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Robert J. Goldstein

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## ARTICLES

### The Future of Environmental Law: Adjusting Expectations After *Tahoe-Sierra*

ROBERT J. GOLDSTEIN\*

David Sive likes to tell the story of how a loose-knit group of hikers, enraged at the prospect of losing Storm King Mountain to an energy-generating reservoir, backed litigation that preserved a natural wonder for the sake of its own beauty.<sup>1</sup> He also points to a conference of litigators, where the term “environmental law” was coined.<sup>2</sup> I have no reason to discount these stories, having heard others verify them; they might even be described as the “founding of environmental law.”<sup>3</sup> The claim is perhaps exaggerated, but in its overstatement lie the seeds of truth. Environmental law was born as a child of litigation, the spawn of a few prescient precedents that allowed it to survive in the absence of positive law.<sup>4</sup>

The positive law was soon to come. It grew encompassing statute after statute, and currently includes over thirty-three lateral inches of text in the Code of Federal Regulations.<sup>5</sup> Some called it command and control regulation.<sup>6</sup> Whatever we think of it, it is voluminous, yet its effects ebb and flow with the political

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\* Visiting Professor of Law, United States Military Academy, West Point.

1. *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (holding that the Federal Power Commission failed to adequately consider several important factors in its decision to grant a license for the development of a hydroelectric project).

2. Interview with David R. Sive, Professor, Pace Law School, in White Plains, NY (May 6, 1997). See also William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: The Who's*, 39 WASHBURN L.J. 1 n.93 (1999).

3. *Id.* at 14.

4. There was positive law that was used to protect environmental interests, such as the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401-418 (1994)), there was a dearth of environmental law *per se*.

5. C.F.R. Title 40, Protection of the Environment, alone, measures over 33 inches, while Title 26, Internal Revenue, measures a mere 22¼ inches.

6. The term is probably derived from the military phrase:  
[C]ommand and control -

will necessary to enforce its broad-based goals. It has also been subject to slow-shifting sands of federalism, as the Supreme Court vacillates between federal dominance and devolution.<sup>7</sup> Positive environmental law has solved many of the problems that faced the country during the days when rivers caught fire<sup>8</sup> and DDT found its way into the fat tissue of most Americans.<sup>9</sup> These laws and regulations have undoubtedly remained with us, even as the most hostile Congress was unwilling (and unable) to retreat from them.<sup>10</sup>

The real question is what comes next? Do we rely on the waning ability of citizen suit standing to litigate future environmental protections,<sup>11</sup> or do we expand upon the existing regulations that have, arguably, made inroads in curbing pollution and preserving ecosystems? I would argue that each of these avenues will have its place in the future of environmental law, but the next phase of environmental law must address the issue of what we do on our land. In examining our relationship to the land, it will be necessary to inculcate the science of ecology and environmental ethics<sup>12</sup>

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(DOD) The exercise of authority and direction by a properly designated commander over assigned and attached forces in the accomplishment of the mission. Command and control functions are performed through an arrangement of personnel, equipment, communications, facilities, and procedures employed by a commander in planning, directing, coordinating, and controlling forces and operations in the accomplishment of the mission. Also called C2.

JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, at <http://www.dtic.mil/doctrine/jel/doddict/data/c/01075.html> (last visited May 7, 2002).

7. See generally RICHARD L. REVESZ, *Federalism and Environmental Regulation: An Overview*, in ENVIRONMENTAL LAW, THE ECONOMY, AND SUSTAINABLE DEVELOPMENT 374 (2000).

8. See generally A BRIEF HISTORY OF POLLUTION (Adam Markham ed., 1994).

9. John Barker & Robert J. Goldstein, *The DDT Paradigm and Electromagnetic Fields: Policy and Scientific Uncertainty*, 17(4) J. PROD. & TOXICS LIAB. 285, 286 (1995).

10. See generally NEWT GINGRICH & RICHARD K. ARMEY, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION. (Ed Gillespie & Bob Schellhas eds., 1994).

11. See generally Robin Kundis Craig, *Will Separation of Powers Challenge "Take Care" of Environmental Citizen Suits? Article II, Injury-In-Fact, Private "Enforcers," and Lessons From Qui Tam Litigation*, 72 U. COLO. L. REV. 93 (2001)

12. An environmental ethic is an understanding that in an ecosystem every action taken has consequences; those consequences may be adjudged as positive or negative values based on the needs of society; and that persons must act as stewards of their domain, whether that domain be their "owned" real property or some lesser interest, to prevent actions that cause negative consequences. Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347 (1998). For a traditional definition of the land ethic, see ALDO LEOPOLD, SAND COUNTY ALMANAC, 237-264 (1990).

into regulations that apply those principles to both public and private lands. To do so would mandate a degree of eco-stewardship.<sup>13</sup>

The future of environmental law will involve the translation of the scientific principles of ecology and the ethical teachings of environmental ethics into positive law. As this positive law is applied to private land, the translation will necessarily involve an adjustment of the expectation of private landowners. This adjustment may be relatively insignificant as applied in many cases, but in theory, is nonetheless profound. Perhaps, the greatest barrier to the application of mandatory eco-stewardship to private lands has been the application of the regulatory takings doctrine. This, however, may have changed.

The Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>14</sup> may have opened the door for regulation that mandates eco-stewardship of land. In that case, the Court denied the petitioner's argument for a categorical rule in the imposition of a moratorium on development that would have been akin to a physical takings analysis.<sup>15</sup> Although current Supreme Court jurisprudence had been seen as expanding the regulatory takings doctrine to a point where it resembled the doctrine of physical takings, the *Tahoe-Sierra Preservation* case seems to have abruptly halted that trend.<sup>16</sup> This decision should allow a fact sensitive inquiry of regulatory takings cases, wherein the adjustment of expectations is examined and ratified, as long as the regulation does not result in a "complete elimination of value."<sup>17</sup> That test, the legacy of *Lucas v. South Carolina Coastal Council*,<sup>18</sup> was limited to "the extraordinary cir-

13. I do not take credit for this term, which according to my best information has been used in several earlier texts. See, e.g., Bill Belleville, *Off Cuba's Coastline Could Be A Paradise Lost; Cuba's Fledgling Tourism Industry Threatens To Disrupt Its Ecosystem That, In Turn, Will Affect Our Ecosystem*, ORLANDO SENTINEL, Apr. 19, 1998, at G1. I will, however, define the term to mean the use of the science of ecology and environmental ethics to manage land. This adds an objective dimension to the concept of "wise use" or "wise stewardship." See *Denmark v. Norway*, 1993 I.C.J. 38 (Separate Opinion of Judge Weeramantry at 274). See also Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 355 (1994).

14. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

15. *Id.* at 1478.

16. "[W]e do not apply our precedent from the physical takings context to regulatory takings claims." *Id.* at 1479.

17. *Id.* at 1483.

18. 505 U.S. 1003 (1992).

cumstance when *no* productive or economically beneficial use of land is permitted.”<sup>19</sup> This approach taken by the Court leads to the acceptance of regulations that are based on realistic expectations implicitly including those grounded in ecology and environmental ethics, which after fact-specific inquiry,<sup>20</sup> will be analyzed under *Penn Central Transportation Co. v. New York City*.<sup>21</sup> “The *Penn Central* analysis involves ‘a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectation, and the character of the government action.’”<sup>22</sup> The application of this analysis, with its concomitant scrutiny of the facts that underlie the landowner’s expectation, supports reasonable environmental regulation that results in adjusting expectations.

Also critical in its decision, the Court noted that the courts must look at “the parcel as a whole,”<sup>23</sup> noting that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking.”<sup>24</sup> These two concepts, although grouped together by the Court, are actually quite distinct. The Court’s mandate to look at the *parcel as a whole* requires any person claiming a regulatory taking to show that the taking is of the entire parcel, not merely portions of it. The Court defines the parcel as physical and temporal.<sup>25</sup> For example, a court must consider both the uplands and wetlands owned by a landowner complaining of a regulatory taking based on a prohibition on building in the wetland. The Court’s reference to the bundle of property rights, means no stick is essential, unless its removal from the bundle amounts to a physical exclusion from the property.<sup>26</sup> Thus, adjusting the expectations of a landowner, by

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19. *Tahoe-Sierra*, 122 S. Ct. at 1483 (emphasis added). The Court further limited the application of the *Lucas* “categorical rule,” noting that it “would not apply if the diminution in value were 95% instead of 100%.” *Id.*

20. *Id.*

21. 438 U.S. 104 (1978).

22. *Tahoe-Sierra*, 122 S. Ct. 1465, n.10 (2002) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)).

23. *Id.* at 1481

24. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51 at 65-66 (1979)). For a history of the bundle concepts, and an analysis of the ‘strands’ or ‘sticks’ see Goldstein, *supra* note 12, at 347.

25. 122 S. Ct. at 1484.

26. See *id.* The bundle is valuable for its notion of divisibility and accumulation of diverse and varying “sticks” that can amount to ownership. There seems to be no fixed formulation for when these incidents rise to the level that some term ‘ownership.’ This is perhaps the strong point of the metaphor, rather than a weakness, in that it makes such an inquiry fact-sensitive.

definition, implies the modification of these 'strands' and, at worst, the destruction of a particular 'strand,' but not the wholesale destruction of the entire bundle.

Clearly, the Court no longer defines an adjustment of expectations, based on mandated eco-stewardship, as a *per se* regulatory taking, and therefore, it can now pass Constitutional muster.<sup>27</sup> What adjusting expectations does, or put more precisely, what it contemplates is a limitation on expectations from real property in the economic sense, that limits reasonable return from real property to uses that are within the physical realities of land that are derived from ecology,<sup>28</sup> and the societal limitations that are imposed on land. Together these can be labeled: Environmental context.<sup>29</sup>

### Ecological Realities

With the specter of the "categorical rule" of takings removed,<sup>30</sup> consideration must be paid to the requirements of fairness and justice that underlie the Takings Clause of the Constitution.<sup>31</sup> Maintenance of environmental context based on positive law and sound ecological science would, ideally, be fair and just. Prohibiting the filling of a wetland, for example, is neither unfair nor unjust, not only because the Clean Water Act or zoning laws prevent it, but also because the owner of the land on which the wetland sits cannot reasonably expect to utilize that land in any other manner. In addition, adjacent owners have the

27. See generally *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, (2002).

28. This view of property, as physically limited by reality, is furthered by the *dicta* in *Tahoe-Sierra*, which notes that "in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole.'" *Id.* at 1481.

29. Justice Brennan in his dissent in *Allied Structural Steel Co. v. Spannaus* wrote:

[d]ecisions over the past 50 years have developed a coherent, unified interpretation of all the constitutional provisions that may protect economic expectations and these decisions have recognized a broad latitude in States to effect even severe interference with existing economic values when reasonably necessary to promote the general welfare.

*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 260 (1978) (Brennan, J., dissenting) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Sproles v. Binford*, 286 U.S. 374 (1932); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

30. *Tahoe-Sierra*, 122 S. Ct. 1478

31. *Id.*

reasonable expectation that the wetland will continue to exist and afford them its benefits.

The lowering of the wetland owner's expectations might be analogized to a lowering of interest rates—the action is taken in response to real concerns. In terms of interest rates these might include business cycles, international business downturns, or the perceived need to thwart inflation. In lowering real property expectations, ecological realities can drive a change in what constitutes reasonable expectations. Like a change in the prime rate, some private property owners will be affected more profoundly than others, but not without rhyme or reason. Those who are likely to suffer most would be those who have speculated on property that they purchased with an awareness of its physical conditions. Physical conditions are those that the purchaser had legal cause to take either actual or constructive notice of. These unfortunates are the speculators.

The other class of unfortunates in this scenario includes those for whom the stochasticity of nature has changed the conditions that affect their land.<sup>32</sup> These conditions may include the “newly appearing” critical habitat for an endangered species. Assuming that these conditions are “newly appearing” rather than simply ignored or covered up, an inequity is presented that has to be dealt with.<sup>33</sup> The issue is whether economic expectations for land can be based on the whims of nature. The answer should be self-evident—economic expectations have always been subject to the whims of nature. Just look to the devastation wrought by a vol-

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32. Alan D. Copsey, *The Protection of Wildlife Under Washington's Growth Management Act*, 16 PUGET SOUND L. REV. 1101, 1127 (1993).

Ecologists often refer to unpredictable events as “stochastic” events. Stochasticity denotes probability over a given length of time and covering a given spatial area. For example, it is impossible to predict when a particular tree or grove of trees will be toppled by wind or consumed by fire. But in many forests it is possible to predict with high certainty that fire or windthrow will occur with a certain frequency and extent throughout the forest. See, e.g., JAMES R. RUNKLE, *DISTURBANCE REGIMES IN TEMPERATE FORESTS*, IN *THE ECOLOGY OF NATURAL DISTURBANCE AND PATCH DYNAMICS* 17 (S.T.A. Pickett & P.S. White eds., 1985). The role of stochasticity in causing extinction is explained in MICHAEL E. GILPIN & MICHAEL E. SOULE, *MINIMUM VIABLE POPULATIONS: PROCESSES OF SPECIES EXTINCTIONS*, IN *CONSERVATION BIOLOGY: THE SCIENCE OF SCARCITY AND DIVERSITY* 19, 24-33 (Michael E. Soule ed., 1986).

*Id.* at n.148.

33. “When landowners find an endangered animal on their property, Chuck Cushman says, the best solution under current law is to ‘shoot, shovel and shut up.’” Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 826 (1997) (footnotes omitted).

canic eruption that erases not only the metes and bounds of someone's property, but anything resembling human habitation from its path.<sup>34</sup> Hurricanes, like Andrew in South Florida, devastate without regard to expectation.<sup>35</sup> Flooding by the banks of the great Mississippi repeatedly overwhelms nearby populations.<sup>36</sup> How are these severe shifts in economic expectations handled by government? Often with subsidies that make little or no sense because it encourages development in the very areas that remain perilous.<sup>37</sup> The grant of such subsidies does not prevent nature from running rampant over our economic expectations.<sup>38</sup>

If an endangered species makes a nest in one's backyard, besides following the precepts of the Endangered Species Act, the landowner must now accept the diminished expectation of profits for their land. Perhaps insurance will become available to cushion this blow; perhaps it will even be subsidized or underwritten by the government at some point. Despite the possibility of the aforementioned scenario, the migration of endangered species to the backyards of middle-class America is a rare, if not an unheard of occurrence.<sup>39</sup> The more likely scenario respects commercial users of land that are occasionally "surprised" by an ecological barrier to

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34. Pamela G. Hollie, *After Volcano, The Logjam*, N.Y. TIMES, June 5, 1980, at D1.

35. James Barron, *Hurricane Andrew: Hurricane Rips Through Florida And Heads Into Gulf*, N.Y. TIMES, Aug. 25, 1992, at A1.

36. Dirk Johnson, *The Midwest Flooding: Flood Controls Pushed to Limit By Rising Water*, N.Y. TIMES, July 11, 1993, at A1.

37. Subsidies that encourage development in flood plains, such as Federal Flood Insurance have been recently curtailed. In the United States, the previous availability of inexpensive federal flood insurance subsidized the development of ecologically rich coastal barrier islands and associated wetlands. The Coastal Barrier Resources Act of 1982 eliminated this perverse incentive by making developments on barrier islands ineligible for federal flood insurance, thus transferring the economic risks associated with building in a flood zone from the government to the private property owner.

Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209, 238 (1998) (citing Coastal Barrier Resources Act, Pub. L. 97-348, 11, 96 Stat. 1659 (1992) (amending National Flood Insurance Act of 1968, 1321, codified at 42 U.S.C. 4028)); see also Elise Jones, *The Coastal Barrier Resources Act: A Common Cents Approach to Coastal Protection*, 21 ENVTL. L. 1015, 1028 (1991).

38. "Life is a crapshoot," George Burns as God in the movie *Oh, God!* (1977).

39. See Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 440-3 (1994). See generally Sagoff, *supra* note 33; see also JASON F. SHOGREN, SAVING HABITATS, PROTECTING HOMES: PRIVATE PROPERTY AND THE ENDANGERED SPECIES ACT (1998).



the realization of expectations.<sup>40</sup> The issue here is how does a government that bases itself on stability and the maintenance of economic expectations allow for the alteration of those expectations based on the forces of nature, which may in some instances be pure chance? The answer again is patent. Chance plays a huge role in our economic expectation; in many cases it is the basis for the accumulation of great wealth. In speculation, which is what the investment in land should be classified as, the element of chance is always pertinent to the economic expectations and the ultimate return.

A distinction has been drawn between "market risks" which would include "all risks—including the risk of natural events such as floods—not caused by uncertainty concerning future government policies," and "government risks."<sup>41</sup> In his analysis of these "legal transitions"<sup>42</sup> Professor Louis Kaplow notes that:

[T]here is little to distinguish losses arising from government and market risk. For purposes of analyzing risk and incentive issues, the source of the uncertainty is largely irrelevant. A private actor should be indifferent as to whether a given probability of loss will result from the action of competitors, an act of government, or an act of God, except to the extent that the source of the risk will affect the likelihood of compensation or other relief. But whether the source of risk should determine the availability of compensation is precisely the issue this analysis is designed to address.<sup>43</sup>

A fire may strike a timber lot and eliminate an entire crop of wood.<sup>44</sup> This is a less-than-rare possibility in silviculture where the time required to raise a stand is often measured in scores of years. Why is it any different when an endangered species nests

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40. Little surprise can be claimed by a purchaser of real estate in light of the body of ecological knowledge and due diligence requirements that are a basic and essential part of real estate transactions practice since the 1970s.

41. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 n.62 (1986).

42. "Most normative legal analysis is devoted to determining which procedures or policies society should prefer. Any divergence between proposed solutions and the current legal regime raises the question of how the gains and losses caused by the transition to the more desirable system should be addressed." Kaplow, *supra* note 41, at 511.

43. *Id.* at 534-535 (footnotes omitted).

44. "Remember chestnut blight? The disease that swept the country 50 years ago and eventually killed every American chestnut tree, eliminating not just a species but chestnut lumber and furniture jobs as well?" Pam Sohn, *Nation Under Alien Attack; Plants, Insects Costly Burden*, CHATTANOOGA TIMES, Aug. 17, 1998, at A1.

in the stand during that time? What if the wood raised is no longer of commercial interest sixty years after it was planted? What if the main use of the wood has become illegal, or unpopular? These questions raise little distinction in a change in economic expectation brought about for ecological reasons. Indeed, as we can now see, ecological reasons for changes in our expectation may be the most sensible of all, as they protect us from what could be global devastation, and at the very least protect the "investment" for the future.

The addition of cognizance of adjusting expectations and its effect on economic expectation is not an unreasonable application of the theory; especially in light of the uncertainties that constantly face us in this ever-changing world.

### Untangling Expectations

In criticizing the decision in *Lucas*, Professor Richard A. Epstein notes that "[o]nly one thing is relevant: The greater the taking, the greater the payment. What is taken is what counts; what is retained, or the ratio between the retained and taken property, is irrelevant."<sup>45</sup> He saw this equivocation between partial and total takings as leading to "massive doctrinal discontinuities."<sup>46</sup> The *Tahoe-Sierra* decision has apparently untangled this discontinuity by its bold adherence to the principle that even the destruction of a 'strand' in the bundle of rights, does not effect a taking.

But when a 'strand' from the bundle is destroyed, what is taken? Based on a theory that takes into account the adjusting of expectations, regulation based on the ecological realities of the land in question takes nothing.<sup>47</sup> The landowner did not own these sticks in the bundle so their identification by regulation, or as a component of environmental context, has not affected his rights.<sup>48</sup> With regard to private law, Epstein writes, "the parties are often explicit about whether or not an expectation will be pro-

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45. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1375 (1993).

46. *Id.* at 1376.

47. "To prevent by regulation that which is forbidden in the first instance under the laws relating to the use of private property is not a taking." *Erb v. Maryland Dept. of the Env't*, 676 A.2d 1017, 1028 (Md. Ct. of Spec. App. 1995). "Simply stated, there exist properties that are unbuildable, whether or not regulated, due to legitimate health and/or nuisance concerns." *Id.*

48. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1481 (2002). "[W]e affirmed that 'where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking.'" *Id.*

tected by a legal remedy. If so, then there is a right; if not, there is none."<sup>49</sup> With regard to expectations that are implicit, Epstein admits that "[d]etermining the relationship between expectations and property rights is more difficult in the absence of any authoritative pronouncement on the subject."<sup>50</sup> Epstein elaborates this point with two examples drawn from contract law and tort law, but fails to enlighten us on the property law implications of implicit expectations. The failure stems not from a fault in reasoning, but rather from a divergence of philosophy. Without justification, Epstein postulates that "[t]he baseline that allows all use of property is surely a better starting point than the alternative that allows none."<sup>51</sup> This assumption is a value judgment that presumes that *use* is better than *nonuse*. This premise is the point of divergence for a discourse that is irreconcilable. It assumes that the rights of the owner trump the rights of the neighbor, again the question of *whose* property rights arises.

With the barriers lowered, the implementation of eco-stewardship can become a priority. Many of the tools to do this are already in place in the form of land use laws.<sup>52</sup> Additionally, the *Tahoe-Sierra* decision should embolden both legislative action and administrative rulemaking efforts in enacting mandatory eco-stewardship provisions.

While it is beyond the scope of this short article to describe the implementation of mandatory eco-stewardship, the effect of existing regulation on the expectations of landowners is evident from the majority's adoption of Justice Sandra Day O'Connor's analysis in her concurring opinion in the *Palazzolo* case.<sup>53</sup> In that opinion she notes the implication of timing of a particular regulation in the *Penn Central* analysis, noting that "[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."<sup>54</sup> The *Tahoe-Sierra* Court implies that existing environmental regulations are a factor in the reasonable expectations.<sup>55</sup> In doing so, the Court gives cognizance to the

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49. Epstein, *supra* note 45, at 1380.

50. *Id.* at 1381.

51. *Id.* at 1386.

52. See generally Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002).

53. 533 U.S. at 616.

54. *Id.* at 635-6.

55. See generally *Tahoe-Sierra*, 122 S. Ct. 1465.

importance of environmental regulation, according it a crucial place in one's investment-backed expectations.

### Conclusion

When I conceived of this article, I thought that it might muse about the direction that environmental law could take beyond litigation and regulation in the future. The decision in the *Tahoe-Sierra* case emboldened me to prognosticate about where that future might lie. The doctrine of regulatory takings has always seemed to be a barrier to reaching the goal of mandatory eco-stewardship. Now it seems less so. The ability to limit the "property rights" of landowners in a legitimate attempt to address environmental problems will now focus on a fairness and justice inquiry that will look at *realistic* expectations.