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I. Introduction

In 2012, the Texas Supreme Court held that a state law imposing a cap on groundwater pumping, and denying all but a small domestic allotment to overlying landowners who had not pumped previously, was effectively a constitutional taking of the non-pumping landowner's property in the groundwater under its land.[1] The decision has been widely noted and sharply criticized on two related grounds: first, the view that there is an extant property right in un-pumped groundwater beneath one's land; and second, that since Texas follows the rule-of-capture—under which any overlying owner can have as much water as it can pump, without any responsibility to other owners overlying the same aquifer—it seems anomalous to say that landowners have a vested property right in water they might never have been able to obtain and use, even in the absence of any government restrictions on pumping.[2]

Texas is well known for having its own distinctive take on many legal issues, so the D*ay* case will likely be of little importance as a precedent in western groundwater law. But the court's opinion also raised an issue that could turn out to be very instructive for understanding a category of regulatory takings cases that have long troubled the courts.

Very briefly stated, the facts in D*ay* were this: in response to Endangered Species Act problems created by heavy pumping of the aquifer, Texas enacted a statute that imposed limits on extractions, allocating the great bulk of the allowable pumping to existing users, with a small allocation, largely for domestic use, available to overlying landowners who

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1. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012), *reh'g denied*, June 8, 2012.

2. E.*g.*, Gerald R. Torres, L*iquid Assets*: G*roundwater in Texas*, 122 YALE L.J. ONLINE 143 (2012), http://yalelawjournal.org/2012/12/4/torres.html.

had not historically pumped from the aquifer. In responding to a takings claim by one of those non-pumpers, the court held that the plaintiff had a property right in unpumped water under his land, and without quantifying that right, opined that the statute had likely deprived such owners of their "fair share" of the aquifer's water, and thus constituted a regulatory taking under the P*enn Central* standard set out by the U.S. Supreme Court.[3]

Such a statute would have been very unusual indeed if it had not "grandfathered" established uses at the expense of prospective users. And therein lies the real interest of the Texas decision for regulatory takings doctrine: the notion of a proprietary "fair share" entitlement to a resource that could have been accessed from one's land, but that was available to other landowners as well and—under a legitimate regulatory law—has reached its use limits. The "fair share" concept suggests the usefulness of thinking about some regulatory takings disputes not simply in terms of the impact of government regulation on the regulated claimant, but the way the total entitlement to use of the resource in question had been allocated among all the original owners who equally shared it.

That is not the way fairness has been approached in takings cases[4] or in the literature.[5] From a "fair share" perspective, a question worth asking is why it turns out that all the burden of restricted use ends up falling on only one or a few owners—late developers, as in the Texas case—rather than being shared in some more equitable way by all the owners who have utilized the resource, and have created the problem that has generated the regulation.

This dilemma arises with what are usually known as common pool resources,[6] where a number of individuals have unlimited access and entitlement to use (and use up) the resource, and where at some point that utilization burdens the resource in an unacceptable way. An unmanaged rule-of-capture aquifer is obviously such a resource, as it is physically and legally available to all overlying owners, and at some point of exploitation it loses its capacity to sustain long-term use. But quite a few controversial

3. D*ay*, 369 S.W.3d at 843. S*ee generally* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

4. "Fairness" as between the owner and government has long been a central concern in takings cases. Virtually, every Supreme Court opinion quotes A*rmstrong v*. U*nited States*, 364 U.S. 40, 49 (1960), saying it is inequitable to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

5. S*ee*, *e.g.*, *infra* notes 7, 8.

6. S*ee* S.V. Ciriacy-Wantrup & R.C. Bishop, "'Common Property' as a Concept in Natural Resource Policy," 15 NAT. RESOURCES J. 713 (1975).

regulatory takings situations have that same quality, and could also be analyzed in terms of the "fair share" of those owners who share legal access to it and can collectively use it up. It is worth considering some familiar regulatory situations with this perspective in mind.

That land use regulation often seems unfair because it "transfer[s] wealth from one class of people, owners of undeveloped land, to another class of people, owners of already existing houses" has been noticed and well documented.[7] The common conclusions drawn from this observation are (1) that selfish residents (owners of developed land) are using government to advantage themselves at the expense of future residents; (2) that it increases housing prices by limiting land use; and (3) that such governmentally generated unfairness that should be treated as a compensable taking of property.[8]

The question I explore here is why we don't have more of a "fair share" property system in common pool resources, the absence of which leads to fairness issues when regulation occurs.

II. Our Non-Fair-Share Legal System

A particularly instructive example is *Agins v. Tiburon*,[9] an open space downzoning case. After some years of dense development on very valuable land at the edge of San Francisco Bay, the city of Tiburon determined that it was running out of open space, and it re-zoned the relatively few remaining undeveloped tracts for very low-density development (one to five acres per home). Agins claimed a taking, noting the loss in value he would sustain from the downzoning. The taking issue was never decided because there had been no determination as to how density limitation would in fact be implemented. The case nonetheless provides an interesting setting in which to think about "fair share" property rights.

Open space in Tiburon can be seen as analogous to the aquifer in the *Day* case. At the outset, it is a resource that overlies (rather than underlies) each landowner's tract. While open space is unlike groundwater in that the quantum of each owner's ability to appropriate is bounded by his tract, it parallels the groundwater situation in that a subset of the total owners can exhaust the available supply in a way that does not equally reflect each owner's acreage (or some other measure of "fair share"). While each owner can only appropriate open space on his own land, what each owner does on

7. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW ECONOMICS, AND POLITICS 251 (1995).

8. E.*g.*, Carol Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1125, 1150 (1996) (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW ECONOMICS, AND POLITICS (1995).

9. Agins v. City of Tiburon, 447 U.S. 255 (1980).

that land diminishes a benefit shared by all owners. That benefit, remaining open space, is analogous to the shared benefit of a sustainable groundwater supply.

In addition, as in the groundwater case, the lawfully available supply is determined not at the outset, but at some later stage in the developmental process. Also, as under the Texas law in the D*ay* case, all the owners who had built on their land before the downzoning are permitted to keep the private benefit of the open space they have used up; and only a quite small amount of usable open space legally remains for those holding undeveloped tracts.

The open space case differs from the groundwater case in that there is no practical way for the owners of existing houses to cut back their existing open space consumption in favor of those who haven't built. But that does not diminish the claim that the available open space was not fairly allocated among all landowners at a much earlier stage. There are devices for such allocation in various settings, such as tradable emission rights in air pollution regulation, and transferable development rights in land use law.

A*gins* is only one example of this species of highly controversial common pool regulatory takings cases. Unlike many conventional cases where a regulated owner wants to do something different from his neighbors—e.g., put a commercial facility or an apartment house in a single family neighborhood—A*gins*-type cases provoke fairness claims because the owner only wants to do what his neighbors have already done. The same is true in wetlands and endangered species cases where only a few owners hold all remaining viable habitat.[10] It is also the situation in many conventional settings: for example, in air pollution regulation where new sources have to meet a higher standard than existing ones,[11] and in routine urban downzoning cases, where existing density of development has created congestion, straining road and public transport capacities.

All such cases bear a relation to the Texas case—and indeed to groundwater cases generally—where use of numerous individuals' tracts exhausts some resource value common to a larger population, such as a sustainable water supply, open space, freedom from congestion, habitat, or air quality. Whenever such cases arise, and laws address the exhaustion/

10. The problem is exacerbated in some Endangered Species Act water cases where only one user bears the burden of restoring flows to avoid jeopardy because the United States prefers to use § 7 (16 U.S.C. § 1536) rather than § 9 (16 U.S.C. § 1538) of the Act. Use of the latter provision would permit action against all those whose diversions contribute to the "take" of an endangered species. *See* HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN 92 (2008). *See also Pac. Coast Fed. of Fishermens' Assn.'s v.* U.S. B*ureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005).

11. *See infra* note 38, at 11.

sustainability problem, the affected owners are likely to perceive the regulation not as unjustified, or even as necessarily economically excessive, but as unfair vis-à-vis their neighbors. In such cases, the claimants do not usually prevail unless their economic loss is very severe.[12] The common response is that laws inevitably change over time and an owner cannot reasonably expect that use rights will remain static while circumstances, such as urbanization, new knowledge, and changed public values evolve.

My purpose here is not to rehash the debate over how much property owners ought to be required to adapt to new public values, as compared with new versions of established values (the so-called nuisance exception), but rather to point out something about such disputes that has gone virtually unremarked in takings debates, either by property rights proponents or their adversaries.

It is this: as contrasted with the view expressed by the Texas court in the D*ay* case, regulatory takings debates have never revolved around the idea that property law should assign a "fair share" of the right to exhaust the capacity of resource in question to each of the owners who have the ability to exhaust it. Consequently, regulatory laws burdening only late developers have not been challenged on the ground that they deprived those owners of their fair share of the resource in question. The Texas case is extremely unusual in basing its takings analysis on that theory.

The question is an interesting one. Why isn't someone like Agins entitled to some fair share of the available open space? If he is, isn't his complaint against his neighbors or against laws that allow them to use more than their fair share? In the A*gins* situation, a claim against the City of Tiburon would probably be a pretty good proxy for the neighbors who used up open space. But in many cases—wetlands, endangered species, and air pollution, for example—there is no practical way to identify those who had exhausted the resource in question.

Another difficulty with a fair share theory of ownership is that it works best when established at an early stage in the developmental process. The earlier the regulation, the more there is reciprocity of benefit and burden among owners, which is one of the hallmarks of fairness. Part of the problem is simply our ability to see the future clearly. For many resources we don't know what the limits of sustainability or public tolerance are (or will be) until we know more and/or have begun to experience problems. That is most dramatically illustrated by wetlands, where over many decades we moved from subsidizing the filling of such "wasteland" to lamenting the loss of a "precious natural heritage."

12. Under the dominant P*enn Central* standard, one of the three controlling factors is "the economic impact of the regulation on the [landowner]." 438 U.S. at 124; and total, or near total, economic loss is the determining factor under the *per se* standard in L*ucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1016, n.7 (1992).

In addition, circumstances change, urbanization having brought acceptance of numerous land use regulations that would have seemed oppressive in less densely developed places. Technology also plays an important role. Before electrification easements of light were important to landowners. Then they became unnecessary. And now solar power has revived them as an issue.

Societal values also change across a spectrum from trivial to fundamental: racially restrictive covenants were once standard restrictions on landowner's transactions rights. Sunday closing laws were once pervasive. Billboards have their day and then become obtrusive. Climate change modifies views about entitlements to coastal development that may ultimately burden the community if sea levels rise significantly.

Moreover, and perhaps at least equally significant, property owners tend to resist early establishment of constraints on development (a/k/a government planning), partly out of suspicion of government and partly from a preference to maintain as much private initiative as possible in shaping the landscape, and to allow consumer preferences to reveal themselves.

As the system now functions, early developers benefit from burdening resource capacity, but bear no costs when limits on that capacity are subsequently imposed. And except in cases of extreme economic loss, late developers get no compensation.[13] The ultimate fairness issues in such cases are undoubtedly various. Surely some owners are caught up in fast-changing circumstances beyond their control or anticipation. Other late developers no doubt take a calculated risk that a potential for greater profit as available land diminishes is worth the possibility that new restrictions will obliterate that opportunity. That must be the case with professional wetlands developers who continue to purchase such lands despite decades of ever-increasing and always-changing restrictive rules, but where such lands are often the only remaining open lands in highly developed areas.

Whatever the facts in any specific case, decades of regulatory takings law makes clear—even during eras when the U.S. Supreme Court majority is strongly protective of property rights—that no concept of "fair share" determines the outcome of *Agins*-type regulatory takings cases.[14] The "fair

13. As noted at note 30, *infra*, mitigating strategies such as transferable development rights are sometimes available.

14. The underlying facts in Tahoe-Sierra are often cited by property rights advocates as an example: Wealthy second-home owners created the water quality problem, and subsequently development restraints were imposed that largely impact small tract owners. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

share" rationale underlying the Texas decision in the D*ay* case is thus profoundly at odds with American regulatory takings law.[15]

III. Our Prior Appropriation Property System

What, then, is the theory that underlies our takings jurisprudence in A*gins*-like settings? The answer, I believe, is a version of what western water law calls prior appropriation. The water in a western river can be taken up and used by appropriators until its legally available capacity is exhausted. The conventional statement of the theory is "first in time is first in right." Those who are late to develop may find there is nothing left for them either because the source is physically exhausted or because some water has been reserved to protect instream uses.

While western river use rights do not arise from landownership,[16] the same prior appropriation system now also applies to groundwater in most western states.[17] My point, however, is not to draw a precise analogy from

Another example is water pollution, where lax non-point-source standards result in the imposition of higher standards on point sources. S*ee* 33 U.S.C. § 1313(d) (§303(d)).

15. The unitization system in oil and gas on which the Texas court relies did not arise as a property rights theory, but is the product of legislation enacted at a time when oil was overabundant and excess production by competing overlying owners was driving prices down. S*ee* Bruce M. Kramer, C*ompulsory* P*ooling and* U*nitization*: S*tate* O*ptions in* D*ealing with* U*ncooperative* O*wners*, 7 J. ENERGY L. & POL'Y 255, 257 (1986); Richard H. Leach, T*he* I*nterstate* O*il and* G*as Compact*, A S*tudy in* S*uccess*, 10 OKLA. L. REV. 274, 274-75 (1957).

16. The standard view in appropriation doctrine is that water belongs to the public, subject to the acquisition of private usufructuary rights. E.*g*., Cal. Water Code § 102.

17. Not in Texas, obviously. A few remnants of riparianism remain elsewhere in the West, primarily in California, where groundwater law as to non-using overlying owners is still unresolved. Even there the courts have acknowledged that the unexercised groundwater right of an overlying owner "if recognized, would "inhibit[] long-range planning and investment . . . and foster[] costly and piecemeal litigation." W*right v. Goleta Water Dist*., 174 Cal. App. 3d 74, 86, 219 Cal. Rptr. 740, 748-49 (1985). Such claims, the court said, are "unrecorded, of unknown quantity, with little opportunity for control in the public interest, and wasteful to the extent it deters others from using water for fear of its ultimate exercise." I*d*. Nonetheless, courts have not yet barred such claims in over-appropriated basins, though in a number of Southern California aquifers where negotiated settlements have been effectuated, sustainable water allocations have effectively been allocated *pro rata* to existing users. S*ee* WILLIAM BLOMQUIST, DIVIDING THE WATERS: GOVERNING GROUNDWATER IN SOUTHERN CALIFORNIA (1992).

western water law doctrine, but simply to point to the terms and practice it employs to describe the way rights in exhaustible resources like open space and clean air and density control actually work in practice.

It is immaterial whether the point of beginning is public ownership (rivers), non-ownership (air) or conventional ownership (land). The important point is the allocation of entitlement to the use of such resources among the various parties that have legal access to them. Even if one begins with the view that every landowner "owns" the open space or the congestion potential implicit in his land, so does every other landowner who can impact openness and congestion within the relevant area. If the governing authority has the right to limit those impacts to any extent at all without paying compensation (and that is the existing law), the crucial question is not whether there are property rights in those uses, but how the rights are shared among those owners.

In practice, prior appropriation governs resource use generally, operating to benefit early users at the expense of later users, even though that terminology is not used outside the water context. Even in the East, where water was traditionally considered abundant, and where riparian doctrine imports a correlative rights (sharing) principle, the fair share idea exists more in theory than in practice once shortages appear.[18] Existing uses (as long as not wasteful) are given a strong preference. For example, Florida's permit system requires an applicant to demonstrate that his proposed use "will not interfere with any presently existing legal use of water."[19] Protection of existing uses is also an explicit element of reasonableness in water use under the Restatement (Second) of Torts.[20]

18. This may be more the case now than it was in the past, and may reflect response to increasing scarcity. S*ee, e.g.*, Martin v. Bigelow, 2 Aik. 184 (S.Ct. Vt., 1827), though even then priority was strongly urged as a defense to sharing.

19. E.*g.*, Fla. Stat. § 373.223(b) (2010). However, where we now have "managed riparianism," effectively a permit system, permit grants can be limited in duration so that future re-allocations can be made. S*ee* Harloff v. City of Sarasota, 575 So. 2d 1324 (Fla. App., 2d Dist. 1991). Under western appropriation state permit systems, as in California, permits are perpetual, though waste and unreasonable uses can be (and are, though rarely) prohibited. S*ee* Water Code §275.

20. RESTATEMENT (SECOND) OF TORTS § 850A(h) (1979). The Restatement also speaks of "the proprietor's reasonable share of the annual supply or total store of ground water," § 858(1)(b), but there appear to be few if any cases implementing that principle. Oklahoma seems to be alone is allowing overlying owners to receive fixed allocations based on percentage of overlying land (Okla. Stat. Ann. tit. 82, § 1020.9 (West 2012)), and in holding it unconstitutional to convert from a riparian to a prior appropriation system, abolishing unused rights, which other western states have done. C*ontrast* F*ranco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568 (Okla. 1990), with the general view in the west allowing abolition of riparian rights in favor

Prior use is also operatively the governing standard in California's mixed appropriation/riparian system.[21] In fact, as far as I have been able to determine nationwide, instances in which existing non-wasteful water uses must cut back to provide latecomers with a 'fair share' are extremely rare.[22] A version of prior appropriation, though not in name, dominates even riparian practice.

The reason seems clear enough. The legal system is highly averse to disappointing expectations based on existing use and existing investment.[23] That is why existing uses are almost always grandfathered when new and more stringent regulations come into play (absent some exigent threat, such as a health hazard).[24] Indeed, retroactive impositions on established property rights raise constitutional questions of their own.[25]

Land use regulation is the most familiar example of restrictions such as new density or height zoning being imposed only for the future.[26] Even new building code restrictions are routinely imposed only when existing

of appropriation, *e.g.*, In re Hood River, 114 Ore. 112, 227 Pac. 1065 (1924); Knight v. Grimes, 80 S.D. 517, 127 N.W.2d 708 (1964). The problem of shifting from a riparian to a permit system is explored in the Commentary to § 6R-1-03 of the Regulated Riparian Model Water Code (1997). The Code respects existing withdrawals, and provides a method for allocating among existing users if total pumping needs to be reduced, § 6R-1-03(5). Non-users get nothing in such circumstances until the initial permits expire.

21. In several old California cases the courts have protected existing surface stream users against subsequent interfering pumping of tributary water (surface riparian v. groundwater overlying owner): *see* Eckel v. Springfield Tunnel & Dev. Co., 87 Cal. App. 617, 262 P. 425 (3d Dist. Ct. App. 1927); McClintock v. Hudson, 141 Cal. 275, 74 P. 849 (1903); Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115 (1910). And in *City of Lodi v. East Bay* M.U.D., the Court protected a prior appropriator of percolating groundwater against a subsequent appropriator of surface stream water, 7 Cal. 2d 316, 60 P.2d 439 (1936).

22. But not unheard of, *see supra* notes 20 and 21.

23. Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation*, 84 N.Y.U. L. REV. 1222 (2009).

24. DANIEL R. MANDELKER, LAND USE LAW §§ 5.78, nn.4, 5 (5th ed., 2003, cum. Supp. 2011).

25. *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 528-29 (1998).

26. The general rule is that municipalities may not zone retroactively to terminate a nonconforming use, *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (Cal. 1930), and for obvious reasons, as noted earlier, new density requirements are not applied to existing development.

users want to rebuild or renovate[27] and non-conforming uses are only gradually amortized away as improvements are made or an existing use has been destroyed in a fire.[28]

In light of the practical difficulty, and political reluctance, that faces efforts to set land use limits early in the development process,[29] "fair share" allocation of property inevitably gave way to a prior appropriation system. Seen this way, late developers who are denied the opportunity to burden such resources further can be seen as analogous to an aspirant water appropriator who finds the stream or aquifer legally exhausted when he seeks to draw on it. Of course there is an important difference: the water system is explicit in adopting priority as the rule; whereas other systems are not explicit about how they operate. Such systems thus generate unfairness claims, though it does not take deep analysis to conclude that the system has chosen to maximize private developmental initiatives at the expense of early government-based land planning, and to favor existing uses and sunk investment over after-the-fact reallocation.

IV. Some (Rare) Examples of "Fair Share"

Prior appropriation has not invariably been the chosen system for allocating property rights in resources. But other arrangements almost always appear where some overarching authority can impose shared rights at an early stage of development. One example is open space "fair sharing" in a planned residential community, such as a large subdivision with a condominium structure for common areas, and clustering of buildings to preserve open space or habitat. A similar arrangement can be made for density development, which is effectively what cities do when they grant downzoned property transferable development rights.[30]

Another example of a "fair share" system is found within federal reclamation projects, which build dams and reservoirs in order to provide water for irrigation, municipal use and hydropower. Reclamation acquires water rights under the prior appropriation system, but then contracts out

27. *See* GRANDFATHERING AND BUILDING CODES, http://www.cornerstone-inspection.com/grandfather.html (last visited Feb. 21, 2013).

28. MANDELKER, *supra* note 24, at §5.82.

29. Perhaps the most notable example was the failed effort some decades ago to enact a national land use planning law. *See* Jayne E. Daly, A *Glimpse of the Past, A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, 28 URBAN L. J. 7 (1996). The Jackson bill was S. 3354, 91st Cong. (2d Sess. 1970).

30. E.*g.*, *Penn Central*, *supra* note 3. However, as has often been noted, if TDRs are granted relatively late in the developmental process, and all the property has already been zoned, a TDR that grants enhanced density rights is effectively taking something away from the owners in the transferee district.

the water to users who have equal-in-priority rights *inter se*, so that in times of shortage they are all cut back equally proportionately.[31] Notably such arrangements are imposed at the outset of development and under the auspices of a single developer, the Bureau of Reclamation.

Two other examples of fair share also arise in the context of western water law. The most notable large-scale case is the Colorado River.[32] The Colorado River Compact of 1922 and later arrangements rejected prior appropriation and allocated a share of the river's anticipated average flows first by a division between the Upper Basin and Lower Basin states, and then within each of the seven states that share the river.[33] It also reserved an unquantified amount of water to be allocated subsequently to Mexico, which was done by Treaty in 1944.

For better and worse, that decision is a striking example of government resource allocation based on a fair-share theory of entitlement. California's early development was repudiated as a basis for it to obtain the lion's share of the river. Nevada got a very small share of the water at a time when Las Vegas was barely a hamlet—no one then imagined it would become one of the nation's fastest-growing urban areas. Even now, nearly a century later, some Upper Basin states have not used their full share. California has had to reduce its long-standing uses, Nevada has fallen short of its needs, and Arizona has abundant water, some of which it stores up for the future. But every state has its long-ago determined "fair share."

Another notable example of "fair share" comes from California water laws enacted in response to the massive dam and reservoir projects that moved water from the abundant north to the arid and semi-arid south. "Area of origin" laws are designed to permit later-developing communities in source areas to reclaim water if and when they needed it.[34] So far those laws have had little impact on prior appropriators in the Central Valley and the

31. Use rights within the system can usually be marketed, adding further flexibility to a shared-rights regime

32. NORRIS HUNDLEY, THE WEST AGAINST ITSELF: THE COLORADO RIVER—AN INSTITUTIONAL HISTORY, IN NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY 9 (Gary Weatherford & F. Lee Brown, eds., 1986). The Colorado River documents are collected in KATHERINE OTT VERBURG, THE COLORADO RIVER DOCUMENTS 2008 (U.S. Department of the Interior, Bureau of Reclamation Lower Colorado Region (September 2010)).

33. The Upper Basin States are Colorado, Utah, Wyoming and New Mexico, and the Lower Basin States are Arizona, California and Nevada.

34. Ronald B. Robie & Russell R. Kletzing, *Area of Origin Statutes: The California Experience*, 15 IDAHO L.REV. 419 (1979).

urbanized Los Angeles mega-region,[35] though some areas of origin have begun to assert their statutory rights.[36]

Notwithstanding these exceptions, the idea of "fair share" as a basis for allocating resource capacity is very much at odds with the usual American approach to property rights. Ironically, even the interstate apportionment of rivers by the U.S. Supreme Court, which goes under the seemingly "fair share" appellation of "equitable apportionment" is powerfully dominated by respect for maintenance of existing uses at the expense of newly proposed projects.[37]

The same is true of the ambient air, and the administration of our air pollution laws. As limits were imposed on emissions, cutbacks of existing uses were imposed in order to reach acceptable concentrations of pollutants. In non-attainment areas, proposed new sources are required to meet a higher standard (lowest achievable emission rate) and to more than offset any emission increases their activity would create,[38] which they can do by shutting down some existing emitter. No historic non-emitter is entitled to a fair share of the total extant emissions, but economic growth is encouraged by allowing a market in emission reduction to operate.

V. Conclusion

Insofar as regulation of later-developing owners in settings like A*gins* seems unfair, such outcomes are generated by our first-come, first-served, prior appropriation system. The problem is not that a regulated owner never had any property interest in the resource in question. Nor is it that some entitlement unique to him has been taken away by the government. It is rather that there is nothing left when he comes to use some of it.

If the total resource—let us say it was 100 open space use units—had been equally divided among ten landowners (with each having a right to buy or sell allotments), and at some later date the city had limited total open space utilization to ninety units, few if any courts would treat that late-stage restriction as a taking, even if open space regulation was quite a new thing. That being the case, whatever sense of unfairness open space ordinances generate in A*gins*-type cases would seem to derive not from the restriction itself, but from the way in which those use-units were allocated.

35. S*ee* THOMPSON, ET AL., LEGAL CONTROL OF WATER RESOURCES 242 (5th ed. 2013).

36. E.*g.*, Tehama-Colusa Canal Auth. v. Dept. of the Interior, 819 F. Supp. 2d 956 (E.D. Cal. 2011).

37. S*ee*, *e.g.*, Colorado v. New Mexico (II), 467 U.S. 310 (1984); but the Court says priority should not be strictly applied where it would work hardship, N*ebraska v. Wyoming*, 325 U.S. 589, 619 (1945).

38. Clean Air Act, 42 U.S.C. § 7503(a) (2012).

Many observers see no unfairness even under the present system, believing that owners in a 'race to the swift' system should be prepared for unpredictable changes, and that even extreme losses call for no compensation. But that is not the way takings law has developed. While Justice Antonin Scalia is the most prominent contemporary advocate of a diminution of value test to measure compensability,[39] he is not alone. Justice Holmes also said that regulation, if too onerous, might qualify as a compensable taking.[40] Thus, while "fair share" has never functioned as the constitutional standard, economic loss has served as an indicator for some broader notion of fairness courts are seeking in takings cases.[41]

Since most regulated parties in A*gins*-like downzoning situations do not prevail in their takings claims unless their economic loss is very extensive, a reasonable conclusion is that courts have tacitly acknowledged the first-in-time system as a defense to a takings claim so long as the loss is not too severe. While basing compensation on diminution of value is plainly not a satisfactory theoretical basis for a constitutional standard,[42] there may be another explanation for judicial attention to the extent of economic loss.

Courts recognize that our prior appropriation system can produce inequitable outcomes for some late-stage developers subject to newly enacted restrictions. That being the case, compensating only those whose losses have been quite severe, and giving weight to other 'soft' factors like the unexpectedness of regulation for some activity,[43] the lack of opportunity to take adaptive measures, and the absence of conduct wrongful in itself;

39. S*ee supra* note 12.

40. Though Holmes rarely decided cases on that basis. S*ee* Joseph L. Sax, T*akings and the* P*olice* P*ower*, 74 YALE L. J. 36, 43 (1964).

41. S*ee supra* note 4.

42. If 100% loss is compensable, why not 95%, and if 95%, why not 75% or 55%? See Justice Scalia's observation in L*ucas*, 505 U.S. at 1019, n.8. The same dilemma arises under the diminution element of the P*enn Central* tripartite standard.

43. An interesting empirical question is whether owners who are more or less surprised by a newly enacted standard are more likely to get compensation than those who arguably ought to have seen it coming, even though the specific restriction was only recently specifically applied to them. For example, wetlands regulations discouraging the use of such lands have been around for more than four decades, even though the detailed rules keep changing. By contrast open space zoning was quite new when the A*gins* case first arose, and the prior practice had been for government to buy open space easements. Indeed, there were efforts to do so in Tiburon prior to the downzoning. S*ee generally*, James C.N. Paul & Jan Z. Krasnowiecki, T*he* P*reservation of* O*pen* S*pace in* M*etropolitan* A*reas*, 110 U. PA. L.REV. 179 (1961).

might provide the basis for something we could describe as compassionate constitutionalism; not "fair share," but fairness as a kind of rough justice.

In light of the decades-long and fruitless search for doctrinal solutions to the takings issue both by courts and scholars, the time might be ripe for transition to an openly situational approach to the problem. The rather fuzzy tripartite *Penn Central* standard[44] is quite amenable to use for this purpose, with a more or less implicit recognition that the question is whether the claimant has been hit so hard, and with so little warning, or opportunity to adapt or adjust, that denying compensation seems unfair. Under such an approach, it may well turn out that the 'widows and orphans' type cases that property rights advocates are so fond of ferreting out would do quite well, while the complaints of large-scale and sophisticated developers would usually fare poorly. Maybe that wouldn't be such a bad way of doling out fairness in the property realm.

44. S*ee supra* note 12.