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Private Land Use, Changing Public Values and Notions of Relativity

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I. INTRODUCTION

Government regulation of land use is becoming increasingly more extensive and demanding. Growing scientific evidence of the link between environmental quality and land use and greater appreciation of the ecological value of natural resources have provided much of the impetus for government's intensified regulatory efforts. Widespread public demand for environmental quality also appears to have had a positive effect on government's willingness to regulate land use. For example, recent opinion polls indicate strong public support for expanded environmental regulation.¹

The types of land use regulations adopted by government vary widely in purpose, form, and methodology. Some regulations impose conditions on otherwise permissible land uses, while others prohibit uses once allowed by law.² One type of land use regulation frequently adopted by localities is the growth control measure. This type of regulation typically

² See generally DANIEL R. MANDELBACH, LAND USE LAW §§ 1.02-.10 (2d ed. 1988) (discussing the different types of land use controls).
restricts or prohibits future development options of private landowners and generally represents government’s response to pressing social problems or changing public values. Other popular forms of land use regulation include aesthetic zoning, like billboard regulation and historic preservation laws, and environmental controls, like wetlands acts and coastal development laws adopted to protect critical environmental resources. Regardless of the type of land use regulation, the effect on private landowners generally remains the same: private landowners’ expectations of present and future land use are restricted, altered, or even defeated.

The reactions of private property owners to expanded land use regulation are predictable. Private parties who purchase land in expectation of future development and use are understandably upset when government interferes with their expectations. With increasing frequency, these private parties are challenging land use regulations as impermissible violations of legally protected property rights. All too often the challenges fail. Under current law, private landowners generally are not entitled to legal protection when well-tailored land use regulations cause a diminution in value, sometimes not even when the diminution is significant.

As a general matter, a government regulation will withstand scrutiny under constitutional provisions protecting property rights as long as the regulation “substantially advance[s] legitimate state interests” and does not deprive the property owner of all “economically viable use.”

3. See generally id. §§ 1.07, 10.01-12 (discussing growth controls).
4. See generally id. §§ 1.06, 11.01-34 (discussing aesthetic regulation).
5. See generally id. §§ 12.01-13 (discussing environmental controls). Some types of land use controls may fall into more than one category. Wetlands regulations, for example, may be adopted to control growth as well as to preserve critical environmental resources.
6. Most, if not all, of the challenges invoke the protection of the Takings and Due Process Clauses of the United States Constitution. The Takings Clause prohibits government from taking private property “for public use, without just compensation.” U.S. CONST. amend. V. The Due Process Clauses protect against government deprivations of property without due process of law. Id. amend. V, XIV. For examples of recent challenges, see Lynda L. Butler, State Environmental Programs: A Study in Political Influence and Regulatory Failure, 31 WM. & MARY L. REV. 823, 832 n.33, 833 n.54 (1990).
when a landowner has relied on a prior land use regulatory scheme to pursue plans for future use, a court will declare the landowner’s rights to be “vested” and therefore protected from government interference under principles of equity. But even this form of protection often is limited to situations involving good faith reliance by a landowner on government approval of the landowner’s development plans.

The schism between private expectations and current law suggests the need to evaluate the legitimacy of those expectations. Of particular concern is the question of whether the law should protect private land use expectations from changes in legal rules, public values, and societal demands. This article suggests that private expectations do not merit protection as constitutional property just because a government regulation has diminished the ability of property owners to realize their expectations. Government efforts to impose well-tailored ecological or other social obligations on private landowners should, as a general matter, be legitimate under constitutional and common law property principles so long as the government action addresses adverse consequences of private land use and does not deprive landowners of all economically viable use. Private economic value cannot be the sole determinant of the legal validity of a government land use regulation. Other factors, including public preferences and political and scientific concerns, must play a role in determining whether private land use expectations merit

that a regulatory taking results upon total deprivation of economically viable use unless the regulatory action is based on limitations inherent in a landowner’s title). This article does not specifically consider that question, but rather focuses on the general constitutional legitimacy of changes in laws affecting private property rights. For further discussion of the recent decision’s implications for constitutionally protected property, see infra notes 145-57 and accompanying text.

8. See generally 7 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 52.08[4][b] (1992) (discussing the vested rights doctrine, as well as a related theory, equitable estoppel). Although court decisions might suggest otherwise, the vested rights doctrine appears to have a constitutional foundation. See MANDELKER, supra note 2, § 6.12. For an argument that constitutional analysis should be applied to the vested rights doctrine and other similar judicial theories developed to protect property rights, see CHARLES L. SIEMON ET AL., VESTED RIGHTS 56-68 (1982).

9. See, e.g., Board of Supervisors v. Medical Structures, Inc., 192 S.E.2d 799, 801 (Va. 1972). For a discussion of the circumstances under which landowners may claim equitable estoppel or vested rights to protect their property interests from changes in land use regulations, see MANDELKER, supra note 2, §§ 6.13-15; 7 ROHAN, supra note 8, § 52.08[4][b].
protection as fundamental property rights. Constitutionally protected property rights, in other words, should be relative, varying over time in response to the totality of facts and circumstances surrounding use of resources.

II. PRIVATE LAND USE EXPECTATIONS

Tensions over government land use regulations exist largely because property owners generally expect to have the freedom to do what they want with their land. Landowners typically believe that ownership rights include the right to use their land as they choose, provided such use is consistent with certain traditional legal principles. Because those principles generally reflect a laissez-faire approach, typically regulating land use only to the extent necessary to separate incompatible uses, landowners have come to expect almost “absolute use” powers. Though landowners may recognize government’s authority to designate where uses may occur, landowners generally expect to have the freedom to exploit their land within the designated area and tend to resist government efforts to impose further use restrictions. Under this “absolute” or “exploitative use” expectation, then, landowners question government’s power to regulate land use beyond the traditional use separation format, at least without the payment of just compensation.

Property owners are especially troubled by land use regulations that have an economic impact. Most, if not all, of the recently enacted land use regulations fall into this category because they either impose new restrictions on use or make those restrictions more stringent. When the legal rules

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10. See generally MANDELBURG, supra note 2, §§ 1.03-.10, 5.01 (discussing traditional and modern zoning techniques).
12. Evidence of the absolute use expectation can be found in the numerous lawsuits filed by private landowners against government units adopting more stringent land use restrictions. For some examples of those lawsuits, see Butler, supra note 6, at 832-34 & nn.33-34, 841-42 & nn.65-66. Evidence also can be found in numerous newspaper accounts of opposition to government efforts to adopt more stringent land use regulations. See, e.g., Nathaniel Axtell, Taxpayers to Foot New Rules on Bay, VA. GAZETTE, Sept. 20, 1989, at 5A (where one opponent of a new environmental law describes the law as “just one more instance of taking an American freedom away from us” and asks who is “more important, man or the environment?”).
governing land use are changed after property owners have purchased their land, the rules will necessarily affect the owners' expectations. Because private landowners generally expect to have the freedom to exploit their land, the landowners typically become outraged when government does not compensate them for economic loss caused by changes in use restrictions.13

Although the law no longer supports the traditional expectation of absolute use,14 the law still tolerates and sometimes even encourages a landowner's exploitative tendencies.15 More often than not, for example, landowners are allowed to develop land and to seek a profit from their initial land investment.16 Perhaps because of the law's tolerance for a landowner's exploitative tendencies, many landowners continue to believe their expectation of absolute use merits constitutional protection as a property right.


14. In the early 1900s, the United States Supreme Court recognized the power of government to modify, to a certain extent, existing property rights and expectations. As Justice Holmes explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). One important source of traditional support for the exploitative use expectation can be found in early land distribution laws encouraging settlement and development. For examples of such laws, see Lynda L. Butler & Margit Livingston, Virginia Tidal and Coastal Law ch. 8 (1988).

15. Just because the law no longer supports the traditional absolute use expectation, that does not mean the expectation does not exist. In many areas of the country, for example, the expectation continues to exist because local and state governments have only recently begun to regulate land use for environmental purposes. See, e.g., Butler, supra note 6, at 863-65 (discussing recent Chesapeake Bay legislation). Further, even when environmental land use regulations have been adopted, they often reflect compromises made to appease opponents. See, e.g., id. at 881-83, 885-86 (discussing some exemptions and omissions found in state environmental legislation). Thus, although the law, as a general matter, does not affirmatively support continued adherence to the traditional absolute use expectation, the absence of environmentally aggressive regulation has, in many areas, indirectly encouraged such adherence.

16. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) (deciding that government regulation cannot deprive a landowner of all economically beneficial use unless the regulation is directed at use interests not originally part of the landowner's title); Butler, supra note 6, at 875-77, 890-91, 909-10, 923-25. But see Just v. Marinette County, 201 N.W.2d 761, 769-70 (Wis. 1972) (upholding a shoreland zoning ordinance which prevented affected landowners from changing the natural character of land located in certain areas without a special permit).
The Supreme Court’s opinion in the 1992 decision *Lucas v. South Carolina Coastal Council* provides clear evidence of the law’s continuing support for a landowner’s exploitative tendencies. In *Lucas*, the Court concluded that a regulation denying a landowner “all economically beneficial or productive use” merited categorical treatment as a taking and did not require a “case-specific inquiry into the public interest advanced in support” of the regulation. The only way the regulation could “resist compensation” would be if an “inquiry into the nature of the owner’s estate shows that the proscribed use interests” were not originally part of the landowner’s title; that is, the regulatory action must be based on limitations inherent in the landowner’s title or in “background principles” of property or nuisance law. In explaining the Court’s categorical treatment of regulations that deny all economically viable use, Justice Scalia relied in part on Coke’s query: “[F]or what is the land but the profits thereof?” When Justice Stevens criticized Justice Scalia for assuming “that the only uses of property cognizable under the Constitution are developmental uses,” Justice Scalia denied making such an assumption. He explained that “[t]hough our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause.” As an example, he cited a case protecting the right to exclude.

Justice Scalia’s response does not adequately rebut Justice Stevens’s argument. In Justice Scalia’s own words, the Court is concluding that a landowner who “has been called upon . . . to leave his property economically idle . . . has suffered a taking.” Furthermore, the only noneconomic interest that Justice Scalia identifies is the right to exclude. Although that

18. Id. at 2893.
19. Id. at 2899.
20. Id. at 2900.
21. Id. at 2894 (quoting 1 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND ch. 1, § 1 (1st Am. ed. 1812)).
22. *Lucas*, 112 S. Ct. at 2919 n.3 (Stevens, J., dissenting).
24. Id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982)).
25. Id. at 2895.
right is noneconomic in the sense that the right does not focus on any particular use or economic interest, the right to exclude is central to a landowner's power to decide how and when to use his property.\textsuperscript{26} By protecting the right to exclude, the Court is protecting a property owner's power to take economic gambles. More often than not, the property owner decides to exercise that power. Thus, notwithstanding Justice Scalia's protests, the decision in \textit{Lucas} reveals a philosophic approach to property that is strongly tied to traditional views.

Whether a landowner's expectations of profit and exploitation deserve protection as property rights depends in large part on the reasonableness of the expectations. Long ago, philosopher Jeremy Bentham defined property as "nothing but a basis of expectation" founded on the law—an "established" expectation of gain derived from and made predictable and secure by the law.\textsuperscript{27} The legal system has incorporated Bentham's notion of established expectations into basic concepts of property. Among other factors, traditional case law focuses on the reasonableness of expectations in determining whether property rights have been violated by private or government action.\textsuperscript{28} The Court's recent decision in \textit{Lucas} appears to elevate, or at least reinvigorate, the role of reasonable expectations in takings jurisprudence. Justice Scalia explains that the Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."\textsuperscript{29} In Justice Scalia's view, government action

\textsuperscript{26} See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (3d ed. 1986) (discussing exclusivity and the other key attributes of property).
\textsuperscript{27} JEREMY BENTHAM, THEORY OF LEGISLATION 111-13 (10th ed. 1896).
\textsuperscript{28} Traditional common law principles governing water use in the East, for example, include a reasonable use standard to resolve conflicts among users. See generally Lynda L. Butler, Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests, 47 U. PITT. L. REV. 95, 125-37 (1985) (discussing the reasonable use standard). Additionally, one of the factors considered by the Supreme Court in determining whether government has impermissibly taken private property is the reasonableness of investment-backed expectations. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
depriving a landowner of all economically valuable use is "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."30 This language reveals how closely property and takings law are bound up with the reasonable expectations of landowners.

Evaluating the reasonableness of private land use expectations requires a better understanding of the sources of those expectations. Once the origins of the absolute use expectation are identified, the legitimacy of private expectations can then be examined. Expectations based on invalid or obsolete facts and circumstances require close scrutiny. As the following discussion suggests, this evaluation process necessarily must involve consideration of competing third party or public values.

A. Origins of Private Land Use Expectations

Over the years, numerous cultural, legal, and political factors have shaped attitudes about property rights, skewing perceptions about resource use and management in favor of private rights and expectations. This influence is especially apparent in the area of land use regulation. Government administrators, legislators, and jurists routinely demonstrate a private rights orientation, often erring on the side of private land use expectations in weighing government options for regulation.31 To this day, people from all walks of life still believe in the sanctity of private land ownership and assume that landowners have virtually absolute rights of use and control.32 Natural use and undeveloped land, in other words, are rarely viewed as normal either in our property system or in our society.33

One cultural factor that has contributed to the development of our private rights orientation, especially our exploitative tendencies, is the early American bias against the wilderness. Known as the "pioneer tradition," this cultural bias

30. Id. at 2900.
31. Legislators, for example, often include broad exemptions in environmental laws affecting landowners, see Butler, supra note 6, at 881-83, 885-86, while courts tend to interpret those laws from a traditional private property perspective, see id. at 896-97.
32. See supra notes 10-16 and accompanying text.
33. See supra notes 13-16 and accompanying text.
evolved from the belief that wilderness needed to be developed and conquered to ensure man's physical and moral survival. Although American society no longer adheres to this belief, the cultural bias against wilderness has, by now, become firmly engrained in the concept of private property.

A tradition of private land management has further contributed to the private rights bias. During the colonial and early statehood periods, this tradition appears to have existed in several American jurisdictions. In Virginia and New York, for example, early systems of land distribution resulted in the concentration of landholdings in the hands of relatively few people. The owners of these landholdings often decided to leave their holdings undeveloped for long periods of time. Although resource protection did not necessarily motivate these decisions, it was, at the very least, an incidental benefit. Today landowners have become too numerous and resource management problems too complex for the tradition of private resource protection to be effective in most contexts.

Legal and political factors have also contributed to the development of the private rights orientation, including the exploitative use expectation. The prominence of private

34. RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 24, 239 (3d ed. 1982). As Nash explained:

Two components figured in the American pioneer's bias against wilderness. On the direct, physical level, it constituted a formidable threat to his very survival . . . . Safety and comfort, even necessities like food and shelter, depended on overcoming the wild environment . . . . The pioneer, in short, lived too close to wilderness for appreciation. Understandably, his attitude was hostile and his dominant criteria utilitarian. The conquest of wilderness was his major concern.

Wilderness not only frustrated the pioneers physically but also acquired significance as a dark and sinister symbol. They shared the long Western tradition of imagining wild country as a moral vacuum, a cursed and chaotic wasteland. As a consequence, frontiersmen acutely sensed that they battled wild country not only for personal survival but in the name of nation, race, and God.

Id. at 24. Others have referred to this cultural bias as the "cowboy mentality" or "cowboy economy." See Large, supra note 11, at 1043-44 & n.22.

35. Butler, supra note 6, at 839 & n.58.

36. Id. at 839 n.59.

37. Lax enforcement of settlement and development conditions imposed on colonial land grants encouraged this practice. See generally BUTLER & LIVINGSTON, supra note 14, § 8.1 (discussing colonial land distribution in Virginia). Eventually state land distribution acts allowed land to be held absolutely and unconditionally. See, e.g., id. § 8.3, at 279.

38. Butler, supra note 6, at 839 n.59.

39. Another factor that sustains the private rights perspective is the reluctance
property in our Constitution has played a significant role in this development process. Besides prohibiting government deprivations of property without due process of law, the Constitution also prevents government from taking private property for public use without payment of just compensation. Some scholars have argued that the Takings Clause represents a victory for the Madisonian political camp, which viewed property rights as "inviolable" and called for an individual rights approach to constitutional interpretation.

Even if this view is not correct, it is nevertheless clear that the Due Process and Takings Clauses of the Constitution recognize the fundamental importance of the private property concept. As Charles Reich once stated in a now famous description of the relationship between property and civil liberties, the freedoms recognized in the Bill of Rights "must have a basis in property," or they will not be preserved. "Political rights presuppose that individuals and private groups have the will and the means to act independently." Property thus serves the important function of maintaining a person's independence by drawing a "zone of privacy" around the individual. Within that zone, the individual is "master" and the majority must "yield to the owner." Given the constitutional stature of

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40. U.S. CONST. amends. V, XIV.
41. Id. amend. V.
45. Id.
46. Id. at 778.
47. Id. at 771.
property, the development of a private rights bias and an absolute use expectation is not at all surprising.

The traditional common law system also has encouraged the development of the absolute use expectation. During the era of “liberty of contract,” the judiciary generally protected private contractual arrangements from government interference. Eventually, as the concept of “freedom of contract” became well accepted, private parties came to expect the same freedom for land transactions. Additionally, after the American Revolution, states allowed individual landowners to hold their property interests free of most if not all of the affirmative obligations that traditionally were owed to a grantor simply because of that party’s prior interest. Together with the development of freedom of contract, this land reform helped foster the view that land was a commodity to be bought or sold in the marketplace just like any other economic asset.

Long-standing land use practices have further reinforced the exploitative view of private landowners. Until fairly recently, many localities had engaged in little, if any, land use regulation. Furthermore, even when localities adopted land use regulations, the localities generally focused on use separation, and not on use restriction. This tradition of minimal land use regulation has created the false expectation in landowners that government will not significantly increase the burdens of land use regulation—at least not without payment of just compensation.


49. Butler, supra note 6, at 841 & n.62. Although some states apparently still retain the tenure concept, there now is little, if any, practical difference between states that have not affirmatively abolished the last vestiges of tenure and those that have. See CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY § 9 (2d ed. 1988). See generally 1 FREDERICK POLLOCK & FREDERIC W. Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 229-406 (2d ed. 1959) (discussing the feudal land system).

50. Butler, supra note 6, at 841 & n.63.

51. See, e.g., id. at 875-77, 923-24 (discussing problems with local government regulation in Virginia).

52. See generally MANDELKER, supra note 2, §§ 1.03-.10, 5.01 (discussing traditional and modern zoning techniques).

53. The Supreme Court’s decision in Lucas v. South Carolina Coastal Council clarifies that compensation is generally owed if government increases the burden of land use regulation to the point of eliminating all economically viable use. 112 S. Ct. 2886, 2895, 2899-900, 2901-02 (1992). To avoid compensation in such a situa-
Although the traditional view of property may be understandable from a cultural, legal, and political perspective, it represents an incomplete and biased view of the concept of property. Among other problems, the traditional view has an unnecessarily narrow and one-sided focus, ignoring important economic and noneconomic values. Given the ecological interrelatedness of natural resources, this one-dimensional perspective makes no sense. As the following discussion explains, legitimate private use expectations must be grounded in a more holistic view of land use.

B. The Need for a Holistic View of Land Use

The private expectation of absolute use has one serious flaw: it adopts a narrow view of the world, ignoring a number of factors critical to the resource allocation process. This limited perspective has two related but distinct effects on the allocation process. First, the narrow view artificially constrains the content of the value system used to allocate property interests. Under the exploitative view of property, this value system focuses almost exclusively on concerns important to individual landowners. Though a landowner’s concerns might implicate a variety of values ranging from economic to moral, the values are primarily defined from the perspective and self-interests of the landowner. Second, the narrow view tends to unnecessarily limit the scope of land use decisions to the interaction of the individual landowner with the challenged regulation. Although the public interest generally is considered in the land use planning process, many significant land use decisions actually are made in the context of an individual landowner’s challenge to a particular regulation. Because of the dispute-oriented nature of our judicial process, land use decisions developed through the judicial process tend to exclude from consideration the relationship between the private landowner and the public at large, as well as the relationship between the private landowner and other property owners. This one-dimensional per-

54. See generally MANDELKER, supra note 2, §§ 3.01-.24 (discussing the land use planning process).
55. See infra notes 69-72 and accompanying text. Third parties, such as neighboring property owners and citizens, must establish standing to challenge land use regulations. See MANDELKER, supra note 2, § 8.02. Many state courts require third
spective thus ignores the interrelatedness of land and other natural resources and of users and nonusers.

Both problems can be demonstrated by a cursory examination of the economic values underlying the exploitative view. Private landowners adopting such a view will often reluctantly accept environmental regulations, like pollution controls, if the costs of complying with the regulations can be passed on to the public through some sort of price adjustment in the marketplace. These landowners will contest, nonetheless, other environmental regulations, like many wetlands use restrictions, because the costs of compliance cannot be similarly recouped. This approach basically relegates the question of the legal validity of land use regulations to the status of an individual business decision; under the absolutist view of property, the validity question is addressed primarily from the economic perspective of the individual landowner, and other relevant values are generally ignored.

The absolutist view, for example, ignores the values of third parties who prefer environmentally sound land use even when a private landowner cannot pass on the costs of achieving such land use. Those opposing aggressive land use regulations often respond to this concern by stressing that, if the value of the public preference for environmentally sound land use is high enough, the public can buy out the landowner's use right. This response ignores serious externality problems

56. Wetlands regulations typically control the size, location, and diversity of land uses, making it difficult for a landowner to pass on the costs of compliance as a use cost. See, e.g., Md. Nat. Res. Code Ann. §§ 8-1807(a), -1808(b), (d) (1990) (establishing a 1000-foot buffer zone around Chesapeake Bay waters for special environmental regulation).

57. See, e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894-95
existing in the environmental and land use area.\textsuperscript{58} An externality is a "cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent."\textsuperscript{59} In the environmental and land use context, externality problems arise in part because public preferences are too diffused and small for the public's needs to be met through marketplace transactions. No single member of the public typically has enough of an interest to prompt that person to act on the public's collective preference. Furthermore, even when someone has a strong interest, that person often prefers not to seek legal protection of the interest because of the free benefits other members of the public would receive from the action.\textsuperscript{60}

Private landowners can claim, in response to this argument, that if an individual landowner has to bear the costs of ensuring environmentally sensitive land use, third parties who

\textsuperscript{58} Although the existence of market problems in the environmental area is generally not disputed, scholars disagree about the moral, economic, and political implications of these problems. Compare Harold Demsetz, The Exchange and Enforcement of Property Rights, 7 J.L. & ECON. 11, 19-20 (1964) (arguing that efficiency concerns justify a private rights approach in most market failure situations) with Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986) (arguing for an expanded public rights approach to the market failure problem). See generally FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 3-6, 21-28 (1977) (discussing market failure in the environmental context and suggesting a pricing approach); A. MYRICK FREEMAN ET AL., THE ECONOMICS OF ENVIRONMENTAL POLICY (1973) (discussing the economic implications of the market failure problem); DAVID W. PEARCE & R. KERRY TURNER, ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT 4-22 (1990) (discussing different economic schools and models of environmental management); Mark Sagoff, Economic Theory and Environmental Law, 79 MICH. L. REV. 1393 (1981) (criticizing economic analysis of environmental problems and arguing for a broader perspective on environmental regulation). This scholarly debate seems to have had little effect on private land use expectations. General scholarly agreement about the existence of a market failure in the environmental area, for example, has not prevented private landowners from becoming upset with land use restrictions designed to correct the failure. Even when landowners recognize the external environmental costs of private land use, they often resist regulation because of the economic impact on private rights and the public benefits resulting from regulation. For further discussion of the constitutional implications of these two factors, see infra notes 146-57 and accompanying text.

\textsuperscript{59} ROBERT Cooter & THOMAS ULN, LAW AND ECONOMICS 45 (1988).

\textsuperscript{60} See ANDERSON ET AL., supra note 58, at 26-27 (discussing some of the reasons for externalities in the environmental context); Joseph L. Sax, Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property, 1983 UTAH L. REV. 313, 322-23 (discussing externalities involving public values).
prefer such use would be freeriding on the landowner. Although some scholars have supported this argument,\textsuperscript{61} it still does not adequately account for the significant marketplace problems facing members of the public who prefer environmentally sound land use.\textsuperscript{62} In addition, the landowners' response in effect ignores the external costs of private land use—that is, the costs to third parties of private land use decisions. Because the marketplace traditionally does not account for environmental preferences, private landowners do not have any incentive to minimize the environmental costs of their land use choices through self-restraint; third parties already bear those costs involuntarily.\textsuperscript{63}

As the formal representative of the public at large, government admittedly can overcome some externality problems by exercising its power of eminent domain to force an exchange of a private landowner's use rights for just compensation. However, this solution will occur only when government decides to recognize and promote the public preference. Additionally, the eminent domain solution ignores the external costs imposed by private landowners on third parties generally.\textsuperscript{64} As the extensiveness and the seriousness of these costs become more apparent, a growing number of people are resisting the proposition that government must pay landowners to minimize their external land use costs.\textsuperscript{65}

Although it may not be desirable to force private landowners to consider all the costs of land use decisions, the appropriate economic solution should not allow private landowners to totally ignore the external costs of their use. Such a unilateral and one-dimensional solution should not be allowed—at least not when the marketplace fails to account for the preferences of

\begin{itemize}
  \item \textsuperscript{61} Cf. Demsetz, supra note 58, at 19-20 (arguing for the exclusion of freeriders through a private rights approach in many public goods situations).
  \item \textsuperscript{62} For additional marketplace problems, see infra notes 85-98 and accompanying text.
  \item \textsuperscript{63} See Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243, 1244-45 (1968) (discussing the serious consequences of externalities).
  \item \textsuperscript{64} The Eminent Domain Clause is also known as the Takings or Just Compensation Clause. See supra note 41 and accompanying text. In determining just compensation, courts only focus on the value of the "taken" property. See 4 JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS ON EMINENT DOMAIN § 12.01 (3d ed. 1990).
  \item \textsuperscript{65} The increasing aggressiveness of state legislatures in regulating land uses that destroy or injure critical environmental resources demonstrates this point. See generally Butler, supra note 6 (discussing state environmental programs).
\end{itemize}
a significant number of people and when private economic choices have serious or high external costs. Though an effective environmental program will significantly benefit the public, government’s decision to adopt the program cannot and should not be compared to normal marketplace choices.

In contrast to the typical voluntary marketplace transaction, government’s decision to adopt environmental land use regulations is, for all practical purposes, involuntary. Government is forced into adopting the regulations because of the serious external costs of private land use; in ecological terms, government must engage in extensive land use regulation to avert the tragedy of the commons. Government must attempt to force private parties to internalize land use costs when land use has a detrimental and long-term effect on third parties and on the health of remaining natural resources. The mere status of being a landowner should not be the sole determinant of the content of the economic values used to allocate costs and benefits between private landowners and third parties.

The artificially constrained value system and one-dimensional perspective of the private rights approach to property is somewhat understandable given the historical development of property law and, more specifically, of land use law. The courts traditionally have defined the scope and meaning of private property rights. The focus of a court is inherently limited to the dispute raised by the parties before it. In the context of land use regulations, such a dispute typically involves the government regulator and the individual landowner challenging the regulation. Although the courts can, in the context of the particular dispute, consider public policies implicated by the

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66. The tragedy of the commons refers to the ecological ruin that results when resources are available for common use without regard for the costs of use. For a discussion of the tragedy of the commons, see Hardin, supra note 63.

67. Of course, the mere status of being a landowner does carry significant legal implications, including constitutional consequences. For further discussion of some of those consequences, see infra notes 99-117, 129-57 and accompanying text.


69. For a discussion of the role of the courts in the environmental context, see Butler, supra note 6, at 854-60, 893-906.
dispute, many courts are reluctant to assume the role of actively defining and developing public policy. In the view of these jurists, public policymaking is a task more comfortably left to democratically responsive government officials. In addition to ensuring that a politically acceptable policy choice is made, these officials are, in the opinion of some, better able to develop comprehensive solutions to complex resource management problems.

Furthermore, until fairly recently, public and private interests in land use overlapped significantly. Because of this country's historical abundance of land and because of its ongoing need for economic growth, land use laws traditionally encouraged private settlement and use. For many years, the public interest focused, like the private interest, on the settlement, cultivation, and development of land. This congruence between public and private interests encouraged the development of a false definition of property—a definition which equates private property with economic development and which results in the subordination of inconsistent public interests to private economic values. The close congruence between public land policy and private land rights has generally ceased to exist, largely because the conditions supporting unfettered development have vanished. Vast acres of undeveloped land and a sparse population have given way to a dwindling supply of land and overcrowded urban areas. Thus, instead of promoting unfettered development, public land policy generally now seeks to control growth and manage the remaining undeveloped land. Despite this change in public land policy, the legacy of the traditional approach remains; many landowners still view their property rights as tantamount to economic free

70. See, e.g., State v. Shack, 277 A.2d 369 (N.J. 1971) (where the court considers the privacy interests of migrant workers, as well as their access to government services, in interpreting and limiting the private property rights of their employer).

71. See, e.g., Butler, supra note 6, at 848-54, 893-904 (discussing the restrictive approach of some state courts).

72. For further discussion of these views, see id. at 854-60, 893-906.

73. See, e.g., BUTLER & LIVINGSTON, supra note 14, ch. 8 (discussing land grant laws enacted during Virginia's colonial and early statehood periods).

74. See WILLIAM OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY 8-9 (1977) (discussing the growing problem of ecological scarcity); Large, supra note 11, at 1041-45 (discussing changing resource conditions).

will and thus consider their rights to be superior to most public interests that are inconsistent with the exercise of that free will.\textsuperscript{76}

The present limitations of the traditional view of property suggest the need to redefine private land use expectations and ground them in a more holistic view of land use.\textsuperscript{77} Under this holistic view, the relationship between private landowners and third parties would be entitled to consideration in resolving disputes over a particular owner's land use. A decisionmaker would no longer feel compelled to ignore the interrelatedness of individual tracts of land and other resources and of users and nonusers. The decisionmaker also would recognize that many of the bases for the private expectation of exploitative use developed in the context of facts and circumstances that no longer exist. Those courts reluctant to expand the dispute before them to consider third party values and interests would need to rethink the nature of the common law, especially its inherent flexibility,\textsuperscript{78} and to identify concepts of common law property that capture that flexibility.

Although this article does not purport to develop a comprehensive solution to the problems and issues raised above, it does offer some thoughts on how to begin the process of redefining private land use expectations and resolving the tensions between private property rights and changing land use laws.\textsuperscript{79}

\textsuperscript{76} See supra notes 10-13 and accompanying text.\textsuperscript{77} At least two members of the current Supreme Court appear to recognize the need for a holistic approach to defining private land use expectations. In his concurring opinion in \textit{Lucas v. South Carolina Coastal Council}, Justice Kennedy deplores the Court for using “too narrow a confine for the exercise of regulatory power in a complex and interdependent society.” 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring). In his view, the “State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source.” Id. Coastal property, for example, “may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.” Id. Justice Stevens also criticizes the Court’s approach as “too narrow” and “too rigid.” Id. at 2918 (Stevens, J., dissenting). He explains that the Court’s holding “effectively freezes the State’s common law,” id. at 2921, and ignores the “evolving” nature of property rights, id. at 2922. In his view, the Court improperly assumed that “the only uses of property cognizable under the Constitution are developmental uses.” Id. at 2919 n.3.\textsuperscript{78} See CARDOZO, supra note 68, at 22-25 (discussing the flexible and evolving nature of the common law).\textsuperscript{79} Among other concerns, this process will require consideration of the following questions: To what extent do existing rules of law generate reasonable expectations that merit protection by the legal system? What effect should changing re-
At the core of these thoughts is the common law concept of relativity—the notion that property rights are relative and therefore vary in relation to the facts, circumstances, and interests implicated by a resource decision. Applying the relativity concept in the context of land use regulation will necessarily require recognition of public interests in privately owned land.

III. PUBLIC VALUES AND REASONABLE LAND USE EXPECTATIONS

Private land use decisions impact the public in a variety of ways. Some members of the public may own property that is adversely affected by a neighbor's land use. Filling in one owner's wetlands, for example, can result in the flooding of neighboring lands and in the depositing of sediment on those lands. Other members of the public may suffer more indirect effects. Though these third parties cannot point to any specific private property interest that is adversely affected, they nevertheless can demonstrate injury to their health, to a common resource, or more generally to the environment. The detrimental effects of industrial land use, for instance, are well documented and include short- and long-term threats to the public health, to air and water, and to the ecology of the affected area. Furthermore, a land use does not have to involve industrial processes to have a significant effect on the public at large. Even modest residential development in a historically important or environmentally sensitive area, for instance, can permanently destroy the historical value of the area or cause irreversible ecological damage. Uncontrolled residential development can also overtax the infrastructure of an area, straining community resources like roads and police or fire protection.

source conditions and new scientific knowledge have on private land rights? Should private landowners bear, as an incident of their ownership rights, a social obligation to exercise their rights in a way that minimizes, or at least considers, the costs to third parties?


32. See, e.g., LOWER JAMES RIVER ASS’N, ROUTE 5: A VIRGINIA BYWAY (1990) (discussing ways to protect historic Route 5 from modern growth and development).
By recognizing the legitimacy of at least some of these third party interests, the law would be correcting some of the economic, political, and ecological failures of the private property system.\(^{83}\) Even under an effective economic and political structure, imperfections in the process for expressing private and public preferences will arise. To the extent that significant imperfections are identified, some effort should be made to correct them. Though the Constitution protects property rights from arbitrary government deprivations, uncompensated confiscations for public use, and unlimited regulation in the public interest, the Constitution does not prevent government from readjusting the private property system to accommodate both private and public interests in valuable or vital resources.\(^{84}\)

A. Recognizing the Public Interest in Private Land Use

When viewed in light of the need for a holistic approach, land use laws serve an important corrective function: reallocating land use rights to account for third party interests ignored by the traditional private property system. This corrective function can be justified from an economic, political, and ecological perspective. Though a detailed discussion of each perspective is beyond the scope of this article, a more limited discussion suggests the importance of the corrective function in the private land use context. By evaluating traditional land use expectations under each perspective, significant weaknesses of the traditional approach are highlighted, their adverse effects on third party or public interests are demonstrated, and the case for recognizing the public interest in private land use is thus advanced.

1. Economic perspectives

In addition to the externality problems mentioned earlier,\(^{85}\) other economic problems surround the absolute use ex-

\(^{83}\) Though moral failures may also exist, this article does not attempt to explore moral bases for private land use regulation. For one scholar’s efforts to define the ethical or moral bases of environmental regulation, see Mark Sagoff, Where Ickes Went Right or Reason and Rationality in Environmental Law, 14 ECOLOGY L.Q. 265 (1987) [hereinafter Sagoff, Reason and Rationality], and Sagoff, supra note 58.

\(^{84}\) For further discussion of constitutionally protected property rights, see infra notes 99-117, 129-57 and accompanying text.

\(^{85}\) See supra notes 56-67 and accompanying text.
pectation of the traditional property system. High transaction costs and inefficient land value discounting, for example, can be associated with the exploitative approach to private land use. Without government land use regulation, private landowners generally would not be able to control their neighbors' land uses. Although private nuisance actions would provide some relief, these actions generally would not be effective against an offending land use having a widespread effect. A private landowner would hesitate to bring such an action when other landowners would benefit from a successful lawsuit without paying for any of its costs. Furthermore, if a private landowner tried instead to form an association of landowners to deal with the problem, the landowner would face formidable transaction costs—that is, the costs of transacting with the numerous landowners in the affected area and ultimately with the offending landowner. In a world without land use regulation, a private landowner would want to discount the value of the expected gain from a possible land use to reflect the probability that the gain will be less because of the uses of neighboring landowners. This discounting might, in turn, cause the landowner to choose a less efficient land use option. Thus, even a purely private perspective suggests the need to limit private ownership rights by land use regulation.

The traditional view of land as an economic resource is also problematic. Although interests in land can, like other property interests, be bought or sold in the marketplace, land differs from typical marketplace goods in ways that justify recognition of a stronger public interest. Besides being nonmovable and fixed in supply, land also is an important

86. See James E. Krier, The Pollution Problem and Legal Institutions: A Conceptual Overview, 18 UCLA L. Rev. 429, 443-59 (1971) (discussing some of the limitations of a judicial approach to pollution control). See generally MANDELKER, supra note 2, §§ 4.02-15 (discussing judicial zoning through nuisance actions). For an article arguing that a more privatized and less centralized system of land use control is superior to zoning in promoting efficiency and equity, see Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973).

87. For further discussion of the free rider and transaction costs problems, see Krier, supra note 86, at 443-49.

88. For an example of such discounting, see POSNER, supra note 26, § 3.1, at 32. But cf. Ellickson, supra note 86 (arguing that a privatized system of land use control is superior to zoning in promoting efficiency).

89. Although the shortcomings of this traditional view are well accepted, scholars still debate the implications of those shortcomings. Furthermore, the view still appears to be prevalent among private landowners. See supra note 58.
source of life. In addition, the land valuation process poses significant problems. Exaggerated land prices often result from the land valuation process because land is not fungible and must therefore be valued through a practice of community extrapolation; that is, land values generally are set by looking at the market prices of comparable tracts of land in the community. Overinflated land values also may occur because private parties speculate about the development potential of a tract of land and ignore its existence value. Because property law has traditionally protected the reasonable expectations of landowners and because the existence value of land reflects fragile ecological values for which there is no established market, marketplace transactions have generally failed to reflect the full value of preserving land in its natural state. Finally, the traditional view of land as an economic resource is based on an assumption of abundance that is no longer valid. While the discovery of North America and the rest of the New World may have temporarily justified this assumption, tremendous growth and development over hundreds of years have made the finiteness of land and other natural resources painfully clear.

For a variety of economic reasons, then, the traditional use expectations of private landowners fail to promote the protection of common resources available for public use either because private rights cannot be effectively recognized or because the resources are vital to the public's survival and well-being. Unless private landowners are forced to consider the third party costs of their land use decisions, the landowners have no incentive to protect common resources affected by their uses. As Hardin explained in his famous article The Tragedy of the Commons, individual users of common resources will not exercise self-restraint to restrict their own use if others do not take similar action; nor will they voluntarily incur costs to preserve the commons. No single user would be willing to pursue such management and preservation efforts without guarantees of

91. For a discussion of the development and existing-use components of land market values, see id. at 362-69, and Large, supra note 11, at 1078-81.
92. See supra notes 14-30 and accompanying text.
93. See Large, supra note 11, at 1080-81.
94. See OPHULS, supra note 74, at 8-9.
reciprocal action by other commoners who would benefit from the efforts.95

By imposing a legal obligation on private landowners to cooperate in preserving common resources, the law would be following some basic principles of economics.96 Under the economic perspectives discussed above, this obligation would require landowners to recognize the legitimacy and significance of the public interest in preserving common resources—at least to the extent necessary to avert the tragedy of the commons. Recognition of the public interest would, in turn, mean accepting reasonable land use restrictions designed to internalize private land use costs, minimize inefficient land value discounting, and readjust land use practices to reflect present resource conditions and existence and other environmental values.97 As a general matter, landowners bearing this duty to cooperate should not be able to successfully raise takings challenges to well-tailored and broad-based restrictions when the restrictions leave the landowner with economically viable use and help to preserve common resources that are available for public use either because of the impracticality of recognizing private rights or because of the importance of the resources to the public's survival and well-being.98

2. Political theory perspectives

Political theory problems also surround the traditional use expectations of private landowners. Although these expectations find some support in the prominence of property rights in the Constitution,99 the traditional expectations of exploitation

95. Hardin, supra note 63, at 1244-45.
96. See generally COOTER & ULEN, supra note 59, at 92-108 (discussing the benefits of cooperation). For an argument for compelled cooperation, see Charles H. Koch Jr., Cooperative Surplus: The Efficiency Justification for Active Government, 31 WM. & MARY L. REV. 431 (1990). Although recognition of private property rights is the solution generally advanced to avert the tragedy of the commons, this solution will not work for the special category of common resources identified above—that is, resources available for public use because private rights cannot effectively be recognized or because the resources are vital to the public's well-being. Indeed, private users are a principal reason for the deterioration of this category of common resources. See Hardin, supra note 63, at 1245.
97. For a discussion of existence value and of environmental valuation generally, see PEARCE & TURNER, supra note 58, at 120-58, 320-41.
98. For further discussion of the takings implications of land use restrictions, see infra notes 145-57 and accompanying text.
99. See supra notes 39-47 and accompanying text.
and absolute use define the concept of constitutionally protected property in a way that is inaccurate and unnecessarily restrictive under political theory perspectives. No single political view should control the definition of key fundamental rights absent clear evidence to the contrary. Such an approach is dangerous because, among other reasons, it places tremendous power in the hands of the decisionmaker who chooses the controlling political viewpoint.

At the time of the drafting of the Constitution, at least two political camps played crucial roles. One camp, the Madisonians or federalists, basically believed in the fundamental importance of individual rights like private property ownership. Fearing government abuse of individuals, Madisonians urged the adoption of a strong individual rights approach to constitutional interpretation. A second camp, the Jeffersonians or republicans, also believed in the importance of property and other individual rights, but had less fear of collective action. The Jeffersonians thus placed a higher premium on promoting the collective interest and believed that property rights were held subject to the greater social good. Though the Takings Clause was the product of the Madisonian camp, the inclusion of the clause in the Constitution cannot—and should not—be interpreted as a total vindication of the Madisonian political view. The drafting and adoption of the Constitution required numerous political compromises, some of which meant modification or rejection of Madisonian ideals.

What is clear is that the framers did not draft a document of governance binding private parties to any one political view of property. Nor did they provide for absolute or near absolute protection of property rights. To the contrary, the framers were reacting to the concentration of absolute property rights in a privileged class and were trying to protect against the sovereign powers that emanate from such rights. A cursory ex-

100. See supra notes 42-43 and accompanying text. But cf. Sagoff, Reason and Rationality, supra note 83, at 290-91 (associating Madison with the republican view, perhaps because of his position on federal/state relations). For a thoughtful examination of the Madisonian camp, see NEDELSKY, supra note 43.


102. Id. at 534.

103. See id.

104. This reaction may explain the rejection of a federalist proposal to restrict
amination of other key property provisions in the Constitution demonstrates this point. The Fifth and Fourteenth Amendments of the Constitution prohibit government deprivations of property without due process of law.105 The clear implication of the due process guarantee is that the framers anticipated lawful government deprivations of property, authorizing them as long as due process was provided. An absolutist view of property generally ignores the distinction between legitimate due process deprivations of property and compensable takings.

Furthermore, in drafting the Constitution, the framers relied on some basic common law concepts that involved a public interest dimension. One of those concepts—private property106—had already evolved by the time of drafting to the point where a public interest perspective had become bound up with property rights. Early land distribution laws, for example, regularly imposed public interest conditions on private parties applying for land grants.107 By the 1600s, English common law had begun to recognize a public interest in certain critical tidal resources.108 American courts would eventually rely on that interest to develop a doctrine that imposed limitations on both government and the private waterfront landowner.109 Consistent with this public interest perspective on property, government traditionally exercised wide latitude in regu-

the election of one house of the legislature to the propertied class. See generally id. at 532-34 (discussing the federalist proposal, as well as Franklin's response to a similar proposal for the Pennsylvania Constitution). During the colonial period, the Crown had attempted to maintain control of the social, political, and economic structure of the colonies in part through their land grant systems. See, e.g., BUTLER & LIVINGSTON, supra note 14, § 8.1 (discussing the land grant system and policies of colonial Virginia).


105. U.S. Const. amends. V, XIV.


107. Laws governing the distribution of private interests in land historically were used to promote a variety of public policies. See, e.g., BUTLER & LIVINGSTON, supra note 14, ch. 8 (discussing the provisions and policies of land distribution laws enacted in Virginia during the colonial and early statehood periods).

108. See id. § 5.1.B (discussing the English law origins of the public trust doctrine).

109. See id. § 5.2 (discussing the emergence of the public trust doctrine in American courts).
lating property. Though this perspective may not be as evident today, perhaps because of the discontinuance of the land grant process, the public interest perspective nevertheless remains bound up with the private property concept.

Traditional land use expectations thus ignore some important political theory perspectives. In drafting the Constitution, the framers were trying to ensure freedom of political thought and action. One device used to achieve this goal was the concept of constitutionally protected property. Interpreting that device as impliedly adopting any one political view of our constitutional democracy would undermine the goal of political freedom. Such an interpretation would also require an insight into the framers’ state of mind and their drafting process—which is virtually impossible to obtain. Though many different political views for interpreting constitutional provisions exist, the Constitution can only realistically be seen as a political compromise intended to promote a wide range of views. Such a compromise requires a holistic approach to defining private land use expectations.

Nor should the concept of constitutionally protected property be interpreted as excluding a public interest component. The constitutional concept of property depends in large part on the common law concept of property, which long ago developed a public interest dimension. Although reasonable people may debate the extent of this dimension, its existence makes sense from political theory perspectives. To the extent that private property rights are supposed to serve political values, it seems logical to recognize public interests in private resources to promote those values when the private system fails to do so. Though it may be difficult to reach a consensus on

110. See Anderson, supra note 42, at 537.
111. Virginia, for example, effectively abolished the land grant system in 1952. BUTLER & LIVINGSTON, supra note 14, § 8.4, at 283.
112. The public interest in certain tidal resources, for example, still remains an important restriction on private waterfront landowners. See, e.g., id. § 5.2.C (discussing the extent to which public trust rights infringe on private rights). A related concept, the commons concept, also recognizes the public interest in certain coastal resources and poses problems for waterfront landowners in some jurisdictions. See generally id. ch. 6 (discussing the development of the commons concept in England and Virginia); infra note 145 (discussing common law grounds for limiting private property to promote the public interest).
114. For sources discussing the political importance of private property rights,
when these failures exist, some of the more compelling cases arguably can be identified.\textsuperscript{115} A public interest in private property, for example, may deserve recognition when use of the private property is threatening a common resource and that resource is so vital that public interest recognition is needed to preserve order and maintain our democratic system of government. Or a public interest limiting private property rights may merit recognition when private use interferes with a resource that is closely linked to fundamental political rights—much like the public interest in navigable waters merits protection against interference by private waterfront landowners because of the interest’s link to the right to travel.\textsuperscript{116} Recognition of the public interest in private land use, in other words, may become necessary under political theory perspectives when the private property system fails to allocate interests in resources consistent with fundamental political ideology. Such recognition would serve an important legitimating function—legitimating government action taken to promote the public interest in private land use.\textsuperscript{117}

3. \textit{Ecological perspectives}

Ecological perspectives also suggest that the traditional expectation of exploitative use is no longer viable or reasonable. As explained earlier, American society traditionally viewed land as an economic resource—a commodity to be exchanged in the marketplace.\textsuperscript{118} Current scientific understandings of our ecosystem clearly indicate that this view is myopic. Besides limiting the scope of land use decisions to the physical boundaries of privately owned land, the traditional view also ignores the ecological value of land.\textsuperscript{119} Proponents of economic theory

\begin{footnotesize}
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\item \textsuperscript{115} For a discussion of political justifications for public rights in instream uses, see \textit{id.} at 372-74.
\item \textsuperscript{116} For further explanation of the political justifications for a public interest in navigation that limits private waterfront landowners, see \textit{id.} at 372.
\item \textsuperscript{117} For further discussion of this legitimating function, see Butler, \textit{supra} note 6, at 857-58.
\item \textsuperscript{118} See \textit{supra} notes 89-94 and accompanying text.
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generally recognize the need to consider costs and benefits in making resource allocation decisions. Yet, in applying this principle to private land use choices, many seem to focus only on traditional economic factors having an established exchange value in the marketplace. The ecological value of land is left out of the traditional land use equation.120

In opposing government’s efforts to incorporate current scientific understandings into land use laws, private landowners typically argue that changes in land use laws improperly disrupt settled expectations in violation of constitutionally protected property rights and that the laws unfairly force them to bear the burdens of public programs. Although these arguments have some appeal given the private economic effects and the public benefits of land use laws,121 the arguments fail to recognize the scientific motivations for environmental regulation of land use. In addition to being driven by general public sentiment, ecological use restrictions reflect growing scientific knowledge about the link between land use and the environment.122 As scientific evidence of the interdependence of natural resources increases, legal recognition of the public interest in privately owned land becomes inevitable.

Although private landowners may indeed bear some of the burdens of environmental programs adopted by the majority, the indiscriminate effects of private land use on common environmental resources are forcing the majority to adopt these programs. Though individual landowners’ expectations of gain may indeed be upset, the social injustice of a tragedy of the commons seems far more compelling. If the problem of the commons is not rectified, it will eventually bring “ruin to all.”123 The “tragedy of the commons, in its fully disastrous form, [admittedly] requires a political paralysis that prevents government from stopping the destruction of a resource.”124 The continuing vitality of the traditional expectation of exploitative use and the hostile national political climate surrounding environmental programs125 suggest that this paralysis may

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120. For further criticism of economic perspectives on environmental problems, see Sagoff, supra note 58.
121. For further discussion of these two factors, see infra notes 145-57 and accompanying text.
123. Hardin, supra note 63, at 1244.
125. Signs of this hostile political climate include the regulatory moratorium
already exist in the area of environmental regulation of land use. Because the *Lucas* decision relies in large part on traditional expectations and understandings of property owners, this paralysis appears, at the very least, to be reinforced by current takings law. Now more than ever, ecological necessity compels environmental regulation of land use. 126

The economic, political, and scientific failures of the traditional approach to private property collectively suggest the need to recognize the public interest in privately owned land and to impose a social obligation on private landowners. This social obligation would force private landowners to bear some responsibility to society for the adverse effects of private land use decisions. As the economic, political, and scientific perspectives suggest, it is only through the imposition of such an obligation or duty that the law will correct the short-term, self-interested perspective of private landowners. The nature and content of the obligation would be defined by the democratic political process, 127 through the adoption of environmental and land use laws, and by the courts, through the reinterpretation of takings and property principles. Inherent in the concept of recognizing a social obligation is the principle of legitimation; because landowners would bear a general obligation to account for some of the adverse effects of their land use decisions, government action taken to promote the public interest and enforce the obligation generally would be legitimated by recognition of the social obligation. 128 Whether the constitutional concept of property would permit the imposition of a social obligation on landowners is a question considered in the next section.

imposed by President Bush on federal regulations, see 23 Env't Rep. (BNA) 1289 (Aug. 28, 1992); 22 id. at 2364-66 (Feb. 14, 1992); 22 id. at 2171-72 (Jan. 24, 1992), and the activities of Quayle's Council on Competitiveness, see 22 id. at 1969-70 (Dec. 13, 1991); 22 id. at 1820-21, 1837-38 (Nov. 29, 1991); 22 id. at 1787-88 (Nov. 22, 1991).

126. Hardin advances the ecological necessity argument as forcefully as any scholar. See Hardin, *supra* note 63.

127. For a discussion of the need to make environmental decisions through the democratic political process, see Daniel A. Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337.

128. See *supra* note 117 and accompanying text.
B. Defining the Reasonable Expectations of Constitutionally Protected Property

Consistent with the Constitution’s reliance on preexisting law, courts and commentators have recognized that the concept of constitutionally protected property is governed in part by state law. Defining the reasonable expectations of constitutionally protected property therefore requires some consideration of common law principles of property law.129 Two perspectives of the common law merit attention: first, the private law perspective found in property disputes between private parties; and second, the public law perspective arising in conflicts between public and private parties.130 The premise for resolving disputes under both perspectives is the well-accepted proposition that property rights are, by definition, a product of the legal system.131

1. The private law perspective

Several overriding guidelines for defining the reasonable expectations of constitutionally protected property emerge from the common law principles governing property disputes between private parties. One guideline concerns the relational approach to property that developed at common law. Under that approach, property rights sometimes vary according to the facts and circumstances surrounding conflicting private claims.132 One obvious example under the common law is the “finders principle,” which gives a finder superior rights as against everyone but the true owner. Under this principle, a finder would prevail against a subsequent possessor of the lost property but would lose to the true owner if she returned to claim the property.133

130. Neither perspective is entirely exclusive of the other. No private land matter, for example, can be purely private since decisions shape public choices and values. Conversely, government land use restrictions are often imposed to protect established private uses from other potentially conflicting private uses.
132. See CUNNINGHAM ET AL., supra note 68, §§ 1.2-.3 (discussing the relational nature of property rights).
133. See generally Ray A. Brown, The Law of Personal Property §§ 3.1, 3.5
Another example concerns the common law reasonable use rule governing water use by waterfront landowners in many eastern jurisdictions.\textsuperscript{134} Such a landowner, known as a riparian proprietor, generally has the right to make reasonable use of a watercourse located adjacent to his waterfront property, but that right is subject to a similar correlative right existing in other riparians along the same watercourse.\textsuperscript{135} Whether a use is reasonable depends on the facts and circumstances of a situation; a use that once was reasonable may become unreasonable over time as conditions change.\textsuperscript{136} Some of the factors affecting the reasonableness of a use include normal and current stream conditions, weather conditions, the purpose of the use, the quantity of water required by the use, and that use's compatibility with other uses.\textsuperscript{137} Thus, for example, reasonable uses conducted when water levels are normal may become unreasonable during periods of low flow. Further, the reasonableness of a use will vary according to a riparian's location along a watercourse; a riparian may have superior use rights as against riparians below him and inferior interests as against riparians above him.\textsuperscript{138} Like the finders principle, then, the reasonable use rule does not define private property rights absolutely or constantly, but rather varies the rights according to the nature of other conflicting private interests.

A second guideline concerns the common law approach to defining a property owner's reasonable expectation of gain. Under the common law, property ownership includes the right to a reasonable expectation of gain, known traditionally as the right to make a livelihood, and more recently as the right to take economic gambles.\textsuperscript{139} The existence of this right does not guarantee, however, that the gamble will pay off. The property owner does not have a legally protected right guaranteeing her a return on her investment; unilateral participation in the marketplace is not a sufficient basis for recognizing a property

\textsuperscript{134} See generally Butler, supra note 28 (discussing the reasonable use rule and other common law principles still governing water use in many eastern states).
\textsuperscript{135} Id. at 105-07.
\textsuperscript{136} Id. at 130.
\textsuperscript{137} Id. at 126.
\textsuperscript{138} See id. at 106-07, 126-27. For further discussion of the reasonable use rule and for suggestions for change, see id. at 125-37.
right in the anticipated return. Though the law protects property owners from unfair competition, it generally does not protect them from fair competitive practices, not even when the losing owners were first-in-time or when the practices caused property owners to lose their entire investment.\textsuperscript{140}

A third guideline involves the judiciary's power to change common law rules. Though some courts are reluctant to overturn common law rules, especially when private parties have relied on those rules, the courts generally have recognized their power to change rules that no longer make sense. The New Mexico judiciary, for example, declared that it would not adopt common law rules that did not apply to current conditions and circumstances and had "reached a point of obsolescence."\textsuperscript{141} The court explained that adherence to property rules which have "no justification or support in modern society" would be a "'revolting'" form of "'blind imitation.'"\textsuperscript{142} A California court went even further, deciding to retroactively reject a common law rule that had applied under its state law. In determining that retroactive application was appropriate, the court balanced "the injustice which would result from . . . [following the old rule] against the injustice, if any, which might result by failing to give effect to reliance on the old rule and the policy against disturbing settled" rights.\textsuperscript{143}

These guidelines establish a common law basis for limiting property rights in disputes between private parties and demonstrate that property rights are relative as between private parties. Under the first guideline the concept of property becomes, in effect, a set of relations which vary over time. Because of those relations, property rights never are totally absolute or predictable. Under the second guideline the property concept incorporates the notion of economic gambles—that is, the idea that property owners generally accept the risks of uncertainty and change in the marketplace. Finally, the third guideline demonstrates that the property concept includes the notion of principled changes in common law rules. Because the

\textsuperscript{140} For the Supreme Court's attempt to define unfair competition, see International News Serv. v. Associated Press, 248 U.S. 215, 236-46 (1918).

\textsuperscript{141} Abo Petroleum Corp. v. Amstutz, 600 P.2d 278, 280 (N.M. 1979).

\textsuperscript{142} Id. at 281 (quoting Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 469 (1897)). In the court's view, the doctrine of destructibility of contingent remainders met this standard.

\textsuperscript{143} Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987, 991 (Cal. 1972) (footnote omitted).
three guidelines all address the basic nature of common law property rights, the guidelines should apply to disputes involving constitutionally protected property. As the Supreme Court concluded in *Lucas*, a regulation eliminating all economically viable use would constitute a taking unless the regulation was based on limitations inherent in the landowner's title or in background principles of a state's property or nuisance law.  

As part of the background principles of property law, the three guidelines establish ways to limit private property rights that are inherent in those rights. *Lucas* suggests the possibility of applying similar notions of relativity to constitutionally protected property.

2. The public law perspective

Earlier discussions of private land use expectations and property disputes between private parties offer justifications for recognizing the public interest in private land use. The discussion of private land use expectations suggests that the exploitative view of property has serious economic, political, and ecological shortcomings which justify recognition of the public interest in privately owned land. By recognizing the public interest in appropriate private land use contexts, the law could correct some of these shortcomings. The discussion of the law governing property disputes between private parties demonstrates a common law basis for limiting private property and suggests that, contrary to the implications of the absolute use expectation, the relativity concept generally governs such property disputes.  


145. The common law also provides some grounds for limiting private property rights for the purpose of promoting the public interest. Long ago the courts began to recognize and protect public rights in certain valuable resources, sometimes even when the resources were privately owned. See generally BUTLER & LIVINGSTON, supra note 14, chs. 5, 6 (discussing two public rights theories: the "public trust doctrine" and the "commons concept"). Although the doctrine used to promote the public interest varies according to the factual and jurisdictional context, the notion of subordinating private property rights to certain public interests is not foreign to the common law. For examples of such subordination, see id. § 20.2, at 750-57. Indeed, at least in the context of navigable waters, the public interest has achieved constitutional stature. As the Supreme Court explained years ago, navigable waterways are essential to commerce and thus, under the Commerce Clause of the Constitution, are impressed with a navigable servitude in the public that generally is superior to the property rights of waterfront landowners. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404-05 (1940); *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 87 (1913); *Gibbons v. Ogden*, 22 U.S. (9
expectations of constitutionally protected property thus becomes whether the constitutional implications of the property concept necessitate protection of the traditional expectation of exploitative use despite its current problems and limitations.

Two aspects of modern land use laws appear, at least on the surface, to be particularly troubling under constitutional principles: the laws’ economic impact on private landowners and the laws’ creation or promotion of a public benefit. Proponents of the exploitative view generally believe that landowners should receive compensation for economic loss caused by government regulation of land use. Advocates of this view apparently reason that the concept of constitutionally protected property includes economic expectations formed under earlier laws. They also believe that the creation of a public benefit at a landowner’s expense is at the core of the Takings Clause and that under the clause government must pay to achieve such a public benefit.¹⁴⁶ Both aspects must be evaluated before the reasonable expectations of constitutionally protected property can be properly defined.

Because adverse economic impact results from virtually all land use regulations, a takings standard based primarily on the existence of economic harm would be troubling. Such a standard would invalidate most, if not all, land use regulations enacted without payment of just compensation and would make environmental preservation and resource management programs costly propositions. A takings standard based in part on the degree of harm to reasonable economic expectations would be far less troubling.¹⁴⁷ Under such a standard, courts would

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¹⁴⁶. Both factors were involved in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In Lucas, a waterfront landowner argued that an environmental regulation prohibiting new construction on his beachfront property constituted a taking because the regulation deprived him of all economically viable use. The landowner also argued that the coastal law was enacted to promote public benefits like tourism and public beach use, not to prevent public harm. See 60 U.S.L.W. 3609 (U.S. Mar. 10, 1992) (summarizing oral arguments before the Court).

¹⁴⁷. Traditional case law supports the focus on degree, as opposed to existence, of economic harm. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). A takings standard that focused solely on the degree of economic harm, however, would also be troubling. For a discussion of some reasons why, see supra notes 56-67, 85-86 and accompanying text.
examine the degree of economic harm, along with other traditional takings factors. These factors may include the reasonableness of the affected landowner's expectation of gain and the nature and importance of the government interest. \(^{148}\) Though the case for payment of just compensation would be far more compelling when a regulation deprives a landowner of all economically viable use, even a total or near total economic loss might be upheld if a regulated use raises serious public health, welfare, or safety concerns or constitutes a nuisance. \(^{149}\)

Most land use laws, however, do not deprive landowners of all economically viable use and thus present more difficult cases. To the extent that these laws make partial readjustments of economic values and interests between public and private parties, the economic perspectives discussed earlier suggest that the readjustments are, as a general proposition, legitimate. Forcing private landowners to internalize more of the costs of private land use should not, in the abstract, require

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In *Lucas v. South Carolina Coastal Council*, the Supreme Court used a takings test that focuses almost exclusively on the degree of economic harm when government action causes a total deprivation of economically viable use. The only inquiry permitted in such a situation is to determine whether the government action is based on limitations that inhere in the landowner's title or in property or nuisance law. 112 S. Ct. 2886, 2899-900, 2901-02 (1992).

148. When government action totally deprives a landowner of all economically viable use, the Supreme Court does not appear to permit consideration of the nature of the government interest. In *Lucas v. South Carolina Coastal Council*, the Court concluded that such a situation merited “categorical treatment” as a taking and ruled out “case-specific inquiry into the public interest advanced in support of the restraint.” 112 S. Ct. 2886, 2893 (1992). The Court, however, suggested that government could be absolved of liability for a compensable taking if it acted to “forestall . . . grave threats to the lives and property of others.” Id. at 2900 n.16 (citing Bowditch v. Boston, 101 U.S. 16, 18-19 (1880)).

149. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). *But cf.* *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897-99 (1992) (describing *Hadacheck, Mugler*, and other cases using “harmful or noxious use” analysis” as early attempts to develop takings theory and as inappropriate tools for resolving total deprivation cases). Even in the recent decision *Lucas v. South Carolina Coastal Council*, the Court appears to recognize the possibility of total deprivation cases that do not require compensation because of serious health, welfare, or safety concerns. See id. at 2900 n.16 (suggesting that government may be absolved of liability in total deprivation cases if government acted to “forestall . . . grave threats to the lives and property of others”).

The Supreme Court appears to have recognized a landowner's constitutionally protected right to make a reasonable return on his property. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31, 136 (1978). This article is not considering the validity or desirability of that position; rather the article seeks to demonstrate the legitimacy of changes in rules of law made without payment of just compensation to affected property owners under general takings and property principles.
compensation. After all, those costs are generally attributable to private landowners, and, to the extent that the costs diminish the value of common resources, private land use impairs third party interests. Thus, land use regulations that do not deprive a landowner of all economically viable use generally should be viewed as reasonable accommodations of private and public interests under the Takings Clause when the regulations are forcing the internalization of private land use costs and are not singling out a particular landowner, as opposed to a particular type of land use, to bear a disproportionate amount of those costs.

Ecological and political perspectives also support the general legitimacy of partial economic adjustments caused by environmental regulation of land use. Under ecological and political perspectives, a land use regulation that attempts to correct some of the scientific failures of the private property system should at least be legitimate when the regulation does not deprive a landowner of all economically viable use. Constitutional protection of scientifically inaccurate interests like the absolute use expectation makes little sense when the appropriate corrective government action would not deprive a property owner of all economic use and would not unfairly single out a particular landowner. As we learn more about this world, we should be able to incorporate that knowledge into laws without having to compensate for every adverse economic impact. Scientific knowledge provides an objective basis for redefining private property rights and thus minimizes many of the fears about arbitrary majoritarian exploitation underlying the Takings Clause.150

Furthermore, given the serious ramifications of the problem of resource scarcity,151 scientific perspectives also suggest that ecologically necessary land use regulations may, depending on the degree of need, withstand constitutional scrutiny

150. Some scholars have criticized scientific principles and methodology as giving a false sense of objectivity and have argued that science is not as value-neutral as many suggest. See, e.g., Sagoff, Reason and Rationality, supra note 83, at 301-08. Even accepting the limitations of the scientific method, science still is objective to the extent that it generates data about and otherwise explains our global ecosystem.

For further discussion of the antimajoritarian basis of the Takings Clause, see Michelman, supra note 28, at 1214-18.

151. For further discussion of these ramifications, see Hardin, supra note 63, and OPHULS, supra note 74.
even when a landowner is deprived of all economically viable use. Even the Court in *Lucas* recognized the possibility of total deprivation cases that do not require compensation because of serious public health, welfare, or safety concerns. In explaining possible justifications for government action depriving private property owners of all economically viable use, Justice Scalia noted that government may be “absolv[ed] . . . of liability for the destruction of ‘real or personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.” 152 Because of the disastrous consequences of the tragedy of the commons and because of the overall tenor of the *Lucas* decision, which solidifies the paralysis that has slowly overtaken governmental units attempting to deal with environmental problems, 153 the grave threats exception should be interpreted to include serious environmental or resource problems. Furthermore, the constitutional reasonableness of private land use expectations should be determined, in large part, from the facts, conditions, and circumstances existing at the time a land use decision is actually made, and not at the time of purchase. 154 Such an approach would be consistent with notions of relativity, which are part of the background principles of property and which establish the variability and adaptability of property over time. The law should not continue to protect private expectations based on invalid assumptions or obsolete facts and circumstances. Continued protection of inaccurate facts and circumstances would raise the possibility of ecological and social disaster.

Because a public benefit also results from virtually all land use regulations, the private landowners’ reliance on the existence of a public benefit to support their compensation claim is also misplaced. Indeed, government regulations must produce some sort of “public benefit” to be valid. Under the Due Process Clauses of the Constitution, government can generally exercise

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153. See supra note 125 and accompanying text.
154. Such an approach would be consistent with Hardin’s principle of morality. See Hardin, supra note 63, at 1245. The suggested approach would, however, appear to be contrary to the language of some Supreme Court opinions, which refer to the importance of protecting “investment-backed expectations” under the Takings Clause. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). This language suggests that the time of investment (often the time of purchase) is the key time for evaluating the constitutional validity of private land use expectations.
its police power to regulate its citizens and resources if the resulting law reasonably promotes the public health, welfare, safety, and morals. Thus, Justice Scalia’s concern in Lucas over whether “private property is being pressed into some form of public service under the guise of mitigating serious public harm” provides little guidance in resolving takings cases. Economic and ecological perspectives suggest that this concern with the creation of a public benefit is one-sided and simplistic. Among other considerations, those focusing on the creation of a public benefit are ignoring the fact that the public benefit reflects a value that the public attaches to common resources adversely affected by the conduct of private landowners—a value that the private marketplace does not adequately consider. Forcing private actors in the marketplace to consider that value seems to be the type of rational economic adjustment that the law should allow. Additionally, Justice Scalia and private landowners are ignoring scientific evidence establishing the detrimental impact of land use on the ecosystem. The harmful effects of land use have left government with little choice; government must adopt more stringent environmental land use regulations if it wants to avoid serious ecological problems. Scientific perspectives thus suggest a more complete view of environmental regulation of land use; in addition to producing a public benefit, the regulations are minimizing the ecological costs of private land use. Though a public benefit admittedly results, that benefit cannot help but arise, given the interrelatedness of resources.

A more accurate and more appropriate focus under the Takings Clause would be to determine whether land use regulations have widespread effect. If the public benefit is created at the expense of a few landowners who have been singled out to bear the burdens of a public program, then the takings question is much more troubling. In such a situation, the fear of majoritarian exploitation of individual property owners becomes quite real; the few landowners who are affected by the regulation may legitimately wonder whether government is trying to “get them.” Unless the scope of the regulation can be


explained rationally from a scientific perspective, the regulation would likely fail to withstand constitutional scrutiny.

Most land use regulations, however, do not single out a few landowners, but rather spread out the burdens among broad-based classes of landowners. Political perspectives suggest that these land use regulations generally should withstand a takings challenge based on the public benefit argument so long as they result from democratically responsive government. As long as the burdens are spread out, landowners should not feel like victims of the majority. Fears of majoritarian exploitation are minimized when affected landowners can see that eventually the benefits and burdens of government regulation offset each other.\footnote{See Michelman, supra note 28, at 1179, 1222-23, 1255.}

IV. CONCLUSION

In conclusion, economic, political, and ecological perspectives provide a basis for incorporating the concept of relativity into the definition of constitutionally protected property. These perspectives are especially important to the modern concept of constitutionally protected property because they promote the development of a more holistic view of land use—a view that is sorely needed in these times of deteriorating and scarce natural resources. More particularly, the perspectives reveal that the traditional view of property, especially as reflected in the absolute use expectation, is not a viable approach to defining private land use rights under constitutional or common law. Besides ignoring legitimate third party interests in common resources, the absolute use expectation reflects a view of the world that is scientifically antiquated and politically one-sided.

By focusing on the failures of the exploitative use expectation, lawmakers have a basis for interpreting constitutionally protected property rights as relative to the overall economic, political, and ecological picture. Significantly, this basis would allow government to recognize the public interest in privately owned land by adopting regulations to correct some of the failures of the private rights system. Under the public interest perspective, government would not, as a general proposition, have to pay just compensation to landowners affected by carefully tailored corrective regulations.