Regulation of Conduct in Relation to Land - The Need to Purge Natural Law Constraints from the Fourteenth Amendment

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We are coming to realize that our land is finite . . . We must accept the idea that none of us has a right to abuse the land, and . . . society as a whole has a legitimate interest in proper land use.¹

National awareness that land is a finite resource has led to recognition of a need for increased regulation of human activity in relation to land to assure the well-being of present and future generations.² Land no longer can be regarded as a commodity to be exploited in a free market economy according to the perceived self-interest of its owner.³ It is more than an object of ownership and an

³ S. Rep. No. 197, supra note 2, at 72-73. See also F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control (1971) [hereinafter cited as Revolution]; Caldwell, Rights
ingredient of individual wealth; it is a vital component of the interrelated and interdependent social, economic, and ecological systems in which man lives.  

Intensified public concern that land be used properly has led to a "quiet revolution in land use control." This revolution has been reflected in the adoption of state-wide land use regulatory systems, establishment of regional compacts to preserve natural resources and protect areas of critical environmental significance, regulation of wetlands development, creation of a federal agency to monitor and allocate national energy resources, establishment of mechanisms to ration dwindling water resources, and adoption of numerous federal measures to control pollution and protect the environment. In addition, traditional land use control devices are being modified. Euclidian zoning is yielding to "incentive zoning."
“timed growth zoning,”13 “conditional zoning,”14 “performance standard zoning,”15 and “floating zoning.”16 Subdivision ordinances often preserve open space by requiring land dedication exactions, or fees in lieu thereof, as a condition to development approval.17 “Transferable development rights” have been recommended as a technique to limit density and preserve open space.18 Efforts to revise standard state enabling legislation for local land use control are currently in progress.19 Simultaneously, considerable scholarly at-

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13. Timed growth zoning involves regulation to assure that new development occurs at a rate consistent with the growth of public services and amenities to enable the latter to meet the needs of the former. See Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

14. “Conditional zoning” is a term which “is used to describe a zoning ordinance which permits a use in a zoning district subject to conditions other than the routine requirements relating to setbacks, yards, height . . . .” R. Anderson, supra note 12, § 8.13.


16. The term “floating zoning” designates “a method of zoning whereby selected uses of property are authorized in districts devoted to other uses under terms and conditions laid down in the ordinances themselves.” Although arguably in violation of statutory requirements that zoning ordinances be enacted in accordance with comprehensive community plans, “[t]he argument for the procedure is based on the premise that applications for . . . exceptions, being based on standards and safeguards, can properly be treated as a part of a comprehensive plan.” 1 E. Yokley, Zoning Law and Practice § 3-7, at 133-34 (1965).

For examples of other modifications of traditional zoning methods, see Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 763, 90 Cal. Rptr. 88 (1970) (approving use of “cluster development” concept that allows density of development on portion of tract in order to have remainder of tract free of buildings); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968) (use of “density zoning” whereby legislature determines percentages of land in a district to be developed for residential units or left for open space, and task of allocating land to each use left to planning commission); Millbrae Ass'n for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968) (recognition of concept of “planned unit development” involving flexible application of zoning classification and diversification in structure location and other site qualities); Sante Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964) (affirming conviction for violation of city zoning ordinance that created historical district pursuant to legislation enabling municipalities to adopt comprehensive zoning plan for general welfare of locality).


tention has been focused on the adequacy of the legal system to accommodate the changes and pressures underway in the field of land use planning.\(^2\)

Increasing numbers of landowners, finding state and local land use controls frustrative of their expectations and aspirations, contend in litigation that they have been deprived of property "without due process of law."\(^{21}\) A taking of property for public use without compensation may violate the fourteenth amendment to the Constitution, and excessive regulation of the use of property may be a "taking."\(^{22}\) Although "[t]here is no set formula to determine where regulation ends and taking begins,"\(^{23}\) it is the line between "regulation" and "taking" that limits the capability of legislatures to control the use of land in the public interest.

Traditionally, this line has been drawn by applying decisional rules on a case-by-case basis.\(^{24}\) Careful study of these decisional rules and their natural law origins will reveal, however, that they are inadequate, discredited by experience, obsolete, and founded upon jurisprudential doctrines no longer deserving of judicial adherence. The needs of modern society demand that the fourteenth amendment be purged of the natural law constraints that underlie these rules. A significantly more limited review of the constitutionality of land use control measures should be performed by the courts, based not only upon the suggested removal of natural law limitations, but also upon an understanding of property as a dynamic concept that can be changed as the public's needs demand.

draft of the Model Code departs significantly from the approach of traditional enabling statutes by treating development activity rather than land as the focal point of regulatory systems. See note 2 supra.


21. U.S. Const. amend. XIV.


DECISIONAL RULES IN THE TWENTIETH CENTURY

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.25

The decisional rules generally employed to distinguish permissible regulation of land from prohibited deprivation of property emanate from principles articulated by the Supreme Court in three land use cases in the 1920's. The first, and perhaps foremost, is Pennsylvania Coal Co. v. Mahon,23 in which a statute regulating subsurface mining operations was challenged. Although designed to avert destruction of dwellings, streets, and utilities, and to assure personal safety at the surface level, the statute effectively prevented Pennsylvania Coal Company from mining significant portions of its holdings.27

Reasoning that, without limitations on the police power of the states, the due process clause would be nullified, the Court invalidated the regulation.26 The Court held that when the diminution in value caused by a regulation reaches a certain magnitude, "in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act" and such regulation must be "reasonable" to be valid.28 The Court also noted that the value of the right to mine coal "is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."29 This rationale provided protection under the fourteenth amendment for the expectation of profitable use of land.31

27. Id. Injunctive relief, sought in order to enforce compliance with the statute, perhaps was more difficult to allow because the complaining landowner had derived title from the mining company through a deed in which it reserved all mineral rights with exculpation from any liability for damage to the surface owner caused by subsurface mining. Id. at 412.
28. Id. at 413.
29. Id.
30. Id. at 414.
31. The statute in Mahon clearly was aimed at a noxious, harmful activity. Also, the statute's prohibitions were addressed to a class of activities and applied in municipal areas throughout Pennsylvania, rather than at geographically identified locations. In this regard, Mahon cannot be reconciled with prior Supreme Court decisions. In Mugler v. Kansas, 123 U.S. 623 (1887) (prohibition of manufacture and sale of intoxicating liquors), and Powell v. Pennsylvania, 127 U.S. 678 (1888) (prohibition of manufacture and sale of oleomargarine),
In the second major case of the 1920's, *Village of Euclid v. Ambler Realty Co.*, the use of zoning to control and allocate land uses by map reference was sustained against charges that the technique on its face was a deprivation of property without due process of law, and, because of lack of uniformity, a denial of equal protection under the law. The Court acknowledged, however, that a zoning measure valid on its face, nonetheless, could be so unreasonable in its application to particular property that it would be an invalid exercise of the police power under the due process clause. Shortly thereafter, in the third 1920's case, *Nectow v. City of Cambridge*, the Court confirmed its dicta in *Euclid* by invalidating an ordinance as applied to a particular parcel. The Court emphasized both the diminution in value caused by zoning property for residential use when it was unsuited for such use and the regulation's denial of all reasonable uses while serving no public interest.

Having thus vitiated the force of earlier decisions sustaining state power to regulate the use and enjoyment of land, the Court, apparently believing its delphic pronouncements sufficient, remained silent for more than 30 years. During those years the Court continued to invalidate both state and federal social and economic legislation that lacked the requirements of "substantive due process." But once validated by *Euclid* and reinforced by the publication of the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, zoning and subdivision control took the

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the Court upheld statewide regulation of activities deemed offensive by the legislature, notwithstanding extreme financial loss to property and business.

32. 272 U.S. 365 (1926).
33. *Id.* at 395.
34. *Id.* at 387.
35. 227 U.S. 183 (1918).
36. *Id.* at 187-88.
38. Not until Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), was the Court to reconsider state and local power to regulate land use.
39. For a survey of decisions during the era of substantive due process, which lasted from the late 1800's until the 1930's, see Justice Black's dissenting opinion in *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965).
nation by storm; state and federal courts faced a concomitant barrage of litigation by offended property owners alleging deprivation of property without due process of law.42

It is not surprising that courts primarily sought thereafter to determine whether land use controls were reasonable in relation to the particular parcel of land in question.43 Admonished to resolve doubt in the legislature's favor when reasonableness was "fairly debatable,"44 the courts, nevertheless, could determine what in fact was fairly debatable. If a particular measure was deemed reasonable, it would be labeled a "valid exercise of the police power"; when it failed the reasonableness test, it would, in substantive due process language, be labeled "arbitrary," "capricious," "discriminatory," "confiscatory," or simply "unreasonable." Any of these appellations indicated that the requirements of due process were not met.45

Generally, these decisions have been exercises in circuitous reasoning.46 Courts have acknowledged that all property is held subject to the police power, under which property rights can be limited, but have given distressingly little attention to the scope, nature, or role of the notion of police power. Moreover, the idea that property subject to alleged deprivation is itself a creature of a sovereign state, taking its character from legislation and common law principles observed by that state,47 virtually has been ignored. The concept of "due process of law" rarely is analyzed in terms of when process created by legislation is "due." Rather, the term functions as a bridge from unconstitutional, forbidden actions to constitutional and permissible exercises of police power. If a court views the police power as sufficiently broad to span the gap, property rights may be limited; if the court deems the power insufficiently broad, property rights are "vested" and may not be "impaired." But how long is the bridge, and how much weight can it bear before collapsing? Can the

43. Although the Supreme Court has retreated significantly from its substantive due process orientation to the fourteenth amendment, several state courts remain faithful to that dogma. See Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950); Comment, Substantive Due Process in the States Revisited, 18 Ohio St. L.J. 384 (1957).
45. See generally 1 R. Anderson, supra note 42, §§ 2.19-.30.
46. See Van Alstyne, supra note 20, at 2.
chasm be spanned? These questions generally have been resolved by courts rather than legislatures, relying upon varying degrees of judicial omniscience to reach sometimes discordant results.\textsuperscript{48}

To evaluate the validity of the decisional axioms that have been discussed, it is necessary to examine the source of the premise underlying their development and to decide whether their continued application is justified. This examination will expose the unnatural wedding of natural law to the fourteenth amendment, the procreation of a unique notion of "police power," a field of "higher law," and a sterile notion of "property."

\textbf{Natural Law Wedded to the Fourteenth Amendment}

\textit{Legislation falls within the "due process" clauses when it is such as rational men may approve.} Taken seriously, this conception makes of our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren. . . . The fact, then, that reasonable men approve of specific legislation does not prevent it from being a violation of "due process of law."\textsuperscript{48}

The judicial vocabulary regarding limitations on the power to

\textsuperscript{48}. It is one thing to identify a decisional process as circuitious, and another to label the product of that process a miasma of inconsistencies. No effort will be made to analyze separately the land use control cases decided since Mahon, as that analysis has been conducted exhaustively by others. The consensus of these commentators is that judicial attempts to reconcile public control with private property have malfunctioned seriously. One commentator has noted, for example, that the "decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Van Alstyne, supra note 20, at 2. Michelman, supra note 20, at 1171, has concluded that the results of the decisional process are "ethically unsatisfying," while Dunham, supra note 20, at 64, calls them a "haphazard accumulation of rules." Several commentators consider this uncertainty an obstruction to effective legislative efforts to create needed land use controls. See, e.g., \textit{Private Property}, supra note 4, at 150. Another, focusing on the confiscation issue where regulation allegedly has resulted in severe diminution in value, has noted the roughly equivalent diminution both in cases in which the exercise of police power has been held valid and in those in which a denial of due process was found. 1 R. Anderson, supra note 42, § 2.23.

Attempts have been made to reconcile apparent inconsistencies by classifying cases according to such factors as the regulation's purpose or its burdensome consequences, the relationship between the public interest asserted and the private detriment suffered, and the evil to be cured by the regulation. See authorities cited in note 20 supra. But these efforts have not provided a means by which judicial action can be predicted. Clearly, if the utility of legal rules in a jurisprudential system can be judged by their predictability, the rules employed to determine where regulation of land use ends and taking of property begins are useless.

regulate land use stresses the words "police power," "due process of law," and "property." Due process is the bridge that spans the chasm between state power and private right. Thus "due process" protects, defines, and limits "property" while defining and limiting legislative capacity or "police power." Jurisprudential techniques of defining legal concepts in terms of other legal concepts, however, appropriately have been labeled "transcendental nonsense"; close scrutiny of the substantive due process concept developed in land use law demonstrates the aptness of that phrase.

Police Power

In the jurisprudence of other nations that follow the Anglo-Saxon common law tradition, the term "police power" is a descriptive term, significant only to lawyers and political scientists who employ it to describe the class of powers that governments traditionally choose to exercise; the term does not connote a limitation on government action, nor does it provide immunities from governmental interference attached to property rights. In these countries the questions of whether legislation is reasonable, arbitrary, capricious, wise, appropriate, just, or necessary are regarded as meaningful in the political arena only, and are of no concern to judges.

Nevertheless, the functional, rather than descriptive, role of the term "police power," has been accepted in jurisprudence in the United States by the Supreme Court. Under the police power, "property rights may be cut down, and to that extent taken, without pay," but "[l]egislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."

50. Id.
51. The police power has received little recent attention from commentators. For an analysis of the origins and functions of the term, and its different roles in the United States and other Anglo-Saxon jurisdictions, see C. Haines, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); Cook, What is the Police Power?, 7 Colum. L. Rev. 322 (1907). See also Grant, Natural Law Background of Due Process, 31 Colum. L. Rev. 56 (1931).
52. Such traditional powers include the power to make and enforce laws and regulations for the promotion of public health and domestic order. See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Berman v. Parker, 348 U.S. 26, 32 (1954); Lawton v. Steele, 152 U.S. 133, 137 (1894).
53. C. Haines, supra note 51, at 135-36.
Yet the police power is "one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."56 Despite the importance of the concept, the Supreme Court has stated:

An attempt to define its reach . . . is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . .

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.57

It "connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the . . . familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."58 The police power is expansive and "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."59

These descriptions all were expressed after the adoption of the fourteenth amendment; before that time, the Court concurred in the descriptive meaning of the police power, usually phrasing it in terms of residual sovereign power.60 Only when natural law was grafted onto the amendment did the term gain operative significance as a doctrine of constitutional law. As legislatures during the nineteenth century became more active in the development of rules of positive law and undertook costly programs of public improvements, while also exhibiting a willingness to use public funds to subsidize private ventures, the notion that governmental power should be limited gained political acceptance in conservative economic circles.61 The

61. For a history of the philosophic, legal, and economic development of this viewpoint, see C. Haines, supra note 51, at 75-103.
concept of government as a "social compact," \textsuperscript{62} instituted to secure inalienable and natural rights, was revived. Limitation of natural rights could not be a valid purpose for a government so instituted; government, therefore, had to be limited in accordance with the principle of "free government." \textsuperscript{63} The jurisprudential expression of this political concept is "natural law."

Perhaps the best exposition of the emergence and ascendancy of natural law in American jurisprudence is that of Professor Haines.\textsuperscript{64} To Chancellor Kent he attributed the origination of the notion that "police power" is a term having operative significance.\textsuperscript{65} Kent, having concluded that rights to property and liberty were natural rights protected by higher law, nonetheless conceded that positive law, expressed through legislation, could in appropriate cases circumscribe natural rights. These appropriate cases were denominated exercises of the police power, in accordance with "fundamental principles." \textsuperscript{66} Professor Haines concluded:

"Police power as a constitutional concept is a judge-made concept arising from the assumption that legislatures are disposed to fritter away constitutional [natural law] inhibitions and that it is the duty of judges to prevent such legislative depredations. The term "police power" was hit upon as a convenient phrase for the courts to determine whether a legislative act which interfered with private rights was reasonable enough to have judicial approval." \textsuperscript{67}

\textsuperscript{62} Id. at 95.
\textsuperscript{63} Id.
\textsuperscript{64} C. Haines, \textit{supra} note 51.
\textsuperscript{65} Id. at 92-93. Haines refers to 2 J. Kent, \textit{Commentaries} 340 (13th ed. 1884) in support of his conclusion.
\textsuperscript{66} C. Haines, \textit{supra} note 51, at 95.
\textsuperscript{67} Id. at 182. The most influential jurist committed to natural law principles was Justice Field, whose dissent in the Slaughter House Cases, 83 U.S. (16 Wall.) 36, 83 (1872), marks the emergence of natural law as the foundation of substantive due process. Justice Field, although willing to strike down unreasonable legislation, apparently believed that "police power" could be defined with sufficient precision to enable it to function in constitutional adjudication. In Barbier v. Connolly, 113 U.S. 27 (1885), when upholding the regulation of public laundries in San Francisco against claims premised upon the fourteenth amendment, he observed that the amendment was not "designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." \textit{Id.} at 31. Justice Field's definition of police power apparently contemplates a relatively narrow warrant for legislative activity. As later courts, consciously or unconsciously, interpreted the term more broadly, the requirement of reasonableness was added.
Due Process of Law

Natural law principles were reflected in diversity cases in the federal courts long before their incorporation into constitutional law. In *Pumpelly v. Green Bay Co.*, finding a "clear principle of natural equity" in a state constitution, the Court required a utility to pay compensation for the statutorily authorized flooding of private land. Yet in several cases decided under the fourteenth amendment prior to 1884, the Court expressly declined to find that "due process" meant "conformity to principles of natural law." The Court occasionally noted that due process was a procedural limitation, and that for "protection against abuses by legislatures the people must resort to the polls, not to the courts."

Natural law and the fourteenth amendment were wedded in a series of cases decided in the last fifteen years of the nineteenth century, and the marriage lasted until 1937. Although legislative process in other countries, reflecting the popular will expressed through duly constituted bodies, is always "due," until 1937 legislative process in this country was "due" only when judges were satisfied that it was reasonable.

Property—A "theme especially apposite for amplificative philosophic disquisition"

Prior to 1885, when the fourteenth amendment was regarded essentially as a procedural limitation, it was unnecessary to define

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68. 80 U.S. (13 Wall.) 166 (1871).
69. *Id.* at 179. This principle was read into the state constitution notwithstanding the state court's unwillingness to do so. Although *Pumpelly* was decided three years after the adoption of the fourteenth amendment, the Court apparently believed that the amendment was not applicable.
73. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), reversing the rule established in Adkins v. Children's Hospital, 261 U.S. 525 (1923), constitutes a clear retreat from natural law analysis of the due process clause, at least in the area of economic regulation. *Compare* 261 U.S. at 548-55, 561, *with* 300 U.S. at 391-93, 397-400.
74. *See* notes 51-53 *supra* & accompanying text.
75. *See* notes 54-59 *supra* & accompanying text.
the meaning of the term "property" as used in that amendment in relation to permissible legislation. After 1885 it also was unness-
sary for the Court to so define the term because the process of
determining whether legislation was reasonable was concomitant to
determining whether the liberty, privilege, course of conduct, or
expectation asserted by the individual was or was not, in law, pro-
tected. Thus, the right to employment, to contract, and to liberty
in the conduct of business became "property," but a precise defini-
tion of the term was not articulated.

Understandably, a court, finding the legal term "property" im-
precise and clarification unnecessary to the disposition of its cases,
might defer formulation of a usable definition to those willing to
undertake the requisite "amplificative philosophic disquisition." Common law traditions have never recognized a property right of
private land use assertable against a state. It is, of course, possible
for legal interests and expectations to be created that cannot be altered by subsequent state action, but whether such interest and expectations have been created in "property" is doubtful.

American notions of property, derived from the common law of
England, are manifestations of legal rules developed to resolve con-
flicts between private persons over the right to possess, enjoy, and
use land. These concepts of property thus should be meaningful
only to resolve private disputes; they should not suggest any delimi-
tation of public power to regulate the use and enjoyment of land.
In fact, under the common law, all rights in property are subordi-
nate to the interests of the state. The common law recognized only
tenures held of the state, which retained paramount title; the terms
of such tenure were subject to definition by the state. Never did the
common law recognize a notion of unfettered private ownership of
land. Notwithstanding these traditional precepts, the Supreme

82. This status of property continues in England. See text accompanying notes 51-53 supra.

For a discussion of English legislative supremacy, in relation to the power to change the
common law, and lack of judicial review of parliamentary enactments, see H. PHILLIPS, A
83. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-37 (1810).
84. See generally Philbrick, supra note 47; Powell, supra note 47.
85. For a survey of legislative limitations on the use of property prior to 1779, and documen-
Court's land use decisions during the era of substantive due process reflected an assumption that title to land includes a right of use that can be asserted against a state when the police power is used in a manner deemed improper by the courts. Despite this reliance upon a right to use property, however, the Court artfully evaded the key definitional question.

When a state regulates land use or enables its localities to undertake such regulation, the state's action rests on an assumption that all land is held under a servitude in favor of the state, thereby redefining the bundle of property rights possessed by the landowner. Although the Supreme Court apparently has not been confronted with the issue of a state's power to redefine property rights in the context of land use regulation, the issue has been met in other contexts, in which the Court has refrained from placing a natural law gloss on property and has not assumed that property enjoys a federal constitutional definition unalterable by the states. Some of
these cases have allowed the states to alter their property laws even when the state itself gains by the redefinition. While leaving unfulfilled the basic need for a clear statement of the limits of the rights accompanying ownership of property, these cases do indicate that property is a dynamic term that may be redefined by the state without affronting the due process clause.

In *Broad River Power Co. v. South Carolina,* a public utility claimed, under its charter, the property right to abandon partially its railway and power franchise. Upholding the state court's issuance of a writ of mandamus against the company, the Supreme Court declined to determine whether "the rule applied by the state court [was] right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." In *Fox River Paper Co. v. Railroad Commission,* the Supreme Court upheld a Wisconsin court's determination that a riparian owner had no right to dam a stream in the face of state objection. The Court stated:

We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.

wrecking and parts yard upheld because "existing use" of the land prior to enactment did not create a "vested interest" protected by the United States Constitution); Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950) (ordinance requiring plaintiff to discontinue use of land as gasoline filling station upheld). "[C]onsiderations of . . . so-called 'vested rights' in private property are insufficient to outweigh the necessity for legitimate exercise of the police power of a municipality." Id. at 413. Although it might be assumed that a right exists, for example, to dispose of property by a will at death, the Supreme Court has acknowledged that "[r]ights to succession by will are created by the state and may be limited, conditioned, or abolished by it." Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944) (dictum). This language suggests that states could require escheat upon death of the owner of land, or require that property passing at death be held thereafter only upon conditions imposed by the state. Due process requirements were imposed upon the suspension from school of an Ohio student, not because the fourteenth amendment itself created a property interest in public education, but because Ohio statutes created an entitlement that the fourteenth amendment would protect. Goss v. Lopez, 95 S. Ct. 729, 735-36 (1975).

89. 281 U.S. 537 (1930).
90. Id. at 541.
91. 274 U.S. 651 (1927).
92. Id. at 657. Another Supreme Court ruling denied the right of a state court to redefine
Whatever doubts may exist about a legislature’s power to redefine or change property rights or vested contract rights, courts seemingly are free to overrule their prior decisions upon which such rights are based without violating the due process clause, at least where the change affects only private parties. Moreover, when clearly confronted with the issue of whether, under the due process clause, property has been taken, federal courts have looked to state law to determine whether, in fact, there is property to be confiscated. In 1944 the Supreme Court considered, in a due process context, a change in state law relating to the duties of trustees under testamentary trusts involving the rights of income and remainder beneficiaries. To the complaining remainderman, the Court answered:

Nothing in the Federal Constitution would warrant us in holding that judicial rules tentatively put forward and leaving much to discretion will deprive the legislature of power to make further reasonable rules which in its opinion will expedite and make more equitable the distribution of millions of dollars of property locked in testamentary trusts, even if they do affect the values of various interests and expectancies under the trust.

Although the Supreme Court thus has upheld legislation that alters the property rights of private litigants and sustained judicial

property rights in land acquired under federal land grants, where the state claimed title to former river beds and coastal accretions under doctrines incompatible with federal common law applicable at the time of the original land patent. Hughes v. Washington, 389 U.S. 290 (1967). See notes 97-101 infra & accompanying text. The decision, however, was based formally on construction of federal grants and statutes and the constitutional prohibition on impairment of contracts, rather than upon the due process clause.

93. See, e.g., Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); cf. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932) (state courts may use discretion in giving retroactive or prospective effect to decisions overruling prior cases on which “vested” rights are based); Central Land Co. v. Laidley, 159 U.S. 103 (1895).

94. For example, when faced with a contention that Louisiana’s invasion of private land to construct a levee constituted a taking without due process, the Supreme Court indicated that under Louisiana law no property was taken because a dominant servitude burdening riparian lands in favor of the state permitted flood control projects to be undertaken without an obligation to compensate affected landowners. Louisiana v. Garfield, 211 U.S. 70 (1908) (dictum) (held that the Court lacked jurisdiction because of the absence of a necessary party, the United States). Similarly, the Court found no private property rights assertable within the bounds of land set aside for a party wall because, under Pennsylvania law, such land was subject to a servitude for party wall purposes. Jackman v. Rosenbaum Co., 260 U.S. 22 (1922). It should be acknowledged, however, that both Garfield and Jackman involved federal court cognizance of established local law doctrines, rather than new determinations of that law.


96. Id. at 48-49.
decisions modifying such rights, the Court has not confronted specifically the propriety of legislation that alters property rights between private individuals and the state. Nonetheless, the question was latent in *Hughes v. Washington*, in which Justice Stewart's concurring opinion expressed a viewpoint later approved in dictum by the Court. *Hughes* involved the status of title to land rather than regulation of land use. A state constitutional provision had been interpreted by the supreme court of Washington inconsistently with its previously understood meaning. As a result, accretions to the coast were held to belong not to the owner of oceanfront property but to the state. Although the Supreme Court majority found for the protesting property owner without resort to the due process clause, Justice Stewart based his concurring opinion on it, expressing concern about unanticipated changes in the law:

> We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Justice Stewart's concern with due process protection against unexpected change in state laws relating to property may be reflected in more recent statements by the Supreme Court in which property rights are expressed in terms of expectancy and reliance. In a procedural due process case, *Board of Regents v. Roth*, a teacher alleged denial of due process because of the termination, without hearing, of his expectancy of continued employment. The Court declared that a "unilateral expectation" of a benefit was not

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99. WASH. CONST. art. 17, § 1.
100. 389 U.S. at 294.
101. Id. at 296-97.
102. 408 U.S. 564 (1972).
property within the scope of procedural due process, but added: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." The Court's statements thus support the utilitarian role of property in maintaining a stable society, rather than a view that mere individual expectancies generate property interests. Moreover, even Professor Michelman, who espoused a utilitarian theory, did not regard property as a static concept; he acknowledged that its utilitarian function required versatility in relation to changing needs. Other commentators also have stressed the dynamic role of property in its capacity, through judicial and legislative input, to respond to emerging societal needs by contraction, alteration, and redefinition.

Fundamentally, current legislative attempts to subject land development to greater public control are efforts to redefine property rights in land. Any significant impediment to these efforts would breach the Anglo-Saxon tradition that property, as an institution, should assume different functional roles as societal needs change. Recognition of this flexibility by the judiciary and legislatures clearly is needed if the utilitarian function of property is to remain effective. Courts and legislatures should be reminded that almost 50 years ago the Supreme Court recognized that changing conditions may justify new restraints on land use.

103. Id. at 577.
104. Id.
106. See, e.g., Horowitz, The Transformation in the Conception of Property in American Law, 1780-1860, 40 U. CHI. L. REV. 248 (1973); Philbrick, supra note 47; Powell, supra note 47; Roberts, The Demise of Property Law, 57 CORNELL L. REV. 1 (1971). Rights in land have not always been viewed primarily in terms of rights to profit from its development. Professor Horowitz, in an excellent analysis of changing conceptions of property between the Revolutionary War and the Civil War, demonstrated that, at the beginning of the period, natural or agrarian land uses were favored in the law over commercial uses, particularly in the allocation of water resources and the rules pertaining to riparian rights. Horowitz, supra, at 248-49. He noted, however, that the courts evolved a balancing test to effectuate the increased economic importance of commercial interests in American society. Id. at 263-64. Thus, the concept of property, originally encompassing only possession and a right to natural uses, expanded to include rights to commercial or economic use. It is not beyond imagination that, given the present level of concern about proper land use, courts eventually will adopt a view of land ownership that will place less emphasis upon developmental rights. As Philbrick noted: "The first tenet of an adequate philosophy must be that property is the creature and dependent of law..." Philbrick, supra note 47, at 729.
The Present Scope of the Due Process Clause

The Supreme Court and Natural Law

Discussion of the present scope of the due process clause must begin with a consideration of the extent to which natural law remains embedded in that clause. Although the era of substantive due process commonly is regarded as having ended with *West Coast Hotel Co. v. Parrish*, later Supreme Court decisions continued to reflect natural law notions. In a dissent, which critiqued the substantive due process era and analyzed clearly the natural law underpinnings of decisions during that period, Justice Black urged that the fourteenth amendment be stripped of natural law. He urged that the amendment be viewed as essentially a civil rights measure to make the Bill of Rights applicable to the states. Eight years

years, urban life was comparatively simple; but . . . problems have developed, and constantly are developing which require . . . additional restrictions in respect of the use and occupation of private lands in urban communities. . . . [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions . . .

Perhaps the term "property" has not been defined more clearly in fourteenth amendment decisions because the Supreme Court has shown greater interest in the frustration of a particular economic expectation in the use of property than in the meaning of the term itself. Empirically at least, these cases, such as *Mahon and Goldblatt*, are concerned with the justification for a regulation that frustrates economic expectations, not with the question of whether "property" has been taken without due process of law; thus, economic expectations have been raised to the status of "property," a status not enjoyed by such expectations in any other Anglo-Saxon jurisdiction.

In widely varying contexts, the degree to which economic expectations acquired in the marketplace are realized or frustrated depends upon continuity or change in governmental policy; values in the securities markets vary as federal fiscal policy changes; profits in rental property may be diminished by rent controls; expectations in the liquor trade rise and fall with changes in the law; expectations on the commodities markets are frustrated by export controls; earnings may be reduced when an individual is drafted into the army; mines become worthless when the price of ore is regulated or a labor supply is withdrawn; fortunes are lost when licenses are not renewed; business opportunities are lost when government restricts the supply of raw materials. Appropriately, it may be asked why expectations in land use receive greater protection from governmental interference than other economic expectations. As was noted in *Laycock v. Kenney*, 270 F.2d 580 (9th Cir. 1959): "'a new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless' [but the] harshness of legitimate legislation affords no reason for considering it to be unconstitutional." *Id.* at 592, quoting *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 551 (1870).

110. *Id.*
later, in *Williamson v. Lee Optical, Inc.*, legislation prohibiting opticians from fitting or duplicating lenses without a prescription was upheld; Justice Douglas, writing for a unanimous court in an opinion devoid of natural law notions, emphasized that "'[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.'"

*Williamson* did not end natural law analysis by the Court, however. Seven years later, in *Goldblatt v. Town of Hempstead*, the Court lapsed into a discussion of reasonableness, quoting *Pennsylvania Coal Co. v. Mahon* with approval.

Perhaps aware of the contradiction between *Williamson* and *Goldblatt*, the Court clarified its position the following year. *Ferguson v. Skrupa* involved a Kansas statute limiting the business of debt adjustment to attorneys, effectively excluding a number of persons previously engaged in that business. Reiterating the *Williamson* analysis, the Court upheld the statute in a manner that clearly repudiated natural law notions. The Court's choice of language is significant:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . . . The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded.

. . . . [W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we . . . willing to draw lines by calling a law 'prohibitory' or 'regulatory.'"

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112. *Id.* at 488, quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876).
113. 369 U.S. 530 (1962) (prohibition of excavation at a particular location upheld).
114. 280 U.S. 395 (1922). *See* notes 26-31 supra & accompanying text.

In cases decided since *Ferguson*, the Court has avoided consideration of legislation in terms of substantive due process and instead has based its decisions on rights to privacy and equal protection, while enlarging the notion of procedural due process when property interests have been affected by state action. These decisions, although reflecting natural law concepts, have not involved questions of "traditional" property rights. *See*, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate pregnancy); *Doe v. Bolton*, 410 U.S. 179 (1973) (right to terminate
In the post-Goldblatt era, Supreme Court dismissal of appeals from three state court land use decisions\(^{117}\) "for want of a substantial federal question"\(^{118}\) has undermined further the natural law doctrines reflected in Mahon and Nectow. In each case the state court had upheld a regulation that had obliterated the economic usefulness of property owned by those challenging the regulation.\(^{119}\) Moreover, Ferguson, although not a land use case, also manifested a resolve by the Court to avoid interference with the legislative domain.\(^{120}\)

One recent land use opinion of the Court, however, does exhibit natural law overtones. In Village of Belle Torre v. Borass,\(^{121}\) the

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119. In Consolidated Rock Products, the California court had held that prohibition of quarrying at a particular location was valid although the regulation effectively prohibited all economic use of the property. 57 Cal. 2d 515, 380 P.2d 342, 351, 20 Cal. Rptr. 638, 647 (1962). Under the doctrines espoused in Mahon and Nectow, this regulation would have been an invalid "taking" because of the excessive diminution in value through elimination of all reasonable economic use. Notwithstanding its natural law relapse in Goldblatt, however, the Court denied the appeal for "want of a substantial federal question." 371 U.S. 36 (1962).

120. Natural law has not been separated entirely from constitutional law in the post-Goldblatt cases, however. Although ostensibly divorced from the due process clause, it has crept into the equal protection clause in the form of certain fundamental rights protected from state categorization unless the state can offer a compelling reason for their limitation. See Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1087-1132 (1969) [hereinafter cited as Equal Protection]. In addition, the ninth amendment has been suggested as a repository of certain natural rights. See Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Black, in dissent, cautioned against a return to natural law principles. Id. at 507. There has been no suggestion, however, that the right to be secure in one's economic expectations in land use is a fundamental right.

121. 94 S. Ct. 1536 (1974).
Court upheld a zoning ordinance that limited occupancy within a town to traditional family units, thereby excluding communal groups. The Court’s reliance on police power analysis to reach its decision suggests the persistence of natural law limitations, since the notion of police power as an operative legal concept is meaningful only if natural law is embodied in the fourteenth amendment. Any reliance on Borass as a clear statement of natural law precepts nonetheless may be misplaced because the permissible scope of the police power in that case was exceedingly broad.

Recent fourteenth amendment interpretation by the Supreme Court therefore demonstrates a continued withdrawal from natural law assumptions. When natural law language has been used, as in the “police power” analysis in Borass, the Court implicitly has authorized an expansive scope of legislative activity. When considering natural rights protected substantively by the fourteenth amendment, the Court significantly has declined to hold economic expectations associated with land ownership to be fundamental rights; consequently, no compelling state interest need be shown to justify a legislative classification that compromises such expectations. It may be stated confidently that only negligible vestiges of natural law protection for land ownership rights remain in the Supreme Court’s fourteenth amendment jurisprudence. Recent lower federal court decisions indicate that this posture of the high court has not gone unnoticed.

122. Id. at 1541. The Court noted that the “police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.” Id.

Because of the factual setting in Borass, the Court, finding no due process problem, focused on the reasonableness of the classification for equal protection purposes. An assumption that there had been a diminution in value was considered essential if the Court was not to find the case moot. Id. Because this assumption did not raise a due process problem, Borass logically may be viewed as a further emasculation of the waning strength of Mahon and Nectow. Moreover, the denial of “fundamental right” status to land use questions for equal protection purposes was fortified by the Court’s statement that if a classification is “‘reasonable, not arbitrary,’ and bears ‘a rational relationship to a [permissible] state objective,’” no violation occurs. Id. at 1540, quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), and Reed v. Reed, 404 U.S. 71 (1971). See note 120 supra.


124. For a discussion of circumstances requiring a compelling state interest to support legislative classification, see Equal Protection, supra note 120.

125. State courts need not follow Supreme Court precedent and interpretational philosophy; they are free to apply more restrictive constitutional notions to legislative power exer-
Land Use Cases in Lower Federal Courts

[The sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the City's police power—a label which describes the full range of legitimate public interests.]

In the past decade lower federal courts have shunned Mahon's diminution-in-value test as a means to invalidate land use regulation. Two courts, for example, have upheld zoning ordinances requiring termination of nonconforming uses. One decision was based on the view that the nonconforming use was not a vested right; the other considered the fourteenth amendment subject to "the inherent power of the state or municipal governments to make all rules and regulations with respect to the use and enjoyment of property rights necessary in the preservation of public health, morals, comfort, order, and safety." Other courts, sustaining zoning ordinances that clearly frustrated economic expectations in land use, have stated that a violation may be found only if the ordinance bears no "rational relation to the public health, morals, safety or general welfare." These cases contain no implication that courts should consider the private detriment suffered and attempt to balance it against the public interest; rather, the rational relationship required by the fourteenth amendment is a causal relation between the regulation and effectuation of a proper public purpose. A regulation therefore that reasonably promotes the public interest...
by prohibiting a harm or encouraging a benefit will be upheld, even though it burdens private individuals.

The search for a causal relationship was apparent in *Stone v. City of Maitland*, in which denial of a rezoning application was sustained notwithstanding the resulting frustration of economic expectations. Following *Ferguson*, the Court of Appeals for the Fifth Circuit, after noting that land use regulations were a type of social and economic legislation, first observed that "courts do not substitute their social and economic belief for the judgment of legislative bodies, who are elected to pass laws," then added: "[T]he sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the City's police power . . . ." Reliance on a causal relationship test by lower federal courts does not imply that the fourteenth amendment is inapplicable to state and local land use controls. One court has held, for example, that a state may not impose restrictions to depress land values in advance of condemnation proceedings in an attempt to reduce the compensation to be paid by the state. Another has noted that while adoption of a comprehensive land use plan may be a proper exercise of legislative power, approval or rejection of tract rezoning is an adjudicative proceeding governed by minimum standards of procedural due process. Nevertheless, these cases do not reflect the natural law notions that supported the Supreme Court's reasoning in *Mahon*, *Euclid*, *Nectow*, and, most recently, *Goldblatt*; in fact, the exclusion of such notions from the opinions of the lower federal courts suggests that those courts refuse to attribute a natural law premise to the Supreme Court land use precedents.

**Conclusion and Prospectus**

The decisional rules applied in land use cases by state and federal courts prior to *Goldblatt* and *Ferguson* were emanations of natural

131. 446 F.2d 83 (5th Cir. 1971).
132. *See* notes 115-16 *supra* & accompanying text.
133. 446 F.2d at 85.
134. Id. at 87.
law principles promulgated by the Supreme Court during the era of substantive due process. These principles have not resolved effectively the question of where regulation ends and taking begins. Undoubtedly for this reason, natural law, as a limitation on the power of state and local governments to regulate land use, appears to have been abandoned. Unfortunately, it awaits formal burial by a definitive Supreme Court pronouncement. The Court has continued to speak of “property” under the fourteenth amendment, primarily in the context of equal protection rather than due process, without addressing the fundamental question of whether property itself is a limitation on state capability to allocate and control uses and resources. It seems apparent, at least, that economic expectations in land are not “fundamental” rights, and, accordingly, that classifications which frustrate such expectations need only be rational in a causal context to be valid. No compelling state interest must be shown to justify the regulation in relation to the private detriment suffered. Hence, a diminution-of-value test of the validity of land use regulations no longer persists; courts need not weigh the public interest against identifiable private detriment.

The interment of natural law as a fourteenth amendment constraint on state power to regulate land use can be accomplished in a number of ways. Most effective would be a clear statement by the Supreme Court in an appropriate case. If substantive due process or natural law is the chasm that protects economic expectations in land use from frustration through the exercise of state power, any permanent bridge over the chasm effectively would eliminate it as a barrier; the Supreme Court recently has enunciated an expansive interpretation of the scope of police power that can function as that permanent span. The Court also has acknowledged that the function of “property” is simply to protect expectations in a utilitarian sense; it must only acknowledge further that, in an increas-

138. Federal courts are coming to recognize that property and protected expectations are identical; nevertheless, property is something more than a “unilateral expectation,” Board of Regents v. Roth, 408 U.S. 564, 577 (1972), and a “mere subjective expectancy . . . is not a property interest within the meaning of the Fourteenth Amendment,” Kota v. Little, 473 F.2d 1, 3 (4th Cir. 1973).
140. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (“It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”).
ingly complex society, the mechanism to identify those expectations deserving protection must be the legislative, rather than the judicial, forum.\(^{141}\)

Legislative power to regulate land use should not be unlimited. Regulations that apply generally and classify in terms of activity, function, relationship, or causative elements should be distinguished from those that concern specific parcels of land. Controls that define and protect the public interest by circumscribing classes of activity without specific spatial reference clearly are legislative measures. Situs-oriented regulations, however, are primarily ad hoc determinations\(^{142}\) of the state's concern about land use on a parcel-by-parcel basis; they are quasi-adjudicative and therefore subject to certain standards of procedural due process.\(^{143}\)

Another limitation that will remain is the established rule that state enabling legislation should not be construed to authorize patently unreasonable local land use regulation.\(^{144}\) This rule, which is not a limitation of state power to delegate legislative authority but rather is a rule of statutory construction, can curb ultra vires attempts by localities to regulate land use. Equal protection prohibitions against racial discrimination\(^{145}\) likewise should continue to apply. Moreover, abandonment of the "invasion" theory of taking, under which governmental occupancy of private land is compensable,\(^{146}\) is not advocated.

The fourteenth amendment, properly construed, places no natu-

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\(^{141}\) The needed acknowledgment could be express or could be made indirectly by adoption of legal rules that permit a broader range of legislative activity. Such rules, for example, could be based upon a recent suggestion that land use regulation should be upheld where the affected land has spillover effects, burdening either the public or other property owners. See *Private Property*, supra note 4, at 161-72. This approach seemingly suggests an expanded notion of police power while retaining some natural law restraints.

\(^{142}\) See 1 E. YOKELEY, ZONING LAW AND PRACTICE § 8-2 (1965).

\(^{143}\) "[T]he adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process." South Gwinnett Venture v. Pruitt, 482 F.2d 389, 391 (5th Cir. 1973) (case remanded because evidence outside the record was used and no reasons were assigned for the decision); cf. Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402 (D.C. Cir. 1973) (zoning commission required to indicate reasons for decision). But see Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973) (zoning judgments are legislative in character); Gerstenfeld v. Jett, 374 F.2d 333 (D.C. Cir. 1967) (zoning commission may consider evidence outside the record).


\(^{145}\) Buchanan v. Warley, 245 U.S. 60 (1917).

\(^{146}\) For discussions of this and related theories, see authorities cited in note 20 supra.
nal law constraints upon the exercise of state and local power to regulate land use in the public interest. Accordingly, categorization of land that rationally promotes a legitimate state objective is a permissible means of regulating human conduct. Property interests in land, themselves legitimately subject to redefinition by the state, are affected only consequentially by such regulation; the extent to which those interests confer protected economic expectancies upon their owners also is a legislative, not a judicial, determination. Pur-gation of natural law from the fourteenth amendment and recognition of the state's inherent power to define "property" are prerequisites to the proper accommodation of limited land resources to the changing needs of society.