 (stating that economic rent is the "difference between total revenues and total opportunity costs").

nancial return, provided the owner has not paid too much for it. Typical open space uses for which people often pay handsomely include hunting, fishing, grazing, forestry, buffer, or aesthetic enjoyment. Only when woodlands or wetlands are sold at building lot prices do these natural uses seem trivial. It could not follow, however, that a buyer has a constitutional right to use raw land as a building site just because the buyer was willing to pay "too much." If that *were* the rule then the mere bidding up of sales prices in the market would ratchet up the constitutionally guaranteed uses of land. The government's power to regulate would be, in effect, at the mercy of private market transactions.

EXISTING USE VS. POTENTIAL USE — "INVESTMENT-BACKED EXPECTATIONS"

In assessing the impact of a land use restriction there is a fundamental difference between existing use and potential future use.⁷⁹ Existing uses of land provide definite, physical bases for specific expectations about the stream of future benefits a parcel of land can produce. Potential use is an abstraction, an image in the mind of the land entrepreneur.

Although conjectures about potential use exist only in people's minds, such conjectures can have appreciable effects on market prices. If land entrepreneurs guess that, by adding capital and labor, a parcel's projected stream of returns can be enlarged, the parcel's market price may include a development site premium over and above the land's existing-use value. This speculative premium, however, is something very different from the value attributable to the parcel's existing uses. It is, bluntly, the difference between an investment and a bet.

There is solid ground for concluding that there is a constitutional difference between an investment and a bet. As the Court has said in *Penn Central* and repeatedly since, the property expectations that the takings clause protects from extreme economic impacts are "reasonable" or "distinct investment-backed expectations."⁸⁰ The Court has been willing to give a fairly wide scope to the concept of "investment,"⁸¹ but it never

79. See *Penn Central*, 438 U.S. at 136, 138 n.36.

80. *Id.* at 124; see *supra* note 58 and accompanying text.

81. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (defining the concept of investment to possibly include the exchange made by the ancestors of the modern Sioux peoples in "ceding" large parts of the original Great Sioux Reservation).

has even hinted that the concept might include a speculator's gamble that development could enlarge a currently projected stream of returns.⁸² In other words, it is one thing to say that a taking occurs when a regulation totally destroys existing land uses. It is, however, something else again to conclude that compensation is required when a regulation takes nothing except a hope or expectancy about possible uses in the future.

The purpose of the takings clause, as the Court has often said, is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁸³ To apply this principle to particular cases "necessarily requires a weighing of private and public interests."⁸⁴ A private owner's interest in keeping something that exists in physical reality presents a far more obvious case for constitutional protection as "property" than the private interest in mere hopes.

Although speculators should not be treated arbitrarily,⁸⁵ it certainly does not follow that the takings clause should guarantee their bets. A buyer may pay an elevated price with a view to getting certain use restrictions relaxed, but it hardly can be harsh for the government to retain the restrictions in force. That was precisely the risk the buyer took.⁸⁶ The Constitution

82. The lower court cases since *Penn Central* generally support the view that the "investment-backed expectations" factor excludes speculative aspirations from takings clause protection. For a careful review and discussion, see Mandelker, *supra* note 58, at 29-37. One exception is *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), in which the court observed, without discussion, that "plaintiffs' reasonable, investment-backed expectations have been frustrated. Plaintiffs intended to purchase the land for development or at least for resale." *Id.* at 396.

83. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) (stating that a taking requires a "determination that the public at large rather than a single owner, must bear the burden of an exercise of state power in the public interest").

84. *Agins*, 447 U.S. at 261.

85. If, for example, the government takes a piece of raw land by eminent domain, and the market value of the land reflects its potential for development, the government must pay that market value. See *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (stating that the measure of recovery is the cash price a willing buyer would pay to a willing seller at the time of the taking). In other words, the law protects a speculator's interest in a property's potential just as fully as it protects a user's interest in what his property is — once it has been determined that the *property* itself has been taken.

86. In *Nollan*, Justice Scalia suggested that if imposition of a particular land use restriction would be invalid as against an existing owner, it likewise would have to be invalid against a later buyer. 483 U.S. 825, 833 n.2 (1987). He reasoned that "the prior owners must be understood to have transferred their

should not guarantee that the speculator will win the bet.

The takings clause similarly does not prevent the government from enacting new restrictions that apply to land already purchased by a developer. Even though such after-the-purchase restrictions may be onerous on the buyer whose intended use is foreclosed, the government's power to regulate cannot be cut down by purely private transactions.⁸⁷ If it were otherwise, zoning codes never could have been constitutionally imposed in the first place, current zoning could never be tightened, and *Euclid v. Ambler Realty Co.*⁸⁸ would no longer be good law.⁸⁹

Whenever a buyer pays a premium over and above the land's existing-use value, the buyer takes a calculated gamble — a gamble that the planned change in use can be profitably accomplished. Part of that gamble is the inherent risk that the government may tighten the applicable regulations. As the Supreme Court has said: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."⁹⁰ The Court has found it particularly reasonable to expect regulatory change in a field of business that "has long been the source of public concern and the subject of government regulation."⁹¹

Land development is an increasingly regulated field, and every competent developer knows that the trend is toward ever greater refinement of land use controls. When land is acquired

full property rights in conveying" the affected land. *Id.* at 833. Justice Scalia's assumption is perfectly reasonable if the restriction in question was invalid at the time of transfer. The example in the text, however, concerns a buyer hoping to obtain relaxation of a *valid* use-restriction.

87. Justice Holmes said it best: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *accord* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-06 (1987) (rejecting claim that statute impairs property owners' contract with surface owners to waive liability for surface damage).

88. 272 U.S. 365 (1926). This is the landmark case upholding the constitutionality of traditional zoning regulations.

89. As the Supreme Court expressed this point: "[T]he submission that [owners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978).

90. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

91. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

for development, the buyer takes a known risk⁹² — particularly if the interval between purchase and actual development is many months or even years.⁹³ An expectation that there will be no regulatory change in the interim simply is not a reasonable expectation, “investment-backed” or otherwise.⁹⁴ Until land actually has been adapted to a potential use, any premium paid by a buyer in anticipation of that use is not so much an investment in “property” as an investment in hope — a “unilateral expectation”⁹⁵ that the land’s stream of earnings can be enhanced.

In summary, land use regulations can affect market values in two distinct ways: by limiting or prohibiting existing uses and by cancelling hopes and conjectures about potential for change. When a regulation bans the existing use of land, it severs an existing flow of benefits; it legally annihilates an existing state of fact. Because the advantage of the asset is functionally destroyed, “property” is taken. A regulation that merely prohibits development, by contrast, takes away at most only a hope or expectancy. The benefit-producing asset is left intact. Although a unilateral aspiration may no longer exist, the “property” remains.

The distinction between existing-use and potential-use values is implicit in the “reasonable investment-backed expectations” factor of the Supreme Court’s “takings” analysis. It supports the owner’s quite normal and reasonable expectation

92. A buyer of riparian lands similarly takes the risk that the government will exercise the navigation servitude to his or her detriment. *See, e.g., United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945) (recognizing no compensable property interest in high-water level of river subject to federal government’s power to make improvements for navigation); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 73-74 (1913) (holding that there is no compensable property interest in navigable waters). The Supreme Court also used this analogy in *Penn Central*, 438 U.S. at 124-26 (noting that the Court upholds regulations that adversely affect property interests when such regulations reasonably promote health, safety, and welfare).

93. *See Andrus v. Allard*, 444 U.S. 51, 64-65 n.21 (1979) (holding that “[t]he timing of acquisition . . . is relevant to a takings analysis of appellee’s investment-backed expectations”).

94. *See Connolly*, 475 U.S. at 227; *Penn Central*, 438 U.S. at 125-26 (noting that “‘taking’ challenges have also been held to be without merit . . . when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm”).

95. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1983) (stating that “a ‘reasonable investment-backed expectation’ must be more than a ‘unilateral expectation or an abstract need’” (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980))).

that land can be beneficially used in the same condition as when the owner sees it and buys it.⁹⁶ It does not, however, require that the public fisc reimburse a speculative investment or assure a speculative profit as the price of regulation. The resulting balance protects the core interest of every owner while the police power to promote the public welfare remains unimpaired.

CONCLUSION

As the country fills and people live closer and closer together, it becomes increasingly apparent that we all have a shared stake in the condition and future of our national landbase. The American landscape, though divided into many private plots, is seen more and more as the shared heritage of all. The character of the land and of communities and regions, and the preservation of dwindling open spaces, are shared concerns. A new land ethic of planning and stability has replaced the pioneer land ethic of autonomy and change.

If we wish to preserve existing patterns of land use and development, we must employ some form of existing-use zoning in the relatively undeveloped, non-urbanized areas that remain. There is no constitutional barrier to existing-use zoning. Supreme Court "takings" cases provide no basis to conclude that there is a constitutional right to develop land. On the contrary, in *Penn Central Transportation Co. v. New York City* and *Nollan v. California Coastal Commission*, the Court embraced exactly the opposite view. There is, however, a constitutional right to have an "economically viable use" of land.

Although the Supreme Court has not defined the concept of "economically viable use," it is clear that the term does not necessarily mean a profitable *rate* of return on any given amount of invested capital. There is no general constitutional requirement that use-restrictions must leave every owner with a use that will yield a profitable rate of return based upon the amount that the particular owner paid for the land. Specula-

96. This actually was the only issue decided by the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The property owner's expectation was the right to mine certain coal. *Id.* at 414. The only possible beneficial use of this right, at its creation and at the time of the case, was to mine the coal for profit. The invalid legislative prohibition on extracting the coal eliminated the only existing use that provided a basis for a reasonable investment-backed expectation. Unlike the abstract potential for benefit that the speculative owner hopes to reduce to a reality, the person who buys for an existing use seeks only that profit potential that is founded on an existing state of fact.

tive transactions bidding up land prices do not ratchet up constitutionally guaranteed uses that are immune from governmental land use regulation.

Regulations limiting land to its existing uses meet the Supreme Court's test of economically viable use as long as the land retains some appreciable benefit in that existing use. The government's power to regulate or prohibit modifications to enable new *future* uses, without compensation, has not been questioned by the Court.

It therefore is constitutionally permissible, according to the Supreme Court cases, to preserve the overall character of our national landbase and to prevent pockets of development from scattering across the countryside. Existing-use zoning can channel new construction projects to already developed areas, and the open lands in between can be retained as they are. The new land ethic of planning and stability need not founder on the property protections of our fundamental law.