

TAKINGS AND THE PROBLEM OF VALUE: GRAPPLING WITH TRUTH IN LAND-RESTRICTION CASES

*Laura S. Underkuffler**

TABLE OF CONTENTS

Introduction.....	465
I. Land Valuation: Complexities and Takings Implications.....	466
Conclusion.....	476

INTRODUCTION

In their contribution to this symposium entitled *Environmental Land Use Restrictions and Property Values*,¹ Jeffrey Michael and Raymond Palmquist challenge the conventional factual and legal assumption that environmental restrictions—such as growth-management laws, minimum lot sizes and density restrictions, open-space zoning, and others—reduce the value of land.² They argue that regulations of this type typically have a mix of positive and negative impacts on property values, with the result that conventional assumptions often overstate the actual adverse effects (if any) on the value of restricted land.³

The Michael-Palmquist study adds to a burgeoning literature that uses actual empirical data to undermine the reflexive assumption by politicians and landowners that regulatory restrictions on development can be assumed to negatively affect land values. Studies by Andrew Plantinga and William Jaeger, Patrick Beaton and Marcus Pollock, Fiorenza Spalatro and Bill Provencher, David Henneberry and Richard Barrows, Kathryn Anderson and David Weinholt, and others have established, through the collection and analysis of empirical data, that development restrictions have complex

* J. DuPratt White Professor of Law, Cornell University Law School.

1. Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 VT. J. ENVTL. L. (forthcoming Spring 2010) (manuscript at 1, on file with author).

2. *Id.*

3. *Id.* at 28.

effects on land values that are often difficult to predict.⁴ In particular, several studies have documented an increase in land values after development restrictions have been imposed.⁵

In this essay, I will discuss how the Michael-Palmquist study and others with similar findings might impact cases brought under the federal Takings Clause.⁶ If these studies are correct—and land valuation in an environmental-restriction setting is, in fact, a complex enterprise—then there should be acknowledgment of this truth in federal takings law. I will argue that such studies raise important questions about existing approaches to takings law as well as other assumptions regarding societal guarantees of land's value.

I. LAND VALUATION: COMPLEXITIES AND TAKINGS IMPLICATIONS

Let us begin with what I believe to be the critical findings of the Michael-Palmquist study, in somewhat simplified form. From the point of view of takings doctrine, the following findings of this study are particularly salient:

4. Andrew Plantinga & William Jaeger, Oregon State Univ., Extension Serv. Special Report No. 1077, *How Have Land Use Regulations Affected Property Values in Oregon?* (2007), available at <http://extension.oregonstate.edu/catalog/pdf/sr/sr1077.pdf> (analyzing the negative effects of development restriction on the property value of vacant lots); W. Patrick Beaton & Marcus Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay*, 68 LAND ECON. 434, 434 (1992) (evaluating the effects of Maryland's Critical Area Law on landowners' equity-preserving options and opportunities for future development); W. Patrick Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 LAND ECON. 172, 172 (1991) (discussing the impact of statewide or regional growth-management plans on state economic policies); Fiorenza Spalatro & Bill Provencher, *An Analysis of Minimum Frontage Zoning to Preserve Lakefront Amenities*, 77 LAND ECON. 469, 469 (2001) (discussing the impact of municipal minimum frontage zoning on frontage prices); David M. Henneberry & Richard L. Barrows, *Land Capitalization of Exclusive Agricultural Zoning into Farmland Prices*, 66 LAND ECON. 249, 249 (1990) (describing the positive and negative price effects "distributed differentially among farmland parcels depending on parcel characteristics"); Kathryn Anderson & David Weinhold, Dep't of Agric. and Applied Econ. Staff Paper Series No. 484, Univ. of Wisconsin-Madison, *Do Conservation Easements Reduce Land Prices? The Case of South Central Wisconsin*, 17-18 (2005) (describing the complex effects of conservation easements on market land prices). For an excellent presentation of the Plantinga & Jaeger findings, and a summary and analysis of other empirical studies, see JOHN D. ECHEVERRIA & FORD RUNGE, GEORGETOWN ENVTL. L. & POL'Y INST., EXPOSING THE FALSE PREMISE OF REGULATIONS' HARM TO LANDOWNERS 23 (2007), available at <http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf>.

5. See, e.g., ECHEVERRIA & RUNGE, *supra* note 4, at 23-26 (reviewing and summarizing prior studies of how government action affects property value).

6. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

(1) [E]quilibrium prices for land are the product of a number of complex factors, including the different alternative uses for . . . land, the mobility of residents, the complexity of the primary commodity associated with land (housing), and possible effects that are external to . . . markets.⁷

(2) Each of these factors is dynamic. Although one might look at a snapshot picture of these elements at a given moment in time, each changes continually due to changing intrinsic and extrinsic conditions.⁸

(3) Public policies—including land-use regulations—are important factors in this mix. Because of the interaction of all of these factors, land-use regulations—including significant land-use restrictions—affect land values in often unpredictable ways. They might (as conventionally predicted) decrease values in some cases, but they might increase land values in others. These disparate effects have been demonstrated in many studies, both theoretically and empirically.⁹

The following example illustrates the operation of these principles. Consider, for instance, a parcel of land whose development is restricted to low-density use through conservation zoning. In an immediate sense, this parcel's value has been sacrificed for the greater good, or for the benefit of neighbors. In other words, the sacrificed value generates positive or environmental-amenities effects for neighboring parcels, which increase in value. This occurs, however, at a cost to the restricted parcel itself.

What the Michael-Palmquist study shows is that this idea of an assumed, simple loss for the restricted property is often inaccurate. In fact, the value of the restricted property often increases from the positive effects of the regulatory scheme, such as the preservation of open and beautiful landscapes, decreased traffic congestion, lack of pollution, and the luring of upscale development. This increase in value can be rooted in the restricted land's own evolving characteristics and (as is often the case) in the evolving characteristics of the surrounding land.¹⁰

What do these essential findings mean for federal takings law?

7. Michael & Palmquist, *supra* note 1, at 12.

8. *Id.* at 7.

9. *Id.* at 10–12.

10. *Id.* at 17.

To begin, we need some understanding of current federal takings doctrine. Although it is notoriously difficult to sketch a coherent approach to the Supreme Court's takings cases, the following guidelines apply:

(1) First, the challenged government action must be substantively permissible—that is, in the words of the Takings Clause, for permissible “public use.”¹¹ This has traditionally been a narrow inquiry, with judicial acceptance of any plausible public good.¹²

(2) Next, the court must determine whether the impairment of the claimant's property is of such magnitude or type that it constitutes a compensable case of some kind. A compensable case is assumed to exist when the government “takes [physical] possession of . . . [the] property”¹³ or when the government “deprives an owner of ‘all economically beneficial uses’ of his [property].”¹⁴ Otherwise, a claimant has a compensable case only if he can establish that the government went “too far” in the regulation of the claimant's property (considering the degree of impairment of the claimant's interest, the importance of the government's interest, and whether it is fair—under the circumstances—for the claimant or the public to bear the burden).¹⁵ If the claimant has stated a compensable case in this sense, then:

(3) The amount of due compensation is calculated and paid.¹⁶

11. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

12. *See, e.g., Kelo*, 545 U.S. at 480 (stating that the natural interpretation of “public use” is “public purpose”).

13. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (finding that a taking occurs when the character of the government's action is a permanent physical occupation of property).

14. *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

15. *See Tahoe-Sierra*, 535 U.S. at 333–36 (outlining legal theories potentially applicable to takings analyses); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001) (plurality opinion) (noting that “while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking”); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (identifying the “economic impact on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations” as relevant considerations in takings analyses).

16. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992).

Under these guidelines, there are two analytical junctures where the valuation of the claimant's loss, and thus the Michael-Palmquist findings, are critical. These occur in step (2), when determining the existence of a compensable case, and in step (3), when calculating compensation.

What the Michael-Palmquist study tells us—at a minimum—is that the calculation of these values is a very uncertain enterprise in environmental-regulation cases.

The traditional method for land valuation is the appraisal approach, which begins with the recent sale of “comparable” land, and then adjusts this value for differences in character between the comparable and appraised properties. Ideally, the appraiser will find another parcel of a very similar type and known value, and—after adjustments for particular characteristics—will estimate from this the value of the appraised property. This process sounds relatively straightforward. However, as the Michael-Palmquist study illuminates, use of this method in cases of significant regulatory change can be highly problematic.

In this setting, there will rarely be anything resembling a true comparable for the appraisal calculation. A true comparable would have a known market valuation (through recent sale), very similar physical and other characteristics, and identical zoning restrictions. Because of the highly subjective and location-specific nature of amenities effects—including visual amenities, recreational opportunities, wildlife enjoyment, and psychological satisfaction from land preservation efforts¹⁷—the finding of a *comparable* piece of land for any newly restricted parcel will be difficult. In addition (and perhaps more fundamentally), value enhancement from amenities effects is often fully apparent only as the new character of the restricted area emerges.¹⁸ Amenities effects, as the Michael-Palmquist study points out, often involve fewer immediate value gains than longer-term, evolving positive effects on value.¹⁹ For this reason, the most useful empirical studies of preservationist change involve land-value assessments tracked for several years after restrictions are imposed.²⁰ In short, the complex and evolving nature of the elements involved in land-restriction cases strongly warn of the hazards of “snapshot” appraisals in this context.

It would therefore seem, at the very least, that takings cases should acknowledge the complexities and amenities effects of environmental land-

17. Michael & Palmquist, *supra* note 1, at 3.

18. *Id.* at 12.

19. *Id.* at 10 (discussing theoretical studies); *see id.* 12–13 (discussing empirical studies).

20. *Id.* at 17 (discussing Garrit J. Knapp, *The Price Effects of Urban Growth Boundaries in Metropolitan Portland, Oregon*, 61 *LAND ECON.* 26, 26 (1985)); Plantinga & Jaeger, *supra* note 4, at 31.

use restrictions. This should be true whether the valuation of the landowner's loss is part of the threshold determination of whether a compensable case exists, or as a part of the later remedy calculation. For instance, with the amenities effects of land-use restrictions now a known economic factor, one would expect to see the value of these positive effects—just like the value of negative effects—occupying a prominent place in assessments of valuation, loss, and remedy in typical cases.

In fact, this has not happened. Courts rarely mention amenities effects or related complexities in discussions of land valuation in the typical environmental-restriction case. If these factors exist, one would not know it from these opinions. Rather, questions of valuation, loss, and remedy are typically handled through a two-part—and contradictory—strategy. On the one hand, property owners are assured (rhetorically, at least) that courts agree that development restrictions cause economic loss, with any benefits from those restrictions (presumably) viewed as a collateral and irrelevant matter. On the other hand, courts use doctrinal dodges to avoid the simultaneous practical impossibilities of implementing this view, making the recovery of compensation very difficult to achieve.²¹

A number of recent United States Supreme Court decisions illustrate the initial thrust of this strategy. In case after case, the Court has ostensibly assumed that environmental restrictions cause economic loss and has ignored the issue of the complaining landowner's benefit from the challenged regulations. In *Dolan v. City of Tigard*, for instance, the Court engaged in a lengthy discussion of the development-thwarting and value-costing character of green-space preservation, impervious-surface restrictions, and pollution-avoidance regulations, while never mentioning their benefits.²² In *Palazzolo v. Rhode Island*, involving a challenge to a typical state wetlands-preservation law, the Court framed the question as whether “[t]he right to improve [private] property” was “unreasonab[ly] and onerous[ly]” burdened—with no mention of environmental benefits.²³ Only in the recent case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* was there any explicit acknowledgment of environmental benefits as any part of the takings calculation.²⁴

21. See LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 47 (2003) [hereinafter UNDERKUFFLER, *IDEA OF PROPERTY*].

22. *Dolan v. City of Tigard*, 512 U.S. 374, 387–93 (1994).

23. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (plurality opinion).

24. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324–25 (stating that while landowners may lose value as the result of development restrictions, that fact is not dispositive of the takings question; rather, that loss must be evaluated in the context of the public program in which it occurs, and the program's broader burdens and benefits).

In contrast, the Court has at the same time erected doctrinal barriers that work to preclude the claimant's recovery in the vast run of environmental-restriction cases. As noted in the sketch of takings law above, courts assume a compensable case exists when there is a complete or nearly complete loss of economic value,²⁵ or when the land is permanently, physically invaded by government.²⁶ Otherwise, the court must use the *Penn Central* "too far" test, which considers the amount of the claimant's loss, the purpose of the regulation, and other factors that bear upon the question.²⁷

In the case of environmental restrictions imposed upon land, there is no permanent physical invasion by government. Nor is there generally a plausible claim that the restriction has destroyed all or nearly all of the land's economic value. Even if viewed in a purely detrimental light, growth-management laws, minimum-lot-size or density restrictions, agricultural and open-space zoning laws, and other environmental measures rarely render land worthless as an economic matter. Wetlands-preservation laws might arguably come the closest to this; but even then, the widely acknowledged role of wetlands in pollution control, the maintenance of flora and fauna, and other critical functions undermines the claim of their economic worthlessness.

This leaves us, in environmental-restriction cases, with the "too far" test—a test which the courts (with good reason) are notoriously reluctant to find satisfied.²⁸ Environmental regulations are generally enacted to vindicate strong interests held by neighbors or the general public. Whether development harms a pristine lake,²⁹ or the filling of wetlands threatens marine pollution,³⁰ or the creation of impervious surface causes water run-

25. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003 (1992) (finding that regulatory action is compensable "where regulation denies all economically beneficial or productive use of land"); *Palazzolo*, 533 U.S. at 631 (requiring compensation if the landowner is "left with [only] a token interest").

26. See, e.g., *Tahoe-Sierra*, 535 U.S. at 322 (stating that compensation is required when "government physically takes possession of an interest in property"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (holding that "a permanent physical occupation of property" is compensable, "without regard to whether the action achieves an important public benefit").

27. See, e.g., *Tahoe-Sierra*, 535 U.S. at 326–27 (endorsing the *Penn Central* ad hoc balancing approach as generally appropriate in regulatory takings cases); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (identifying factors relevant to takings analyses).

28. See cases cited *supra* notes 23–24.

29. See, e.g., *Tahoe-Sierra*, 535 U.S. at 302 (dealing with development restrictions to preserve Lake Tahoe).

30. See, e.g., *Palazzolo*, 533 U.S. at 606 (dealing with wetlands-preservation laws).

off problems on the land of others,³¹ controls of this sort are an attempt to acknowledge the inherently bilateral nature of property rights and the need for landowners to account for the actual negative externalities of their conduct.³² This reality, together with the financial implausibility of societal indemnification for the frustration of development interests that environmental laws entail, makes courts extremely and justifiably reluctant to find compensable takings in such cases.³³

In addition, even if the court finds a potentially compensable case, the claimant must surmount yet another doctrinal hurdle. According to the idea of average reciprocity of advantage³⁴—or, as it is sometimes called, “implied compensation”³⁵—a government scheme that might otherwise support a compensable claim will not do so if the complaining owner receives benefits from the restrictions that the scheme imposes upon others. Developed most prominently in the zoning context,³⁶ this doctrine is potentially applicable in any situation where restrictions are placed on the rights of many. The underlying theory, in takings terms, is that the government action has provided non-monetary compensation to the claimant.³⁷ Although compensation (in a monetary sense) has not been paid, this doctrinal twist asserts that the restraints the regulation has placed upon others are the equivalent and work to offset the claimant’s loss.³⁸ When environmental restrictions are rooted in the physical and ecological interdependence of land—when they restrict the many, for the benefit of many—the claim that landowners receive implied compensation for the operation of these laws is obvious.³⁹

31. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (dealing with restrictions on the paving of a flood-plain area).

32. See UNDERKUFFLER, *THE IDEA OF PROPERTY*, *supra* note 21, at 94–101.

33. The facts in *Palazzolo* illustrate the economic stakes. The claimant owned three parcels of salt marsh, which together encompassed about 20 acres. For this, he claimed damages in the amount of \$3,150,000, “a figure derived from an appraiser’s estimate as to the value of a 74-lot residential subdivision.” *Palazzolo*, 533 U.S. at 616.

34. See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (noting that “reciprocity of advantage” occurs when a complaining owner “benefit[s] greatly from the restrictions that are placed on others”) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

35. Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 133 (1990).

36. As a result of this doctrine, the general diminution in value of land through zoning short of the prohibition of *all* economically viable use is not a compensable taking. See, e.g., *Agins v. Tiburon*, 447 U.S. 255, 260–61 (1980); *Gorieb v. Fox*, 274 U.S. 603, 607 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 392 (1926).

37. See, e.g., *Keystone*, 480 U.S. at 491 n.21 (comparing “benefits received” from regulation of others to benefits received from taxation); *Agins*, 447 U.S. at 262 (noting that zoning schemes “benefit the [claimants] . . . as well as the public by serving the city’s interest in assuring careful and orderly development of residential property”).

38. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 21, at 47.

39. *Id.* at 100.

So, where do we end up? We could shrug, and argue that despite the problems with this body of doctrine, it still achieves the correct result. The simple idea of landowners' loss from environmental controls might be wrongly entrenched, and the true complexities involved in the valuation of environmentally restricted land might be wrongly ignored, but, in the end, the payment of compensation is rightly denied. The process is awkward, but the result is correct. Thus, there is no real complaint with this body of law.

However, this answer has a serious problem. Rhetoric matters. More precisely, judicial rhetoric matters. Popular preoccupation with constitutional guarantees—in particular, federal takings guarantees—gives judicial rhetoric a meaning and importance in this context that it might lack in others. For better or worse, we have seized upon the Takings Clause as the legal and political arena for struggles over the ideologies of individual prerogative and state power.⁴⁰ Property rights and their security trigger deeply emotional human aspirations and fears regarding control, hoarding, achievement, and survival. Rights in land, as the most psychologically elemental and (for most people) economically important of these rights, incite particular passion. When courts portray property rights in land as “establishing a sphere of private autonomy which government is bound to respect,”⁴¹ and the individual landowner as a project pursuer with a right to act who is wronged by government action, they encourage, entrench, and ultimately frustrate a popular view and deny the landowner any practical remedy. Indeed, the explicit failure of federal law to vindicate the mythology of sweeping and irrevocable rights in land has led to ill-fated efforts by popular initiative to do so.⁴²

40. *Id.* at 37–38.

41. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

42. *See, e.g.*, Measure 37, OR. REV. STAT. § 197.352 (2005), *repealed by* Measure 49, OR. REV. STAT. § 195.305 (2007).

Measure 37 claims . . . ranged from a desire to put a single additional house on a residential lot, to the building of large housing developments, to an open-pit mining operation. The new law pit[ted] neighbor against neighbor, as landowners who relied on zoning and other laws to create value for their property now . . . [found] those laws crumbling in the face of their neighbors' claims.

Laura S. Underkuffler, *Property As Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1251 (2007) (footnote omitted); *see also* William Yardley, *Anger Drives Property Rights Measures: Support Is Strong for Measures Limiting Governments' Power*, N.Y. TIMES, Oct. 8, 2006, at 34; Ben Arnoldy, *Topping 2006 Ballots: Eminent Domain. In November, 12 States Have Initiatives on the Ballot That Seek to Protect Private Property Against Seizure and Regulation*, CHRISTIAN SCI. MONITOR (Boston), Oct. 5, 2006, at 1, available at <http://www.csmonitor.com/2006/1005/p01s02-uspo.html>.

In sum, to avoid the entrenchment of false (and necessarily frustrated) expectations, courts must explicitly acknowledge the dependency of economic rights in land in the *context* of land, as a scarce, critical, and physical asset owned in collaboration with others. This means that both the contributions of others and the needs of others must be a part of the legal treatment of claimed rights in land. In particular, in the takings context, this requires recognition:

First, that the creation of economic value in land is the product of a complex mosaic of both private and public factors.

It is apparent, after only brief reflection, that the value of land is the product of both individual (private) and collective (public) investment and other actions. For instance, the value of a particular parcel of land is affected by private construction, preservation, or other activities regarding the target parcel or neighboring properties; the creation of public utilities, bricks-and-mortar projects, or other infrastructure; continually changing market conditions, such as changing tastes in the buying public and natural and historical factors; unplanned and uncontrolled shifts in population centers; and a myriad of other factors.

Furthermore, public regulation and public investment are often as important as private factors in this mix. In particular, they have a great deal to do with the value—particularly, the positive value—of much urban, suburban, and ex-urban land. Yet, when one considers American takings law, there is virtually no conceptual space for the acknowledgment or public recovery of publically created value. Apart from the idea of implicit compensation received by a takings claimant⁴³—an idea that has more to do with the claimant not having suffered a loss than with her receiving any cognizable government benefit—takings doctrine has no piece that accounts for public contributions to land's value.

Indeed, in even the clearest of cases—for instance, when the construction of a highway interchange triples the value of raw land—there is an assumption that the landowner simply recovers this value in a later takings action. Whether land doubles in value because of the construction of public infrastructure, or the heavy investment of revitalization tax dollars or other particular and disproportionate benefit, these investments by the public are invisible, as offsets of any kind, when it comes to the takings calculation. It is simply assumed, without any reason or explanation given, that such windfalls inure to the owner's benefit and are capitalized as a part

43. See *supra* text accompanying notes 34–39.

of land's value. Effectively, government action is assumed to count, for takings purposes, only when it impairs individual interests. Otherwise, it is simply part of an unmentioned one-way ratchet up, for the landowner's unquestioned and exclusive benefit.

Arguably, this omission is justified because of the difficulties involved in attaching a dollar value to the benefits to land conferred by public action. For instance, it is (perhaps) difficult to say what percentage of value is due to amenities effects, public revitalization dollars, or other government action. However, as the Michael-Palmquist study shows, all valuations of land are in fact complex.⁴⁴ Assessments of benefits conferred by government would be no different—if the motivation were there—than assessment of government detriments. Indeed, other legal regimes with similar takings frameworks include the value of government investments and subsidies in their takings calculations.⁴⁵

This leads us to the second reality that must be recognized:

That investments in land are investments, like any other; and that the public fisc can no more pretend to be a guarantor for economic return in this context than it can in any other.

In most areas of economic endeavor, Americans are realistic. We, as a society (and the courts, as a matter of legal doctrine) assume that investments in stocks, bonds, fertilizer plants, automobiles, or in any other of thousands of instruments or commodities are investments with risk, including the risk of potentially adverse government action. There is no assumed eruption of frustration, claims of betrayal, and the playing of the “politics of outrage”⁴⁶ if, for example, someone invests in automobile stock, which by reason of government policy falls in value; or if someone invests in the manufacture of a particular pesticide, which later (for environmental reasons) is banned; or if someone invests in a college-town bar, which is adversely affected when the drinking age is raised to twenty-one, eliminating patrons. There is no invocation of simplified notions of property ownership, with the image of government as “thief.”⁴⁷ There is an

44. Michael & Palmquist, *supra* note 1, at 12.

45. *See, e.g.*, S. AFR. CONST. 1996 ch. 2, § 25(3) (“The amount of the compensation [awarded] . . . must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including . . . the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property . . .”).

46. UNDERKUFFLER, *IDEA OF PROPERTY*, *supra* note 21, at 127–28.

47. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) (Scalia, J., concurring) (arguing that value accruing to the public through wetlands-preservation laws is “profit to the thief”).

acceptance in these investment contexts that values ebb and flow, and that although one might try to predict or hedge against such changes, they are an inherent part of the risks of profit-seeking enterprise.

Peculiarly, investments in land do not share the reality of this context. There seems to be a view, prevalent among many, that investments in land are different: protected, immune—indeed, guaranteed—against the changing needs of others and resultant loss. This, it seems, is believed to be true, whether the collective action is necessary or not. As Chief Justice Rehnquist (joined by Justices Scalia and Thomas) recently urged, such cases are properly viewed—and only properly viewed—“[f]rom the [complaining owner’s] . . . standpoint.”⁴⁸ And that standpoint does not include, as a purported legal matter, the risk of public change and loss.⁴⁹

The image of land solely as a capitalized (individual) asset, with takings law as its guarantor, is, of course, not a sustainable one. Land is an essential constituent of life, on which all human beings depend. The actions of landowners can advance or jeopardize the physical and psychological needs of others. There is, furthermore, no way that we, as a society, can or should pay for the preservation of millions of acres of farmlands, wetlands, watersheds, or other assets on which we all depend. As takings law in fact has recognized, the public fisc cannot—and should not—insure landowners against every collectively induced change or risk of loss. The truth is the truth. The sooner that legal images and legal rhetoric acknowledges this reality, the better.

CONCLUSION

The Michael-Palmquist study and others with similar findings challenge notions that occupy an illogical but prominent place in American law. They challenge the notion that environmental restrictions imposed on land invariably reduce land’s value. They challenge the idea that property in land is simple, stable, and easily assessed. They challenge, in essence, the isolation of private land, in a context apart from the efforts and needs of others.

These findings accord with what takings law, in its operation, has often implicitly acknowledged. Property rights in land cannot be the simple,

48. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 349 (2002) (Rehnquist, C.J., dissenting).

49. *See, e.g., id.* (arguing that the majority opinion ignores the “practical equivalence” between the respondent’s deprivation and the deprivation resulting from a leasehold, allowing the government to “take private property without paying for it”).

concrete entitlements that political and judicial rhetoric often makes them out to be. Takings law cannot insure landowners against the risks of environmental protection and related collective change. Land cannot be seen as something given and endowed, expressing the needs, wants, and wealth prerogatives of individual owners alone.

The question is how, and when, the images and rhetoric of law will acknowledge these realities. Until it does, the schism between legal fact and fantasy will continue to persist. We, as a society, will continue to encourage beliefs of entitlement that cannot be. We will continue to separate—as a rhetorical matter, at least—the truth about land from the images of law. By using the law to reinforce mythology—and then, to deny its remedies—we will continue to incur serious social and legal costs.

