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John E. Donaldson  
*William & Mary Law School*

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## ARTICLES

### REGULATION OF CONDUCT IN RELATION TO LAND— THE NEED TO PURGE NATURAL LAW CONSTRAINTS FROM THE FOURTEENTH AMENDMENT

JOHN E. DONALDSON\*

*[W]e are coming to realize that our land is finite . . . [W]e 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.<sup>1</sup>*

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.<sup>2</sup> 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.<sup>3</sup> It is more than an object of ownership and an

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\* B.A., University of Richmond; J.D., The College of William and Mary; LL.M., Georgetown University. Professor of Law, The College of William and Mary.

1. COUNCIL ON ENVIRONMENTAL QUALITY, FIRST ANNUAL REPORT XII-XIII (1970).

2. See SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE POLICY & PLANNING ASSISTANCE ACT, S. REP. NO. 197, 93d Cong., 1st Sess. 44-46 (1973) [hereinafter cited as S. REP. NO. 197].

The subject of land use regulation should be viewed as a division of the field of public law, not as a branch of the field of property law. See Hagman, *The Teaching of Land-Use Controls and Planning Law in American Law Schools*, 1974 LAND-USE CONTROLS ANNUAL 61. Activity, not property or land, is the true subject of land use regulatory measures. Fundamentally, land use regulation defines conduct to be proscribed or controlled and prohibits or limits such conduct by spatial reference. It proceeds from the notion that public authority can prohibit specified activities if undertaken in designated locations. The objective of this Article is not to discuss privately held rights or expectations associated with property that can be asserted against the public, but to ask what activities in relation to land use may be proscribed by the public.

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 inter-related and interdependent social, economic, and ecological systems in which man lives.<sup>4</sup>

Intensified public concern that land be used properly has led to a "quiet revolution in land use control."<sup>5</sup> This revolution has been reflected in the adoption of state-wide land use regulatory systems,<sup>6</sup> establishment of regional compacts to preserve natural resources and protect areas of critical environmental significance,<sup>7</sup> regulation of wetlands development,<sup>8</sup> creation of a federal agency to monitor and allocate national energy resources,<sup>9</sup> establishment of mechanisms to ration dwindling water resources,<sup>10</sup> and adoption of numerous federal measures to control pollution and protect the environment.<sup>11</sup> In addition, traditional land use control devices are being modified. Euclidian zoning is yielding to "incentive zoning,"<sup>12</sup>

*of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974).

4. See generally F. CHAPIN, *URBAN LAND USE PLANNING* 7-68 (2d ed. 1965); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971) [hereinafter cited as *Private Property*].

5. REVOLUTION, *supra* note 3, at 1.

6. Hawaii, Maine, and Vermont represent the more comprehensive approach. See 13 HAWAII REV. STAT. §§ 205-1 to -8 (1968); ME. REV. STAT. ANN. tit. 38, §§ 481-88 (Supp. 1973); VT. STAT. ANN. tit. 10, §§ 6001-89 (Supp. 1974). For an analysis of these statutes, see REVOLUTION, *supra* note 3.

7. The Tahoe Regional Planning Compact, 83 Stat. 360 (1969), provides for planning and regulation of development in the Lake Tahoe area by the Tahoe Regional Planning Agency, a board representing the states of California and Nevada, and the affected localities.

8. For an analysis of the Coastal Zone Management Act of 1972, 86 Stat. 1280, and a survey of state wetlands and coastal area regulation systems, see J. Ludwigson, *Coastal Zone Management, A Whole New Ball Game* (ENV. REP. Monograph No. 18, March 8, 1974).

9. Federal Energy Administration Act of 1974, 15 U.S.C.A. §§ 761-86 (Supp. 1975).

10. See, e.g., Groundwater Act of 1973, VA. CODE ANN. §§ 62.1-44.83 to -107 (Supp. 1974).

11. See, e.g., Federal Water Pollution Control Act Amendments of 1972, 16 U.S.C.A. §§ 1251-1376 (Supp. 1975); Clean Air Amendments of 1970, 42 U.S.C.A. §§ 1857-58(a) (Supp. 1975), amending 42 U.S.C.A. §§ 1857-58(a) (1969); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

Congressional consideration also has been given to a measure designed to encourage broader state involvement in land use regulation, including identification and conservation of prime agricultural lands threatened by urbanization. See Land Use Policy and Planning Assistance Act, S. 268, 93d Cong., 1st Sess. (1973) (passed by Senate in 1973, but companion measure defeated in House of Representatives in 1974, Trevaskis, *National Land Use Policy*, 9 REAL PROP., PROB. & TR. J. 639, 639 (1974)).

12. Incentive zoning, also known as bonus zoning, "undertakes to add an affirmative thrust to . . . land use regulations by encouraging the establishment of uses regarded as desirable, or by inducing the addition of desirable features when new construction is carried out. It is a carrot-and-stick technique which employs administrative concessions to induce needed

"timed growth zoning,"<sup>13</sup> "conditional zoning,"<sup>14</sup> "performance standard zoning,"<sup>15</sup> and "floating zoning."<sup>16</sup> Subdivision ordinances often preserve open space by requiring land dedication exactions, or fees in lieu thereof, as a condition to development approval.<sup>17</sup> "Transferable development rights" have been recommended as a technique to limit density and preserve open space.<sup>18</sup> Efforts to revise standard state enabling legislation for local land use control are currently in progress.<sup>19</sup> Simultaneously, considerable scholarly at-

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construction or desired features thereof." R. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* § 8.16 (1973).

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.

15. See *International Harvester Co. v. Zoning Bd. of Appeals*, 43 Ill. App. 2d 440, 193 N.E.2d 856 (1963) (upholding performance standard zoning regulations in manufacturing district); N. WILLIAMS, *THE STRUCTURE OF URBAN ZONING* 218, 222-23 (1966).

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. YORLEY, *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 768, 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).

17. See generally Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967); Note, *Subdivision Exactions in California: Expansion of Municipal Power*, 23 HASTINGS L.J. 403 (1972). See also Annot., 43 A.L.R.3d 862 (1972).

18. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

19. See, e.g., MODEL LAND DEVELOPMENT CODE (Tent. Draft Nos. 1-5, 1968-1973). The latest

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.<sup>20</sup>

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."<sup>21</sup> 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."<sup>22</sup> Although "[t]here is no set formula to determine where regulation ends and taking begins,"<sup>23</sup> 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.<sup>24</sup> 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.

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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*.

20. See, e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); Dunham, *Griggs v. Allegheny County in Perspective*, 1962 S. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); *Private Property*, *supra* note 4; Sax, *Takings and Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as *Police Power*]; Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

21. U.S. CONST. amend. XIV.

22. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

23. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

24. *Private Property*, *supra* note 4, at 150.

## 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.*<sup>25</sup>

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*,<sup>26</sup> 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.<sup>27</sup>

Reasoning that, without limitations on the police power of the states, the due process clause would be nullified, the Court invalidated the regulation.<sup>28</sup> 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.<sup>29</sup> 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."<sup>30</sup> This rationale provided protection under the fourteenth amendment for the expectation of profitable use of land.<sup>31</sup>

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25. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

26. 260 U.S. 393 (1922).

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.*,<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> Shortly thereafter, in the third 1920's case, *Nectow v. City of Cambridge*,<sup>35</sup> 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.<sup>36</sup>

Having thus vitiated the force of earlier decisions sustaining state power to regulate the use and enjoyment of land,<sup>37</sup> the Court, apparently believing its delphic pronouncements sufficient, remained silent for more than 30 years.<sup>38</sup> During those years the Court continued to invalidate both state and federal social and economic legislation that lacked the requirements of "substantive due process."<sup>39</sup> But once validated by *Euclid* and reinforced by the publication of the Standard State Zoning Enabling Act<sup>40</sup> and the Standard City Planning Enabling Act,<sup>41</sup> 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 (1928).

36. *Id.* at 187-88.

37. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (requiring cessation of brick manufacturing); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (closing livery stables in urban areas); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (limiting operation of fertilizer plant).

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).

40. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1928). See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 80 (1971).

41. U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928). See D. HAGMAN, *supra* note 40, at 48.

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.<sup>42</sup>

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.<sup>43</sup> Admonished to resolve doubt in the legislature's favor when reasonableness was "fairly debatable,"<sup>44</sup> 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.<sup>45</sup>

Generally, these decisions have been exercises in circuitous reasoning.<sup>46</sup> 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,<sup>47</sup> 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

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42. See 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 2.07-10 (1968).

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).

44. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 368 (1926).

45. See generally 1 R. ANDERSON, *supra* note 42, §§ 2.19-30.

46. See Van Alstyne, *supra* note 20, at 2.

47. For a persuasive justification of this notion of property, see Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Powell, *The Relationship Between Property Rights and Civil Rights*, 15 HASTINGS L.J. 135 (1963).



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.<sup>48</sup>

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."

### NATURAL LAW WEDDED TO THE FOURTEENTH AMENDMENT

*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 bretheren. . . . The fact, then, that reasonable men approve of specific legislation does not prevent it from being a violation of "due process of law."*<sup>49</sup>

The judicial vocabulary regarding limitations on the power to

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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., *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.

49. Cohen, *Transcendental Nonsense*, 35 COLUM. L. REV. 809, 819 (1935).

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";<sup>50</sup> 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"<sup>51</sup> 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;<sup>52</sup> 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.<sup>53</sup>

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,"<sup>54</sup> 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."<sup>55</sup>

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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.

54. *Block v. Hirsh*, 256 U.S. 135, 155 (1921).

55. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

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."<sup>56</sup> 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.<sup>57</sup>

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."<sup>58</sup> 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."<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup> The

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56. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

57. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

58. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

59. *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911).

60. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

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,"<sup>62</sup> 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."<sup>63</sup> 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.<sup>64</sup> To Chancellor Kent he attributed the origination of the notion that "police power" is a term having operative significance.<sup>65</sup> 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."<sup>66</sup> 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.<sup>67</sup>

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62. *Id.* at 95.

63. *Id.*

64. C. HAINES, *supra* note 51.

65. *Id.* at 92-93. Haines refers to 2 J. KENT, COMMENTARIES 340 (13th ed. 1884) in support of his conclusion.

66. C. HAINES, *supra* note 51, at 95.

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." *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.*,<sup>68</sup> finding a "clear principle of natural equity"<sup>69</sup> 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."<sup>70</sup> 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."<sup>71</sup>

Natural law and the fourteenth amendment were wedded in a series of cases decided in the last fifteen years of the nineteenth century,<sup>72</sup> and the marriage lasted until 1937.<sup>73</sup> Although legislative process in other countries, reflecting the popular will expressed through duly constituted bodies, is always "due,"<sup>74</sup> until 1937 legislative process in this country was "due" only when judges were satisfied that it was reasonable.<sup>75</sup>

*Property—A "theme especially apposite for amplificative philosophic disquisition"*<sup>76</sup>

Prior to 1885, when the fourteenth amendment was regarded essentially as a procedural limitation,<sup>77</sup> 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.

70. *Davidson v. New Orleans*, 96 U.S. 97 (1877); *United States v. Cruickshank*, 92 U.S. 542 (1875); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872). See also C. HAINES, *supra* note 51, at 145-49.

71. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

72. See C. HAINES, *supra* note 51, at 149-65.

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.

76. *Gleason v. Thaw*, 236 U.S. 558, 560 (1915).

77. See C. HAINES, *supra* note 51, at 143-49, 154-65.

the meaning of the term "property" as used in that amendment in relation to permissible legislation. After 1885 it also was unnecessary 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, protected. Thus, the right to employment,<sup>78</sup> to contract,<sup>79</sup> and to liberty in the conduct of business<sup>80</sup> became "property," but a precise definition of the term was not articulated.

Understandably, a court, finding the legal term "property" imprecise 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."<sup>81</sup> Common law traditions have never recognized a property right of private land use assertable against a state.<sup>82</sup> It is, of course, possible for legal interests and expectations to be created that cannot be altered by subsequent state action,<sup>83</sup> 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 conflicts between private persons over the right to possess, enjoy, and use land.<sup>84</sup> These concepts of property thus should be meaningful only to resolve private disputes; they should not suggest any delimitation of public power to regulate the use and enjoyment of land. In fact, under the common law, all rights in property are subordinate 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.<sup>85</sup> Notwithstanding these traditional precepts, the Supreme

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78. *Lochner v. New York*, 198 U.S. 45 (1905).

79. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

80. *Adair v. United States*, 208 U.S. 161 (1908).

81. *Gleason v. Thaw*, 236 U.S. 558, 560 (1915).

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 FIRST BOOK OF ENGLISH LAW* 104-08 (6th ed. 1970).

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<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> Some of

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tation of the assertion that the desire to use land is not a right that can be asserted against the state, see F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 20, at 51-88.

86. See notes 26-36 *supra* & accompanying text.

87. Property rights clearly are creatures of the state and derive their content, utility, and role from that source. Property rights are not protected by the courts; rather, what the courts protect constitutes property rights. See Powell, *supra* note 47, at 145. As Justice Jackson once stated: "[O]nly those economic advantages are 'rights' which have the law back of them. . . . We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered." *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945).

The Supreme Court acknowledged early that the fourteenth amendment created no new rights, but only guaranteed that existing rights be equally secure to all. *Ex parte Virginia*, 100 U.S. 339 (1879). There is no clear indication that the proponents of the fourteenth amendment intended to create new classes of liberties and rights in property; rather, the emphasis was on equality of rights. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (fourteenth amendment did not create a right to education). It therefore is not clear how the right to use land, when asserted against a state declining to recognize that right, gained its legal status. Possibly, state law could provide some insight into the question whether such a right exists in a given situation; but it then may be unclear whether the relevant state law is that presently in force, or that in effect at the time of the fourteenth amendment's adoption. Reliance on state law also would raise questions about the state's ability to redefine that law and questions regarding the extent to which natural law must be incorporated into the state's identification of property rights assertable against it. If natural law must be included in a state's definition of property and the resultant protected rights, still unanswered is the question whether natural law itself is a static concept or a dynamic principle that can change with the altered needs of society. Unanswered by the courts, these questions draw into doubt the notion of property as a source of rights deserving constitutional protection under the guise of substantive due process.

88. See notes 89-96 *infra* & accompanying text. See also *Yecko v. Township of Penn.*, 387 F.2d 126 (3d Cir. 1967) (zoning ordinance depriving land owner of use of land as automobile

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*,<sup>89</sup> 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."<sup>90</sup> In *Fox River Paper Co. v. Railroad Commission*,<sup>91</sup> 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.<sup>92</sup>

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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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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

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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.

95. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944).

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*,<sup>97</sup> in which Justice Stewart's concurring opinion expressed a viewpoint later approved in dictum by the Court.<sup>98</sup> *Hughes* involved the status of title to land rather than regulation of land use. A state constitutional provision<sup>99</sup> 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<sup>100</sup> 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.<sup>101</sup>

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*,<sup>102</sup> 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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97. 389 U.S. 290 (1967).

98. *Bonelli Cattle Co. v. Arizona*, 94 S. Ct. 517, 528-29 (1973).

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,<sup>103</sup> 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."<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup>

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103. *Id.* at 577.

104. *Id.*

105. Michelman, *supra* note 20, at 1211-13.

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: "[T]he first tenet of an adequate philosophy must be that property is the creature and dependent of law . . . ." Philbrick, *supra* note 47, at 729.

107. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926): "Until recent

## 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*,<sup>108</sup> 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.<sup>109</sup> He urged that the amendment be viewed as essentially a civil rights measure to make the Bill of Rights applicable to the states.<sup>110</sup> Eight years

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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).

108. 300 U.S. 379 (1937). See 2 Mo. L. Rev. 365 (1937).

109. *Adamson v. California*, 332 U.S. 46, 68 (1947).

110. *Id.*

later, in *Williamson v. Lee Optical, Inc.*,<sup>111</sup> 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."<sup>112</sup> *Williamson* did not end natural law analysis by the Court, however. Seven years later, in *Goldblatt v. Town of Hempstead*,<sup>113</sup> the Court lapsed into a discussion of reasonableness, quoting *Pennsylvania Coal Co. v. Mahon*<sup>114</sup> with approval.

Perhaps aware of the contradiction between *Williamson* and *Goldblatt*, the Court clarified its position the following year. *Ferguson v. Skrupa*<sup>115</sup> 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.'<sup>116</sup>

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111. 348 U.S. 483 (1955).

112. *Id.* at 488, quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

113. 369 U.S. 590 (1962) (prohibition of excavation at a particular location upheld).

114. 260 U.S. 393 (1922). See notes 26-31 *supra* & accompanying text.

115. 372 U.S. 726 (1963).

116. *Id.* at 729-32, citing *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955).

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<sup>117</sup> "for want of a substantial federal question"<sup>118</sup> 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.<sup>119</sup> Moreover, *Ferguson*, although not a land use case, also manifested a resolve by the Court to avoid interference with the legislative domain.<sup>120</sup>

One recent land use opinion of the Court, however, does exhibit natural law overtones. In *Village of Belle Torre v. Borass*,<sup>121</sup> the

pregnancy); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (possessory property interests); *Levy v. Louisiana*, 391 U.S. 68 (1968) (invalidating provisions of death-by-wrongful-act legislation discriminatory against bastards); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives).

117. *Markham Advertising Co. v. Washington*, 393 U.S. 316 (1969); *Desert Outdoor Advertising, Inc. v. County of San Bernardino*, 393 U.S. 8 (1968); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 371 U.S. 36 (1962).

118. Denial of an appeal for this reason is regarded as a disposition on the merits. See *Moss v. Hornig*, 214 F. Supp. 324, 329 n.2 (D. Conn. 1962), *aff'd*, 314 F.2d 89 (1963); R. STERN & E. GROSSMAN, *SUPREME COURT PRACTICE* § 4.28 (4th ed. 1969).

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, —, 370 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).

In both *Markham Advertising* and *Desert Outdoor Advertising* state courts upheld regulations requiring the removal of signs within specified periods, without compensation for the residual value of the signs. 73 Wash. 2d 405, —, 439 P.2d 248, 261 (1968); 255 Cal. App. 2d 765, —, 63 Cal. Rptr. 543, 545 (Dist. Ct. App. 1968). Significantly, the test used in *Mahon* to invalidate Pennsylvania's land subsidence statute was not applied directly to ownership of "the land," but rather to ownership of a particular incident, mineral rights; when that particular incident was "taken," due process was deemed violated. Nevertheless, the Supreme Court dismissed each appeal for "want of a substantial federal question," although undoubtedly the signs were "taken." 393 U.S. at 316; 393 U.S. at 8.

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.<sup>122</sup>

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;<sup>123</sup> consequently, no compelling state interest need be shown to justify a legislative classification that compromises such expectations.<sup>124</sup> 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.<sup>125</sup>

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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*.

123. *Village of Belle Torre v. Borass*, 94 S. Ct. 1536 (1974).

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-

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*[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—a label which describes the full range of legitimate public interests.<sup>126</sup>*

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.<sup>127</sup> One decision was based on the view that the nonconforming use was not a vested right;<sup>128</sup> 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."<sup>129</sup> 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."<sup>130</sup> 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

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cised under state constitutions. Thus substantive due process, although generally abandoned by federal courts in constitutional adjudication, persists in several states, where natural law still flourishes. See note 43 *supra*. A proper measure, therefore, of the applied meaning of Supreme Court guidelines for constitutional adjudication in the land use regulation area is not the response of state courts, but rather that of lower federal courts. See, e.g., *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950). See also *Steel Hill Dev. Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972); *City of St. Paul v. Chicago, S.P.M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *Diedrich v. Zoning Comm'n*, 393 F.2d 666 (D.C. Cir. 1968); *Central Bank & Trust Co. v. City of Miami Beach*, 392 F.2d 549 (5th Cir. 1968).

126. *Stone v. City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971).

127. *Yecko v. Township of Penn*, 387 F.2d 126 (3d Cir. 1967); *Grams v. City of Cudahy*, 226 F. Supp. 385 (E.D. Wis. 1964).

128. *Yecko v. Township of Penn*, 387 F.2d 126, 127 (3d Cir. 1967). See also *Standard Oil Co. v. City of Tallahassee*, 183 F.2d 410 (5th Cir. 1950).

129. *Grams v. City of Cudahy*, 226 F. Supp. 385, 386 (E.D. Wis. 1964) (upholding requirement that pre-existing salvage yard be enclosed).

130. *Sinclair Ref. Co. v. City of Chicago*, 178 F.2d 214, 217 (7th Cir. 1949). See also *Stone v. City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971).



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*,<sup>131</sup> in which denial of a rezoning application was sustained notwithstanding the resulting frustration of economic expectations. Following *Ferguson*,<sup>132</sup> 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,"<sup>133</sup> 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 . . . ."<sup>134</sup>

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.<sup>135</sup> 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.<sup>136</sup> 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

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131. 446 F.2d 83 (5th Cir. 1971).

132. See notes 115-16 *supra* & accompanying text.

133. 446 F.2d at 86.

134. *Id.* at 87.

135. *Robertson v. City of Salem*, 191 F. Supp. 604 (D. Ore. 1961).

136. *South Gwinnett Venture v. Pruitt*, 482 F.2d 389 (5th Cir. 1973). See Comment, *Due Process—The Adjudicative Decision Inherent in Tract Rezoning Requires the Decision-Maker to Adhere to Standards of Minimal Due Process*, 8 GA. L. REV. 254 (1973).

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.<sup>137</sup> If substantive due process or natural law is the chasm that protects economic expectations<sup>138</sup> 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<sup>139</sup> 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;<sup>140</sup> it must only acknowledge further that, in an increas-

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137. Cf. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 20, at 327.

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).

139. *Village of Belle Torre v. Borass*, 94 S. Ct. 1536 (1974). See note 122 *supra* & accompanying text.

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.<sup>141</sup>

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<sup>142</sup> 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.<sup>143</sup>

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.<sup>144</sup> 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<sup>145</sup> likewise should continue to apply. Moreover, abandonment of the "invasion" theory of taking, under which governmental occupancy of private land is compensable,<sup>146</sup> 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).

144. See Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1605 (1965). See also H. PHILLIPS, *A FIRST BOOK OF ENGLISH LAW* 108 (6th ed. 1970).

145. *Buchanan v. Warley*, 245 U.S. 60 (1917).

146. For discussions of this and related theories, see authorities cited in note 20 *supra*.

ral 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. Purgation 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.