

Legislative Expansion of Fifth Amendment "Takings"? A Discussion of the Regulatory Takings Law and Proposed Compensation Legislation

*Molly L. Dillon**

I.

INTRODUCTION

Until now, Congress has been content to let the judiciary draw the line on takings by deciding when the government must pay compensation to private property owners. However, some members of the 104th Congress proposed new legislation which would significantly change the current federal approach to regulatory takings.¹ These legislative proposals sought to replace much of the case law interpreting the Fifth Amendment Takings Clause. Despite judicial decisions favoring private property owners in the last few years, many in Congress believe that a clear standard on regulatory takings is needed — a standard which will better protect private property rights in the face of government regulation by reducing the amount of property value diminution required before the government must compensate private property owners. These members believe expanded protection of property rights is consistent with the intentions behind the Fifth Amendment Takings Clause. At the heart of the conflict is the tension between individual rights and the interests of the public, or, as some would say, the will of the majority. There are no easy answers to this timeless dilemma.

* Juris Doctor Candidate, 1997, UCLA School of Law; B.A., Liberal Studies, Summa Cum Laude, University of California Riverside. I would like to thank Dan Smith, Kathleen Miller, and Joe Dillon for their support in this process. I also want to express my appreciation to this journal for its excellent editorial assistance.

1. H.R. 925, 104th Cong., 1st Sess. (1995) and S. 605, 104th Cong., 1st Sess. (1995).

These recent legislative proposals reflect a general hostility toward government regulations, especially those designed to protect the environment and natural resources. Opponents of the proposals are concerned that the proposals would, if enacted, create a cost deterrent to needed regulations.²

Proponents argue that needed environmental regulations would still be enforced, but would no longer be "on the backs of particular individuals." The government—"we the people"—should bear the costs when society as a whole benefits from the use of private land.³ Proponents also argue that the costs would not be prohibitive if government agencies act efficiently.⁴ By inference, acting efficiently would mean foregoing regulations necessary for the protection of public welfare and safety. The only other option under the proposed legislation would be to compensate landowners, because the proposals make compensation mandatory for regulations which affect property values even minimally. However, both the House and the Senate proposals found it unnecessary to allocate additional funds for landowner compensation required by the proposals. Instead, the money must come from an agency's existing budget. This forces government agencies to decide between bearing the expense of certain regulations or foregoing their promulgation altogether.

The view that government regulation is overburdensome, and interferes with the landowner's ability to prosper is a familiar theme. This theme to some extent finds its roots in the libertarian ideology which advocates the limited role of government. In turn, the roots of the libertarian ideology may be found to some extent in the classical philosophy of property espoused by John Locke in the late 17th century.⁵ Locke contended that property rights existed before government and therefore government's role is limited to that of protector of preexisting individual rights which are inherent in man.⁶ House of Representatives 925 and Senate 605, both of the 104th Congress, reflect Locke's philoso-

2. Barbara Moulton, *Takings Legislation: Protection of Property Rights or Threat to the Public Interest?*, 37 ENV'T 44 (Mar. 1995).

3. Symposium, *Taking 'Takings Rights' Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L. J. AM. U. 253, 266 (1995) [hereinafter Symposium].

4. 141 CONG. REC. H2498 (daily ed. Mar. 2, 1995) (statement of Rep. Smith).

5. John Locke, *Second Treatise On Civil Government: Two Treatises of Government*, in SOCIAL CONTRACT, (Ernest Barker, ed., 1947).

6. *Id.* at 101. Richard Epstein contends that Locke's ideas about property and natural law are the foundation for the Fifth Amendment and therefore these views should inform our decisions about how government should act. RICHARD A. EP-

phy of property and, in turn, support a more protective and expansive view of individual property rights.

The legislation adopts only the most libertarian concepts from current case law and fails to acknowledge the principles developed to address the necessary balance between public interests and private property rights. While proponents of this legislation seem to believe the libertarian ideology as stated by Locke was the inspiration behind the Fifth Amendment, contrary arguments exist. The proposals suggest an overly broad and ineffective solution to a problem which requires a balancing of the public interest, including protection of the environment, in conjunction with the protection of private property rights. As a result, the proposals ignore the struggle over current land use issues altogether.

The justifications of this wave of proposals, and the underlying ideas about property rights, has been hotly debated both politically and academically.⁷ Though neither of the proposals was enacted, the underlying clash of ideas will continue. The supporters view the property rights issue through the perspective of classical property theory. This perspective ignores the historical case law and even departs from the current case law.⁸ Ultimately, these ideas fail to acknowledge that a balance of interests is necessary.

Part II of this comment describes the rules developed in the legislative proposals and the extent of property rights protection advocated. I explain how such rules, the protection they would provide, and the arguments of their proponents are representative of the libertarian view of property rights. In Part III, I present the arguments against finding that the libertarian view of property was the sole influence behind the Fifth Amendment. Part IV is an analysis of the past and present case law which shows that the proposals adopt only the most libertarian ideas from the current case law, thus ignoring the need to find a balance between private and public interests. Proponents claim that protection of private property rights must be restored in order to carry out the intentions behind the Fifth Amendment Takings

STEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

7. See e.g., 141 CONG. REC H2498 (daily ed. Mar. 2, 1995); Symposium, *supra* note 3.

8. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (holding that when the effect of a state regulation is to deprive land of all economically beneficial use, it shall constitute a taking unless the prohibited use does not inhere in landowner's title). This case does not apply a categorical rule for more than the extreme situation of total diminution.

Clause. This contention finds no basis in the early case law. Lastly, in Part V, I present more balanced alternatives to the type of rules supported in the past proposals.

II.

PROPOSED LEGISLATION

A. H.R. 925

The property rights protection bill that passed in the 104th House in 1995 is H.R. 925 or the "Private Property Protection Act of 1995."⁹ House of Representatives 925 falls under the category of "compensation" bills as opposed to the "assessment" bills. Compensation bills focus on paying the landowner for a diminution in the value of his land. Assessment bills propose a "taking impact analysis" by federal agencies before they promulgate any regulations which might adversely impact the value of private property.¹⁰

House of Representatives 925 would affect all federal agencies which promulgate regulations under the authority of those acts specified in the proposal.¹¹ The proposal requires federal agencies to compensate any landowner whose land value has been decreased by 20% or more by such regulations. If the diminution reaches 50% of the land value, the landowner can force the agency to buy the land outright for "fair market value." Additionally, the bill requires only the affected portion of the property to be considered in measuring the affect of the federal agency action, thus making it significantly easier to obtain compensation. Even if the landowner cannot meet the 20% level of diminution for the entire piece of property, she may make a compensation claim for a smaller portion.

Section 3(B) prohibits indefinitely a restricted use for which the agency has paid compensation, even if the restriction is later

9. This bill passed in the House as part of the Job Promotion Act or H.R. 9.

10. Michelle K. Walsh, *Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation as a Remedy*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 317, 326-29 (1995).

11. Only certain laws are targeted in this bill. These include: Section 404 of the Federal Water Pollution Control Act (33 U.S.C. § 1344), the Endangered Species Act of 1979 (16 U.S.C. § 11531 et seq.), Title XII of the Food Security Act of 1985 (16 U.S.C. § 3801 et seq.), Reclamation Act or the Act of June 17, 1902, and all Acts amendatory (43 U.S.C. § 371 et seq.), the Federal Land Policy Management Act (43 U.S.C. § 1701 et seq.), and Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. § 1604, § 6). This means that only agency action taken under these laws would create a cause of action for the landowner.

withdrawn. If the agency later rescinds the restriction and the landowner wishes to pursue the previously restricted use, she must repay the compensation with the amount adjusted for inflation. In essence, the government is buying from the landowner the particular land use being prohibited by the agency action.

Despite the attempt to clarify this area of law, ambiguities would arise if courts encountered the nuisance exceptions proposed in both bills. Two types of nuisance exceptions exist; those which defer to the existing state law and those which are defined in the legislation themselves. The House proposal contains both types. It requires the avoidance of inconsistency between state law and the federal Act. Under this provision, anything already prohibited by state nuisance law or local zoning will not be compensable. Those courts which have traditionally been more deferential to state legislatures in the area of land use law may find a more expansive definition of public nuisance possible. Thus, the bill will likely have a disparate affect on landowners according to the situs of the property. The second exception in H.R. 925 seeks to avoid compensation for the federal prohibition of those land uses which would cause a hazard to public health or safety or damage to "specific property" other than the regulated property. This may be a difficult distinction to draw given the interdependence of land and the broad effects land uses are now known to have.

B. *S. 605*

Proponents also attempted to pass a bill in the Senate that would expand the protection of property rights from its current judicial interpretation under the Fifth Amendment. The Senate version, S. 605, was the second introduced by former Senator Bob Dole.¹² Senate 605 or the "Omnibus Property Rights Act of 1995," is more comprehensive than H.R. 925 in that it is not limited to compensation but also has an extensive provision on agency assessment. In addition, the Senate proposal is not limited solely to the coverage of laws aimed at environmental protection. The proposal applies to all agency regulations regardless of the law under which the regulation was promulgated. This proposal also applies to state agency regulations required or funded by the federal government. The Senate version requires

12. See S. 605, *supra* note 1, for other sponsors.

33% diminution or greater before a property owner would be awarded compensation.¹³

The proposal has five sections, the first of which is the statement of findings and purpose.¹⁴ Title II sets forth the compensation provision. Section 204 is somewhat an attempt to codify existing law. This section provides for "just compensation" when private property is taken or invaded or when the owner is "deprived of all or substantially all economically beneficial or productive use of the property."¹⁵ Section 204(D) provides for compensation when the "fair market value of the affected portion of the property" is diminished by 33% or more.¹⁶

Senate 605 also establishes a nuisance exception equivalent to that in *Lucas*.¹⁷ Thus, the government would have the burden of showing that the regulation merely prevents a use which would be considered a nuisance in accordance with state common law.

13. Compare to the 20% diminution required under H.R. 925.

14. The statement of findings in the proposal reiterates the traditional libertarian position of property rights advocates. The findings state that "there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people." The bill also states that the Supreme Court's current interpretation of the Fifth Amendment is "ineffective" and "costly." The bill attempts to "clarify the law" and "vindicate property rights."

15. This rule is similar to the one articulated by the Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). However, the rule as stated in *Lucas* requires that "all economically beneficial use" be prohibited by the regulation before a taking may be found on this factor alone. The rule stated in S. 605 has modified the *Lucas* "total takings" test to include the loss of "substantially all economically beneficial use." How much of a loss "substantially all" would require is unclear from the proposals, but the rule appears to be more in line with the "partial takings" rule articulated in *Florida Rock Ind., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995), which found a 95% diminution in value substantial enough to constitute a taking under the Fifth Amendment. For further discussion, see *infra* Part IV.

16. This section of S. 605, allowing the property owner to assess only the "affected portion of the property," would make it easier for a landowner to bring a claim for compensation. Under this provision any effect on property value could be framed in terms of a 33% diminution. This would simply require the property owner to describe that portion or property right affected so that the diminution appears larger in comparison.

17. The "total takings" test in *Lucas* is subject to one exception. If a landowner is denied all economically beneficial use of his or her land, the prohibition must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect

must . . . do no more than duplicate the result that could have been achieved in the courts . . . under the state's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 505 U.S. at 1029.

Whether this will have a clarifying effect is doubtful given the uncertainty inherent in the nuisance exception created by Lucas.

Authors of the Senate proposal also attempted to make it easier for landowners to overcome procedural hurdles which may prevent courts from deciding the merits of certain cases. First, they proposed an amendment to the Tucker Act which is seen as an obstacle to landowners in seeking judicial relief.¹⁸ The proposal's amendment expands the jurisdiction of the Federal Court of Claims under the Tucker Act so that the landowner could bring actions under the proposed legislation. It would also allow the Federal Court of Claims to "grant injunctive and declaratory relief when appropriate" and assert ancillary jurisdiction in certain cases. Additionally, under current law there are requirements which the landowner must meet before the claim is considered "ripe."¹⁹ By creating an independent cause of action and conferring standing on anyone "adversely affected by an agency action," reaching the merits of a takings claim would prove much easier. Of course, this is only true if a federal agency action, or one mandated or funded by the federal government, is at issue.²⁰

These proposals, if enacted, would have a great impact on the federal agencies' ability to effect land use management regulations. Although H.R. 925 was adopted by the 104th House of Representatives, the 104th Senate failed to pass any kind of property rights protection legislation and it is speculative to pre-

18. Under the Tucker Act, the landowner must choose whether she wishes to challenge the law itself, either facially or as applied, in which case the landowner must proceed in Federal District Court. However, if the landowner wishes to pursue a compensation claim, she is to proceed in the Federal Court of Claims. 28 U.S.C. § 1491 (1996).

19. The ripeness doctrine for inverse condemnation causes of action is sometimes difficult to overcome. The landowner must show that the decision of the governmental entity denying the landowner's request for the use of his or her property is final and that compensation has been sought through any other channels provided by the land use entity. *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985).

20. Additional sections of the bill which are not directly relevant here include a provision for alternative dispute resolutions (Title III), an assessment provision requiring that agencies complete a "Takings Impact Analysis" prior to any actions that may result in a "taking," and a "bill of rights" for property owners the purpose of which is to "provide a consistent federal policy" to promote private property ownership and "to establish an administrative process and remedy" for the protection of private property rights (Title IV). In addition, Title IV creates an administrative appeal to wetlands decisions and decisions made under the Endangered Species Act. This would allow a property owner to appeal several aspects of agency decisions which affect an individual's property, including the decision to impose sanctions on a property owner for violation of the Endangered Species Act.

sume that similar proposals will be presented with any success in the next Congress.²¹ Whether or not further proposals are successful, the ideas which these proposals have already brought to the forefront may not fade as easily as the political tide which brought them.²² In other words, the view of property rights represented by the failed proposals survives. Thus, any concerns which surround the proposals and the view of property rights which they represent should not end with the failure of the 104th Congress to pass this legislation.

C. *The Libertarian Perspective Revealed*

The libertarian view of property rights is represented by the legislative proposals in more ways than one. First, the proposals adopt only those rules which reinforce a limited government role in promulgating regulations which affect land use. The proposals make the finding of diminution particularly easy for the landowner by setting a low percentage level of diminution and by allowing the landowner to show that only a portion of her property has been diminished. These rules would severely limit federal agencies from promulgating regulations which in any way affect the monetary value of land. By forcing the federal agencies to pay for every diminution in property value over 20% (H.R. 925) or 33% (S. 605), these rules would have in effect forced the end of regulation which has up to this point been constitutionally permissible. These regulations, in many cases, may still be considered necessary for the public good.

Proponents contend that regulations causing a decrease in private property values are either inefficient or overburdensome,

21. It is too early to predict what proposals may take shape in the 105th Congress. A search revealed only one new proposal directly regarding private property rights protection. House of Representatives 95 was introduced by Rep. Solomon in January, 1997 and was referred to the House Agriculture Committee and the House Judiciary Committee. The proposal is titled "Private Property Protection Act of 1997" but differs from the legislation discussed in this comment. The proposal would require that all prospective agency regulations be certified as in compliance with executive order 12,630 by the Attorney General before they take effect. Executive Order 12,630 was issued by President Reagan in 1988 and "requires all federal agencies to conduct reviews of all actions that 'may affect the use or value of private property.'" Moulton, *supra* note 2, at 49 (quoting President, Executive Order 12,630, 3 C.F.R. 554 (1988), reprinted in 5 U.S.C. § 601 (1988)). Similar attempts to codify Executive Order 12,630 have been proposed during previous sessions in the House and the Senate. Moulton, *supra* note 2.

22. John Tibbett, *Takings Laws Just Won't Die*, PLANNING, Feb. 1996, at 16 (discussing some state measures and the House and Senate proposals from a planning perspective).

and must be changed, done away with, or paid for.²³ This contention is premised on the libertarian view of property rights: the rights of the landowner to do what she wishes with her property as an inherent right which should not be abridged by any government action (aside from common law nuisance). Any restriction on land use is viewed as an imposition upon these rights.

Second, proponents have asserted that the proposals are in line with the original intent of the Fifth Amendment Takings Clause because it is based on libertarian principles. There are several instances in the congressional record where supporters of this proposed legislation have expressed that at least one reason to enact such legislation is that it is required by the libertarian principles behind the Fifth Amendment Takings Clause.²⁴ Of course, such statements may be more political rhetoric rather than well thought-out reasons for the proposed legislation.²⁵ Whether political rhetoric or heart-felt beliefs, the statements still express the proponents' view of their position. The statements may be a true reflection of why proponents support the proposed legislation,²⁶ in which case they express the proponents' belief that such rules are necessary to implement the libertarian principles be-

23. 141 CONG. REC. H2498 (daily ed. Mar. 2, 1995).

24. See 141 CONG. REC. H2501 (daily ed. Mar. 2, 1995) (statement of Rep. Emerson: "Clearly the Fifth Amendment to the U.S. Constitution is one of the greatest liberties ever given to the free world. However, in recent years, private landowners have seen the Federal Government and radical 'preservationist' groups infringing on private property rights protected by the Fifth Amendment."); *Id.* at H2510 (statement of Rep. Hayworth: "In supporting this legislation, we in Congress have the opportunity to reaffirm what Locke referred to as the 'root of all liberty'-the right to own property."); *Id.* at H2514 (statement of Rep. DeLay: "Ownership of property is a right protected by the Constitution, a precious right which should not be infringed upon except in the most grave of situations."). See also, Symposium, *supra* note 3, at 258.

25. See Michael Allen Wolf, *Overtaking The Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENVTL. L. J. 637 (1995). Wolf asserts that such statements, apparently framed to embrace Constitutional values, the protection of property rights, and free enterprise, are "key rhetorical strategies employed by legislative champions of the property rights movement. . . ." He concludes that this "private property offensive" has targeted the Endangered Species Act but that "a more wide-ranging attack on regulations, ordinances, statutes and even principles of judicial interpretation that shield the public-at-large from extant and anticipated harms" will likely follow. The article contains a list of proponents' statements which make explicit the "Principles They Represent" and contrasts them with statements made about "Defenders of the ESA and the Principles They Represent."

26. While Wolf, *supra* note 25, and others may doubt this, the courts when interpreting legislation must presume that these statements represent the true intent of the legislature. Thus, even the political realist must admit that because these statements may effect how a law is later interpreted, they are of some import.

hind the Fifth Amendment Takings Clause. Or, the statements are indeed political rhetoric used strategically to assure the adoption of these proposals, which themselves represent the libertarian view of property rights through the adoption of rules which restrict government land use regulation. Thus, whether through proponents' explicit statements or through the proposals' restrictive rules, this legislation represents the libertarian view of property rights.

III.

SOME ORIGINS OF PRIVATE PROPERTY RIGHTS — UNDERLYING PHILOSOPHIES

The proponents' contention — that the proposals are consistent with the original intent behind the Fifth Amendment Takings Clause — depends on the assertion that libertarian principles were the basis for this original intent. The proposals' restrictions on government regulation or interference with the rights of land owners are based in the libertarian principle of a limited government role and more specifically Locke's idea of property as an inherent right which deserves protection from intrusion.²⁷ The proposals also adopt only libertarian views from the current case law, focusing only on monetary value rather than the balancing of interests which had been pursued through years of Fifth Amendment interpretation of regulatory takings.²⁸ Such a grouping of justifications seems to assume that the Fifth Amendment rested solely on Locke's view of property rights and role of the government. The assertion that the Takings Clause was based solely on the Lockean view of property may previously have been unchallenged, but it is in dispute today.²⁹

27. See *supra* note 24.

28. See *infra* Part IV.

29. For an in depth analysis of the ideology and development of the Fifth Amendment, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). Treanor contends that "the Takings Clause was intended to apply only to physical takings," and points to the Pennsylvania Coal decision as a departure from the limitations of the Takings Clause as originally understood. Treanor then argues that liberalism was not the dominant political ideology at the time of the framing, but shared influence with republicanism. He examines James Madison's conception of the Takings Clause as support for the arguments that the Takings Clause was intended to apply only to physical takings and the argument that more than one ideology was influential. Treanor then proposes using the translation model to develop a current analysis of takings consistent with underlying principles. He concludes that "[c]ompensation should be mandated only in those types of cases where the political process is particularly unlikely to consider property claims fairly"

Scholars dispute which theories were most influential during the framing of the Fifth Amendment.³⁰ Some commentators argue that the original intent behind the Fifth Amendment was a liberal and expansive view of property rights in the face of a potentially overbearing government.³¹ This view of limited government intrusion with the rights of property can be traced to the philosophy and writings of John Locke.³² Locke's political philosophy was of great influence at the time and his views were embraced by many involved in the framing of the Constitution. Locke espoused a theory of private property rights which was novel for his time. He believed that the individual's right to property exists in nature and that government should exist only to protect this and other inherent rights of man.³³

30. See, e.g. Epstein, *supra* note 6; Treanor, *supra* note 29; Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988). See also, John F. Beggs, *The Theoretical Foundations of the Takings Clause and the Utilization of Historical Conceptions of Property in the Ecological Age*, 6 FORDHAM ENVTL. L. J. 867 (1995). Beggs evaluates the historical assumptions made by Justice Scalia and Justice Blackmun in *Lucas*. He argues, based on Treanor's article, that original intent behind the Takings Clause was not influenced solely by the "classical liberal model." Beggs also argues that continuing reliance on the framer's intent to resolve the regulatory takings question is misguided due to the evolution of the human condition.

31. See Epstein, *supra* note 6, at 95; Treanor, *supra* note 29, at 819 (citing others who held the popular view that Locke was the dominant influence on "early American Ideology." DANIEL J. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS*, 78 (1953); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICAN POLITICS*, 140 (1955); CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY*, 357 (1953); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 13-14 (1992)). See also, Kmiec, *supra* note 30 (writing as a counter to Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988)). Kmiec contends that the definition of property as used in the Takings Clause will affect the extent to which the Takings Clause will limit legislative action. Thus, the definition should "both [promote] intuitive fairness and [observe] the structural limitations on governmental power without denying the existence of that power." *Id.* Kmiec believes that accepting a "nuisance-based definition of private property" would limit the legislative ability to redefine property rights by manipulating the distinction between harm and benefit. *Id.* This is in line with the Founders' desire to protect the individual from overreaching majoritarian decisions. B. SCHWARTZ, *THE RIGHTS OF PROPERTY* 21 (1965) (quoting *THE FEDERALIST* NOS. 10, 51 (James Madison)). Kmiec's argument rests on the idea that the line between compensable actions and non-compensable actions should be drawn according to whether the government seeks a public benefit from private property or prevention of a public harm.

32. Locke, *supra* note 5.

33. *Id.* at 101. Locke states that:

Political power is that power which every man having in the state of Nature has given up into the hands of the society, and therein to the governors whom the society hath set over it self, with this express or tacit trust, that it shall be employed for their good and the preservation of their property.

Professor Epstein follows this line of reasoning in his support of limited government intrusion with property rights.³⁴ He argues that we base our recognition that deprivation must be compensated on the presumption that these rights exist:

A set of forced exchanges existing from rights does not create the original rights so exchanged; like the constitutional vision of private property, forced exchanges presuppose them. A forced exchange does not create culture and sense of community, it protects them by removing the need for compelling or allowing everyone to act as a policeman in his own cause.³⁵

For this reason, Epstein believes that the government has no redistributive role. For every inherent right taken from an individual, the government must confer "rights more valuable than they have been deprived of."³⁶

Those in support of the current legislative proposals to extend property rights protection put forth similar arguments that government should not intrude upon an individual's right to own, possess, and control property.³⁷ This is only tempered by the Fifth Amendment that pronounces that the government has the right to do so for a public purpose if it compensates the landowner in the process.³⁸ The proposed legislation, which attempts to further individual rights, relies on this liberal interpretation as a historical basis.

There is a counter-view to commentators like Epstein, who believe that Locke was the dominant influence during the framing of the Fifth Amendment,³⁹ which supports a less expansive interpretation of the Fifth Amendment. This view comports with the early case law that was less protective of private property rights

34. See generally Epstein, *supra* note 6.

35. *Id.* at 334.

36. *Id.* at 332.

37. See sources cited *supra* note 1.

38. The Takings Clause states ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

39. See Treanor, *supra* note 29. In disputing the Lockean view, Treanor relies on a number of historians who believe that the "dominant ideological paradigm," which was traditionally assumed to have been liberalism, was actually nonexistent. Rather, there were a blend of influences — both liberal and republican. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

in the face of government regulation than the courts are today.⁴⁰ The counter-view contends that Locke's was not the dominant theory of property at the time.⁴¹ Instead, the republican view was as, if not more, influential. The republican view of property, presented by James Harrington, contends that only the distribution of land will enable people to be involved in the political process.⁴² Therefore, land was not thought of as a political right but as a political necessity. Property was the means to facilitate political balance and avoid the oppression of the minorities by the majority.

"This scholarship indicates that Epstein's equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke has no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as the ideology of the framing."⁴³ Thus, the belief that the expansion of property rights protection is aligned with the originalist view of the Fifth Amendment may be inaccurate.

IV.

THE PROPOSALS COMPARED TO THE CASE LAW

There is no requirement that legislation follow case law. In rare instances, legislation has been enacted to reject a specific decision with which Congress is unsatisfied.⁴⁴ However, the development of case law should at least inform Congress of the balance of interests which exist. Even if Congress chooses to create more protection for a certain category of rights, the work of the judiciary in dealing with the balance of interests in a difficult area of law should not be cast aside without consideration. However, the authors of these proposals have done just that. As a result, the authors fail to consider the public interest which has influenced regulatory takings decisions in the past.

40. See e.g., *Miller v. Schoene*, 276 U.S. 272 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mun-
gler v. Kansas*, 123 U.S. 623 (1887).

41. See Treanor, *supra* note 29; Beggs, *supra* note 30.

42. JAMES HARRINGTON, *The Commonwealth of Oceana*, in *THE POLITICAL
WORKS OF JAMES HARRINGTON*, 155 (J.G.A. Pocock ed., 1977).

43. Treanor, *supra* note 29, at 824.

44. This was the case with the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb(a) (1996). The Act contained a specific statement rejecting the decision in *Smith* in favor of adopting greater protection for religious freedoms under the Free Exercise Clause. However, the RFRA relied on two earlier cases in restoring protection. 42 U.S.C. § 2000bb(b) (1996).

This Part examines the early case law on takings, pointing out that regulation was not considered significant enough by the courts to warrant compensation under the Fifth Amendment until the decision in *Pennsylvania Coal v. Mahon* in 1922. The development of regulatory takings law and the courts' struggle to create a workable standard include the consideration of interests on both sides of this issue. While in the fifty years the cases have become more protective of private property rights under the Fifth Amendment, they still have not rejected the need for balance between private property rights and necessary regulations which represent the public interest. The authors of the legislative proposals have ignored this struggle. The proposals embrace the emergence of rules in the recent case law that reflect a more restrictive standard for regulations which govern the use of land. The proponents have focused only on the portions of the case law which support the most protective and thus most libertarian ideas about property rights. These ideas, which may further protect property rights by making it easier to show total diminution or no residual use — such as segmentation and partial takings — have appeared in recent regulatory takings cases.⁴⁵ While current regulatory takings decisions may reject the balancing of interests present in previous case law, this is true in only the most extreme situations.⁴⁶

A. *Early Interpretation*

Even if correct about the underpinnings of the Fifth Amendment Takings Clause, the proposals' proponents fail to acknowledge the Takings Clause's evolution through judicial interpretation. Early case law decisions provide no basis for the adoption of the restricted role of government with respect to the property rights. Just the opposite is true. The early case law did not find it necessary to compensate for the impact of government regulation.⁴⁷ The early Supreme Court interpretation of the Tak-

45. See e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995). Discussed *infra*.

46. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (establishing a categorical rule only in those situations where all viable economic use has been prohibited by the government regulation in question).

47. See *Miller v. Schoene*, 276 U.S. 272 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mungler v. Kansas*, 123 U.S. 623 (1887).

ings Clause extended property protection only to physical takings or its close equivalent.⁴⁸

Several of the early takings cases are indistinguishable from public nuisance cases. In both situations the government was allowed to restrict the property owner's use without compensation because the government was acting to protect the public health and welfare.⁴⁹ In these cases, no one claimed that the government would have to compensate the landowner. The Court found the right of the government to restrict certain land uses to be inherent in the property interest or a valid exercise of the police power.⁵⁰ The Court's only inquiry concerned the validity of the statute and this was undertaken with great deference to the legislature. The Court recognized that "the discretion cannot be parted with any more than the power itself."⁵¹

Now, the public nuisance doctrine and the right of the government to exercise its police power fall into different legal categories. However, both the police power and public nuisance doctrine are derived from the idea that property ownership and use dictate the need for balancing the individual's right against that of the community. This balancing became more complicated as the number of land uses expanded along with the number of landowners.⁵² Government, in adopting regulations that prohibit

48. In *Mungler*, the Court reasoned that regulations adopted for the protection of the public interest did not constitute a taking. 123 U.S. at 623. The regulation at issue in *Mungler* was a state prohibition on the manufacture and sale of alcohol. Two brewers challenged the regulation claiming that it constituted an unconstitutional taking because it rendered their breweries valueless. The Court held that the regulatory actions of the government did not seriously impinge on the rights of the property owners because the state was only limiting those actions which were "prejudicial to the public interests." *Id.* at 669. "A prohibition simply on the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69.

49. See cases cited *supra*, note 47.

50. Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 103 (1995). Freyfogle discusses the divergence between police power rules and title limitations, stating that "land use restrictions were viewed as inherent, implicit limits on land titles that owners derived from the state." *Id.* Freyfogle points to Lemuel Shaw's 1851 decision in *Commonwealth v. Alger* as effecting this divergence. Shaw determined that police power rules "arose from the government's inherent regulatory power; they were distinct from, and not contained by, any preexisting limitations on a landowner's title." *Id.*

51. *Mungler v. Kansas*, 123 U.S. 623, 669 (1887) (citing *Stone v. Mississippi*, 100 U.S. 814 (1879)).

52. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1449 (1993). In his article evaluating the *Lucas* decision Sax contends that the definition of property has

certain land uses in certain areas, necessarily engages in a balancing process, considering, among other things, which activities are most socially useful. However, the definition of social utility is an evolving notion.⁵³

Traditional case law analysis focused on monetary value, but only in conjunction with other factors such as the character of the governmental intrusion and the investment-backed expectations.⁵⁴ The first case to find that a government regulation violated the Fifth Amendment⁵⁵ Takings Clause was *Pennsylvania Coal v. Mahon*.⁵⁶ Justice Holmes found that the economic impact on the coal company imposed by this regulation was a factor in finding that the government regulation in this case violated the Fifth Amendment Takings Clause, but was not dispositive. "One fact[or] for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."⁵⁷ While this case seems to embrace the notion of private property rights protection in the face of an over-burdensome regulation, other factors likely contributed to this outcome.

One other explanation for this decision is that the Court believed that the state was interfering with private contract rights. The individual landowners who were losing their homes to land

always been subject to the views of society and the particular value system which exists at the time. Sax presents the adoption of zoning laws as one example: "[t]he affected landowners contested zoning statutes, claiming they were subject only to the case-by-case restrictions on land use under nuisance law. The Supreme Court rejected their claim and validated zoning. Justice Sutherland wrote: 'In a changing world, it is impossible that it should be otherwise.'" *Id.*

53. *Id.* at 1447.

54. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (finding no "set formula" in determining what constitutes a taking under the Fifth and Fourteenth Amendments, but instead finding that a number of significant factors must be considered in each case; including the economic impact, investment-backed expectations, and the character of the government intrusion).

55. Technically, Fifth Amendment rights are enforced against state governments under the Fourteenth Amendment. For the sake of simplification, such rights shall be referred to as originating under the Fifth Amendment.

56. *Pennsylvania Coal* dealt with a state statute prohibiting the mining of coal, despite ownership, that would cause the subsidence of surface property owned by someone other than the coal company. The coal company challenged this law when faced with an injunction obtained by a private surface property owner and claimed that the regulation resulted in a taking of private property. Since this land use regulation was authorized by the state, the loss of this coal should be compensated, or the statute held invalid. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

57. *Pennsylvania Coal*, 260 U.S. at 413.

subsidence had agreed to sell the support estates to the coal mining companies. Thus, the risk of subsidence was inherent in the ownership of the surface property and was probably reflected in the prices paid by the surface owners versus that paid by the coal companies. The state regulation had gone "too far"⁵⁸ in this case not only because the amount of value lost by the coal company, but because the state regulation interfered with a private agreement.⁵⁹ This created a windfall for the surface landowners. In short, the government was reallocating a property interest to that handful of people who had knowingly sold their rights in the first place. "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought."⁶⁰

Despite the existence of private contract rights as a contributing factor, *Pennsylvania Coal* still set a new precedent for regulatory takings. After *Pennsylvania Coal*, government regulation could violate the Fifth Amendment. But, a clear rule had not been articulated and thus courts continued to struggle to find the proper balance between private property rights and the public interest.

58. *Id.* at 415. ("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.")

59. See *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 544 (1914) which the Court distinguished in *Pennsylvania Coal*, 260 U.S. at 415. In *Plymouth Coal*, the state passed a law mandating that a pillar of coal be left between adjacent mines for the safety of the mine workers. Here, the Court found the law valid because it was for the safety of the mine workers and "secured an average reciprocity of advantage that has been recognized as a justification of various laws." *Pennsylvania Coal*, 260 U.S. at 415. The mine workers may not have bargained for this additional amount of safety, but this imposition was acceptable given that the mining company stood to benefit as well. This implies that the thrust of Justice Holmes' concern may have been the level of government intrusion into private contracts and not the percentage of property at stake.

60. *Pennsylvania Coal*, 260 U.S. at 916. The argument that *Pennsylvania Coal* is based, at least in part, on the fact that the government regulation interfered with private contract rights is also discussed in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The *Keystone* case, decided over 60 years later, dealt with a similar government regulation restricting coal extraction that caused subsidence. The Court in *Keystone* discussed the distinction between the two statutes stressing that the more recent statute was not limited to subsidence on private lands, but on public lands as well. "Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners." *Keystone*, 480 U.S. at 485. *But see* Kmiec, *supra* note 31 (criticizing the *Keystone* decision).

The next significant case which made progress in stating a rule for regulatory takings was *Penn Central Transportation Company v. New York City*.⁶¹ Rather than identify a particular level of diminution in value or specific government actions which may be found overly intrusive, the Court in *Penn Central* found, that because of important interests on both sides, the consideration of various factors was necessary.⁶² The Court articulated factors that "have particular significance:" the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action.⁶³ In essence, the Court created a balancing test requiring the examination of these articulated factors in every case.

The balancing test articulated in *Penn Central* continues to remain the focus of analysis in questions of regulatory takings, except in situations that involve total diminution of all viable economic use.⁶⁴ During the evolution of the regulatory takings law, the Court found no absolute test, short of the total diminution test articulated in *Lucas*,⁶⁵ that would fairly evaluate the in-

61. 438 U.S. 104 (1978). This case involved the right to build on top of Grand Central Station in New York City. Designated a "landmark site," all plans to change the structure had to be approved by the city. After two building proposals were denied, the station's owner, Penn Central Transportation Company, brought suit claiming these denials constituted a regulatory taking under the Fifth Amendment.

62. See *id.* at 124. "While this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' *Armstrong v. United States*, 364 U.S. 40, 49, (1960), this court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 123-24.

63. See *id.* at 124.

64. See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1019 n.8 (1992) (recognizing that someone whose land is diminished in value by 95% will not get the benefit of the categorical rule applied in this case, but that finding that an application of the balancing test articulated in *Penn Central* may result in finding a compensable taking).

65. In *Lucas*, the rule was established that a regulation which prohibited all development, and therefore decreased the value of the land to zero, went "too far" and compensation was required. Lucas was a developer and bought two beach front lots on which to build million dollar homes. Before he sought a building permit, the South Carolina Coastal Council, a state land planning agency, passed a law to preserve the coastal lands. The law moved the set-back line for development to exclude Lucas's lots, prohibiting him from building the homes he had intended and causing him the potential loss of the money he had paid for the lots.

The South Carolina Supreme Court found no taking even though the trial court record established that the value of the land had been zeroed out by the regulation.

terests of both private property owners and the public interest in the regulation of land use. Instead, the Court consistently found that the circumstances in each case must determine the outcome.

The authors of the legislative proposals have failed to consider the difficulty which led the courts to reject any absolute test. Proponents ignore the factors articulated by the courts in favor of only one consideration: diminution in value. First, the authors ignore the fact that the earliest Fifth Amendment cases did not require compensation for mere regulatory actions. This undermines any argument that the proposals are needed to “restore” protection of property rights since no significant protection from government regulation existed prior to *Pennsylvania Coal*. The lack of protection in the early case law also tends to refute any claim that the current case law is not in alignment with the original intent behind the Fifth Amendment Taking Clause. If that were true, the early case law would have reflected this intent — unless the early interpretations were completely erroneous.

Second, the authors ignore the judicial development of the balancing test used in cases where the property has not been rendered “valueless.”⁶⁶ The *Lucas* decision recognized that those situations involving the depletion of all viable economic use were the rare exception,⁶⁷ thus implying that a consideration of the balancing factors is unnecessary only in those situations where the regulatory effect is the most extreme. Yet the authors of the proposals insist that 50% devaluation is significant enough to warrant total compensation. This rule rejects even the most pro-

The South Carolina Supreme Court relied on the purpose underlying the Beach Front Management Act. It was designed to “prevent serious public harm” by avoiding erosion of the beach that may cause flooding and destruction of the homes already in existence there. The justification for the Act was the history of problems that plagued the South Carolina Coast in the past, threatening damage and destruction of homes.

The Supreme Court did not question the underlying purpose for the Act or the justifications presented by the state. Instead, the Court focused solely on the diminution in value of Lucas's land. The Court felt that in situations where the landowner was deprived of all development possibilities, and therefore all land-value, the balancing test need not be employed. In such cases, the only important factor is the “zeroing-out” of all property value. It did not matter that the state sought to prevent “serious public harm.” The Court established a nuisance exception to this per se rule, but in doing so refused to accept current legislative definitions because any action can be justified as “harm-preventing. Instead, the regulating body must now show that the use is prohibited under existing state nuisance or common law.

66. See *Lucas*, 505 U.S. at 1009. This is the term used in *Lucas* to express the idea that the property in question was left with no economically viable use.

67. *Id.* at 1017.

protective measure taken by the Supreme Court — one which recognized the need for a less stringent rule in most regulatory takings cases.

B. *The Appearance of Libertarian Ideas Adopted by the Legislative Proposals*

The authors of the legislative proposals have not ignored the case law altogether. However, they used the current cases on regulatory takings as a grab bag of ideas from which they select only the ideas that uphold libertarian notions of property rights. Recent years have seen the emergence of new ideas in the case law which represent the libertarian views espoused in the legislative proposals. First is the notion of segmentation. Segmentation shifts the focus in regulatory takings cases from the entire property interest to only that portion or right affected by the regulation. Property rights advocates use this concept to claim further devaluation than would exist if the denominator was defined as the entire interest. Second is the concept of incomplete diminution, or "partial takings." The effects are similar to that of segmentation in that the less diminution required, the more protection for property rights. Both of these concepts appear in the legislative proposals discussed above. The section below discusses the emergence of these concepts in the case law and describes how the courts have dealt with these issues.

The Court in *Penn Central* rejected the use of segmentation as a way to circumvent the interest balancing it had imposed.⁶⁸ The plaintiff argued that the air space above Grand Central Station constituted a separate right that was being taken, and thus required government compensation. If accepted, this approach would have made it easier for courts to find regulatory interference with property rights by focusing only on the use which was lost. The proposals would probably accept this argument in favor of segmentation. Both H.R. 925 and S. 605 would allow the landowner to assert a claim for compensation if the affected portion of the property is diminished. Since air space may be considered a stick in the bundle of property rights, it may constitute the affected portion of the property for purposes of compensation under the rules as stated in the proposals.

68. See *Penn Central Transp. Co. v. New York City*, 438 U.S.104, 130-31 (1978) (finding that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

The concept of segmentation was reasserted in *Keystone Bituminous Coal Association v. DeBenedictis*.⁶⁹ In this case, the Supreme Court evaluated a Pennsylvania statute similar to the one found unconstitutional in *Pennsylvania Coal*. The Court once again rejected a segmentation argument similar to that made in *Penn Central*.⁷⁰ Instead, the Court considered all the holdings of the coal company in evaluating the effects of the statute on their property interests, finding that only a relatively small portion of the interest was affected by the mining restriction.⁷¹ The Court recognized that the segmentation argument taken to its logical extreme would prohibit even the most minor government regulation of property: “[U]nder petitioner’s theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for taking law purposes.”⁷² Furthermore, the Court rejected the segmentation argument even in light of Pennsylvania’s recognition of a support estate as a separate property interest.⁷³

Despite the Court’s past refusals to consider segmentation arguments, the issue is still unsettled. In *Lucas*, Justice Scalia wrote the opinion for the Court and addressed the issue of seg-

69. 480 U.S. 470 (1987).

70. In analyzing the segmentation issue, the Court examined several sources. In posing the question as one requiring the Court to determine the “denominator,” the Court cited Michaelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967); Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 60 (1964); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-67 (1984). For the proposition that the correct analysis is to view the property interest in its entirety the Court cited *Penn Central*, 438 U.S. at 130-31; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (“where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety”). *Id.* at 497.

71. See *Keystone*, 480 U.S. at 496. The Court determined that the statute required the coal company to leave approximately 27 million tons of coal in place. Under the Court’s analysis this represented only 2% of the entire property interest.

72. *Id.* at 498 (citing *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding validity of setback ordinance) (Sutherland, J.)).

73. Although Pennsylvania property law does, or at least did at that time, recognize the support estate as a separate and therefore alienable property right, the Court stated “that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.” *Keystone*, 480 U.S. at 500. The Court backed away from this assertion in finding, with reliance on determinations made by the Court of Appeals, that “[the support estate’s] value is merely a part of the entire bundle of rights possessed by the owner of either the coal of the surface.” *Id.* at 501.

mentation in a footnote.⁷⁴ Scalia expressed disagreement with how the Court's decision in *Penn Central* dealt with the issue of segmentation.⁷⁵ He stated that because the rule concerning the correct "'property interest' against which the loss of value is to be measured" is unresolved, it has created inconsistencies in past decisions.⁷⁶ In footnote 7, Scalia asserts that "the answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the state's law of property."⁷⁷ However, the issue in *Lucas* did not call for a resolution of this question.

It seems that the dicta in *Lucas* found its mark in the Federal Circuit Court's decision in *Loveladies Harbor, Inc. v. United States*.⁷⁸ Rather than focusing on the entire development project, the litigation in *Loveladies* concerned only that 12.5 acres for which a Corps of Engineers permit had been denied. The Federal Circuit Court referred to this as the "denominator problem," recognizing that the outcome in many cases would differ depending on what portion of the property is considered in the equation.⁷⁹ The court found that the decision about what portion of

74. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, n.7 (1992).

75. *Id.*

76. *Id.* at 1016 n.7 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) and *Keystone Bituminous Coal Ass'n. v. DeBeniticcis*, 480 U.S. 470 (1987)). Justice Scalia apparently ignores other distinctions between the two situations, including the private contract in the former case that, according to the Court in *Keystone*, influenced the decision in *Pennsylvania Coal*.

77. *Id.* at 1003. Scalia did not attempt to square this statement with the Court's decision in *Keystone*.

78. 28 F.3d 1171 (Fed. Cir. 1994). In this case, *Loveladies Corp.* ("Loveladies") had acquired 250 acres of land on which it sought to build homes. After the development and/or sale of 199 acres of this land, *Loveladies* wanted to develop the last 51 acres. *Loveladies* approached the state and managed to negotiate a deal whereby it could fill and build on 12.5 acres providing that it left the other 38.5 acres unaltered. However, approval from the Corps of Engineers was denied in part because the state admitted that the action was unwise. *Loveladies* sought to recover on a takings challenge after other challenges proved fruitless. The regulatory takings claim was brought in the United States Claims Court (presently known as the United States Court of Federal Claims) and \$2,658,000 in compensation was awarded to *Loveladies*. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990). The government appealed this award to the United States Court of Appeals for the Federal Circuit and the decision was affirmed.

79. *Id.* at 1180:

If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the wetlands regulation, then either a partial or no taking occurred

the property constitutes the denominator in any given case should be informed by the time at which the regulatory scheme was implemented.⁸⁰ Although it expands the segmentation issue beyond prior case law, *Loveladies* also potentially limits the application of segmentation to factually similar situations where the regulatory scheme was not in place at the time of the original purchase.

The issue of segmentation raises a question of line drawing that is ignored by the authors of H.R. 925 and S. 605. Both legislative proposals adopt the idea of segmentation outright. The logical extreme of the unconstrained use of segmentation was noted by the Court in *Keystone* — even a land use regulation as benign as a setback requirement may be found to affect a property interest if the concept of segmentation is adopted.⁸¹ However, the proposals do not include any provision limiting the use of segmentation. Nor did the authors of the proposals attempt to establish any logical boundaries as suggested by the Court in *Lucas* and in *Loveladies*. The authors seem to find the idea of segmentation valuable because it upholds the libertarian view of property rights. Such a rule allows landowners to manipulate property interests in pursuit of compensation in almost any regulatory situation.

The second idea to emerge in the recent case law, that also appears in the legislative proposals, is that of “partial takings.” This notion holds that a partial diminution in value may be sufficient for the court to find, without consideration of other factors, that a government regulation violates the Fifth Amendment Takings Clause. The partial takings issue arose in *Florida Rock Industries v. United States*, another Federal Circuit Court decision.⁸² In *Florida Rock*, the plaintiff challenged the denial of a wetlands mining permit required under regulations imposed by

In this case the government contended that the entire 250 acres originally purchased was the “denominator,” and *Loveladies* contended that only the 12.5 acres for which they sought a development permit should be considered.

80. The court in *Loveladies* found that the government had not attempted to curtail development until after most of the development had occurred. Since there was no preexisting regulatory scheme, the portion of the land which was already developed should be excluded from consideration in applying the current regulatory scheme. Thus timing is a key factor in determining what portion of a property interest constitutes the “denominator” in a regulatory takings analysis.

81. *Keystone*, 480 U.S. at 497.

82. 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

the Corps of Engineers.⁸³ The claim was first asserted in the United States Court of Federal Claims ("Claims Court")⁸⁴ which found that the permit denial constituted a taking under the Fifth Amendment and awarded Florida Rock \$1,029,000.

On appeal, the Federal Circuit Court remanded the case with instructions to focus on the "fair market value" of the property after the permit denial and not just the use denied.⁸⁵ On remand the Claims Court found the appraisal of Florida Rock, \$500 per acre, was the correct assessment of fair market value because they reflected the buyer's knowledge of the current regulatory situation.⁸⁶ Given Florida Rock's appraisals the land was still not "valueless." The Claims Court found the 95% reduction in value a sufficient enough impact on Florida Rock's property to find a taking when also considering the landowner's inability to recoup its investment.⁸⁷

The government appealed again.⁸⁸ The Federal Circuit Court instructed the Claims Court to take the government's appraisals into account when determining fair market value. The Federal Circuit Court then found that it would be necessary to determine if partial diminution would be sufficient to find a taking, and if so, how much diminution was necessary. The court noted, "[n]othing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests."⁸⁹

83. In this case, a mining company acquired 1560 acres of wetlands in Florida paying \$1900 per acre for the land. Shortly after, the Corps of Engineers imposed regulations requiring a permit before taking any adverse actions on land falling under the definition of wetlands. Florida Rock sought a mining permit for the entire 1560 acres. The Corps of Engineers refused, citing the potential damage that would be caused by the mining. Florida Rock then sought a permit to mine 98 acres of the wetlands they owned, which was again denied by the Corps of Engineers. *Id.*

84. *Florida Rock, Indus., Inc. v. United States*, 8 Cl. Ct. 160 (1985).

85. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 479 U.S. 1053 (1987).

86. The government had argued that a willing buyer would not necessarily be aware of all the circumstances surrounding the land and submitted appraisals at \$4,000 per acre. The government argued that this price was a more realistic estimate based on the sales of similarly situated land. This argument was rejected by the court. *Florida Rock*, 21 Cl. Ct. at 161.

87. The court avoided the partial takings question and looked at the traditional balancing factor of investment-backed expectations in deciding that the government regulation effectuated a taking. *Id.* at 175-76.

88. *Florida Rock*, 18 F.3d 1560 (Fed. Cir 1994), *cert. denied*, 115 S. Ct. 898 (1995).

89. *Id.* at 1568.

Addressing the "partial takings" issue, the Federal Circuit Court found that *Lucas* implicitly suggested that a less than 100% diminution in value would not necessarily leave the landowner uncompensated. However, in *Lucas* the Court called for an application of the traditional balancing test (stated in *Penn Central*) in situations involving less than total diminution.⁹⁰ Despite this discussion in *Lucas*, the Federal Circuit Court's conclusion in *Florida Rock* was that at some point "mere diminution" becomes "a compensable 'partial taking.'"⁹¹

Some commentators find the *Florida Rock* decision disturbs the balance between private property rights and the public interest by ignoring the balancing test articulated in *Penn Central* and reasserted in *Lucas* for situations that involve less than total diminution.⁹² However, the Federal Circuit Court's finding that a 95% diminution in value may alone be sufficient to require compensation seems minor when compared to the levels of diminution called for by the legislative proposals. In these proposals, numbers as low as 20% and 33% diminution in value of the affected portion of property would require compensation. The proposals adopt the most protective tools to emerge from the current case law and take them even closer to their logical extreme, thus enforcing the idea that even slight government intrusion with private land use is unacceptable.

Both segmentation and partial takings are part of the broader notion of "conceptual severance."⁹³ This notion maintains that property — understood as the bundle of rights to which the property owner is entitled — may be broken down into individual fragments. The extent of this deconstruction may be dependent only upon the conceptual limitations of the ingenious property lawyer. The argument is that each fragment should enjoy the protection of the Fifth Amendment Takings Clause, thus im-

90. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (finding that a landowner who has suffered a 95% diminution in value would not get the benefit of the categorical rule, but may receive compensation under an application of the traditional balancing test as articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

91. *Florida Rock*, 18 F.3d at 1570.

92. See e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in The Federal Circuit*, 25 ENVTL. L. 171, 172-73 (1995); see also Susan E. Spokes, *Florida Rock Industries, Inc. v. United States: Tipping the Scales in Favor of Private Property Rights at the Public's Expense*, 47 ME. L. REV. 501 (1995).

93. Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

mensely increasing the overall protection for private property rights.

C. *The Need for Balance*

No right is absolute. Even rights to free speech are qualified when it comes to the possibility of public harm.⁹⁴ Different kinds of speech are protected less than others. Our notions of fairness to the individual, values about our society, and community standards control the extent to which these rights should be qualified. It is always necessary to find a current balance of interests, and property rights are no different. The debate about land use, environmental concerns and private property rights is as polarizing today as the debate about the propriety of seditious libel before the turn of the century.⁹⁵

Professor Blumm, in his recent article analyzing the *Loveladies* and *Florida Rock* decisions, finds that the idea of "conceptual severance" is derived from the libertarian understanding of property.⁹⁶ Modern day support for the libertarian property perspective is found in Epstein's book, *Takings*, in which the analysis embraces the idea of conceptual severance, thus limiting government's ability to interfere with the individual use and control of property.⁹⁷ Epstein's contentions rely heavily on Locke's philosophy of property as a basis for finding that limitation on government intrusion is warranted. However, Blumm questions the wisdom of this perspective given the evolution of environmental concerns:

The libertarian urge to "conceptually sever" property rights into discrete segments reflects an individualistic, atomistic view of the world that is out of step with life in the last decade of the twentieth

94. See Walsh, *supra* note 10 at 343. "Just as it is inappropriate to scream 'Fire!' falsely in a crowded theater, it is inappropriate to destroy significant environmental resources when developing land." *Id.* (citing *Re-authorization of the Endangered Species Act: Hearings before the Subcommittee on Clean Water, Fisheries & Wildlife of the Senate Committee on Environment and Public Works*, 103d Cong., 2d Sess. 9 (1994) (statement of Sen. Craig comparing restrictions on Fifth Amendment rights to restrictions on freedom of speech)).

95. While I see a parallel between the Free Speech Clause and the Takings Clause in that both have been controversial and require the courts to consider important factors on all sides of the debate, this is where the analogy ends. The factors which inform each issue are the same only to the extent that the balance of interests often involve the protection of individual rights in conjunction with the prevention of harm to society. The harms and values which must be considered differ greatly with each issue.

96. Blumm, *supra* note 92, at 172-73.

97. Epstein, *supra* note 6.

century. In an increasingly crowded world this reactionary impulse to return to a simpler time is understandable, but is inadequate for an era in which ecological interdependencies become more apparent with each passing day.⁹⁸

Discoveries of the last few decades have informed us about the ever increasing strain on the Earth's resources. Activities tied to land use such as landscape modification and habitat destruction are now known to have "[t]he most widespread and important cumulative" effects.⁹⁹ "What ecology tells us is that all forms of life are linked with, and dependant upon, all other forms of life, and ultimately with the land itself."¹⁰⁰ The conversion of land to use for agricultural practices, deforestation and wetlands development are examples of common practices that may have long lasting effects on biodiversity and the future existence of natural resources.

There are several competing reasons why the protection of biodiversity and natural resources is considered an important goal. These reasons range from utilitarian arguments, which are basically self-preservation oriented,¹⁰¹ to arguments in support of preservation of the inherent value of nature which exists beyond the economic activities of the human species.¹⁰² No matter what

98. Blumm, *supra* note 92, at 196.

99. Gordon H. Orians, *Thought for the Morrow: Cumulative Threats to the Environment*, 37 ENV'T 6, 8 (Sept. 1995).

100. Freyfogle, *supra* note 50, at 78. Freyfogle cites literature on the subject: STURART L. PIMM, *THE BALANCE OF NATURE?: ECOLOGICAL ISSUES IN THE CONSERVATION OF SPECIES AND COMMUNITIES* (1991), K.S. SHRADER-FRECHETTE & E.D. MCCOY, *METHOD IN ECOLOGY: STRATEGIES FOR CONSERVATION* (1993), EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992), and DONALD WORSTER, *NATURE'S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* (2d ed. 1994).

101. See e.g., Susan L. Smith, *Saving the Swamps and Salmon: Strategies to Protect Biodiversity from Compensation Threats*, SA83 A.L.I.-A.B.A. 469, 472 (1996). Smith makes the argument that biodiversity is necessary to preserve a "diverse warehouse of new foods, medicines, and other resources." *Id.* at 472. In addition, Smith contends that the preservation of species is necessary for the health of ecosystems which are vital to human life. *Id.*

102. See e.g., Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993). Freyfogle's article focuses on the effects that the traditional concept of ownership has had on land. In his article, Freyfogle describes a journey across the United States, stressing the natural beauty and thus the inherent value of land. Freyfogle personifies the land in his statement, "[t]he Earth is not a frequent litigator, and it responds mutely to pain," again stressing that the preservation of land is not just a selfish task but a moral one. *Id.* at 1271. Cf. Joseph Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993). Sax asserts that there are two divergent views of property rights: the "transformative economy" and the "economy of nature." The "transformative economy" perspective sees land as a means to an end — namely

the justification in support of preservation, it seems that this goal must be pursued in competition with the individual desires of landowners to do with their property what they wish. "Land almost always has more than one possible use, and private landowners are usually more interested in exploiting its economic potential than in protecting its ecological value."¹⁰³

Recently enacted legislation in Florida demonstrates both the need for and feasibility of compensation legislation that seeks to maintain a balance of interests.¹⁰⁴ The Bert J. Harris, Jr., Private Property Rights Protection Act ("Harris Act") is a compromise between environmentalists, the property rights populist movement and big business.¹⁰⁵ The Harris Act is less clear cut and confers less extensive private property rights than the federal legislative proposals. The Act contains a compensation provision but does not attempt to establish a quantitative value, such as the 20 or 33% diminution levels in the Congressional proposals. Instead, the Harris Act is much less definite and leaves room for judicial interpretation, prompting some to question whether the Act is really much of an advantage over preexisting law.¹⁰⁶

The Harris Act creates a cause of action for landowners who feel that local government action has caused an "inordinate burden" on individual property use.¹⁰⁷ Just what exactly constitutes an inordinate burden under the new Act is not clearly defined and is left open for a judicial interpretation using a balancing of the public and private interests involved. The Act does give general guidance, stating that an inordinate burden may result when

economic wealth. *Id.* at 1442. This view is much in line with the Lockean understanding of the value of land. See Locke, *supra* note 5, at 26 ("land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing"). The "ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing important services in its unaltered state." *Id.*

103. Orians, *supra* note 99.

104. FLA. STAT. ch. 70 (1995) ("Harris Act").

105. See Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 318 (1995). Vargas provides an examination of some of the pressures which led to the almost unanimous enactment of the Harris Act. See also, David L. Powell, Robert M. Rhodes & Dan R. Stengle, *Florida's New Law to Protect Private Property Rights*, 69 FLA. B.J. 12 (Oct. 1995) (discussing the impetus and drafting of the Harris Act and the law itself).

106. See *Land-Use Regulation - Compensation Statutes — Florida Creates Cause of Action for Compensation of Property Owners when Regulation Imposes "Inordinate Burden"*, 109 HARV. L. REV. 542, 546-547 (1995).

107. Jane C. Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, 70 FLA. B. J. 55, 55-56 (Jan., 1996).

local action causes a permanent loss of reasonable investment-backed expectations of an existing use or vested right.¹⁰⁸ No compensation is given for temporary interferences, nuisance abatement or inordinate burdens which result from "transportation-related activit[ies]."¹⁰⁹

As of February 1997, there have been no reported decisions applying the Harris Act. Several reasons may explain this lack of judicial interpretation. First, "[t]he Harris Act only applies to applications of statutes, rules, and ordinances enacted after May 11, 1995."¹¹⁰ Second, the Act only applies to protect a "vested right" or "existing use" of real property.¹¹¹ Third, the Harris Act has a provision requiring the landowner to notify in writing the governmental entity that has imposed the alleged burden 180-days prior to filing suit.¹¹² The governmental entity must make a settlement offer within this period. The settlement offer must "protect the public interest served by the regulations at issue" and Provide "appropriate relief" to prevent an inordinate burden on the real property.¹¹³ The options available to the governmental entity range from the issuance of a variance or special exception to "no changes to the action of the governmental entity."¹¹⁴ These provisions may allow the governmental entity and the landowner to arrive at a mutually beneficial arrangement without resorting to litigation.¹¹⁵ Additionally, if the matter does reach litigation, the prevailing party may recover costs and attorney's fees from the other side if it can show that the other side failed in its duty to either provide (usually the governmental entity) or accept (usually the landowner) a bona fide settlement offer that "reasonably would have resolved the claim."¹¹⁶

Another possible reason for the absence of judicial decisions involving the Harris Act is an opinion issued by the Florida At-

108. *See id.*

109. *Id.* at 56.

110. Symposium, *Waiting for the Go: Concurrency, Takings, and the Property Rights Act*, 20 NOVA L. REV. 661, 681 (1996).

111. *See* Hayman & Stuparich, *supra* note 107, at 55; Powell, *supra* note 100, for a discussion of the meaning of these terms in the statute.

112. FLA. STAT. § 70.001(4)(a) (1995).

113. FLA. STAT. § 70.001(4)(d)(1) (1995).

114. FLA. STAT. § 70.001(4)(c)(1)-(11) (1995).

115. FLA. STAT. § 70.001(4)(d)(2) (1995) (requiring the governmental entity and the land owner to seek circuit court approval of any settlement offer that would effectively contravene "the application of a statute as it would apply to the subject real property.").

116. FLA. STAT. §§ 70.001(6)(c)(1)-(2) (1995).

torney General regarding application of the statute to real property which is not the subject of governmental action.¹¹⁷ The opinion states that recovery for real property that incidentally suffers diminution, but that is not itself the subject of the governmental action, would be inconsistent with the apparent meaning of the statute. Also, because the statute is “analogous to a waiver of sovereign immunity,” it should be narrowly construed in terms of the obligations created against the state.¹¹⁸

The intent behind the Harris Act was to “simplify government” and achieve “fairness” in the balance between private property rights and the public interest.¹¹⁹ The creators did not seek to adopt a more liberal view of property rights which would do away with “Florida’s growth management and environmental laws.”¹²⁰ The Act may require further reform or at least some judicial interpretation if a clearer standard of when government regulation has gone far enough to warrant compensation is to emerge. The compromise which took place in this process, however, should be seen as a victory — one supportive of the need for balance.

In order to maintain regulatory protection for biodiversity and natural resources, a more balanced approach to the takings analysis than the ones espoused by the legislative proposals is necessary. The view of property represented by the legislative proposals facilitates economic incentives for land prospecting. Extensive protection of private property rights would practically guarantee investments in land for development and other uses which may be considered harmful in the aggregate to biodiversity and natural resource preservation.¹²¹ The proposed regulatory

117. 1995 WL 750474 at *1 (Fla. Att’y Gen. Dec. 7, 1995).

118. *Id.* at *5.

119. Vargas, *supra* note 105.

120. *Id.*

121. 141 CONG. REC. H2498 (daily ed. Mar. 2, 1995) (Statement of Rep. Conyers: “Ordinary Americans will end up paying to enrich wealthy speculators and the 65 million homeowners would lose because their tax dollars would go to pay off speculators or also their property values would fall because of reduced health, safety, and environmental protection that would otherwise go to their communities”). See also, Vargas, *supra* note 105, at 322 nn.26-27, 329-30 nn.64 -70. Vargas states that one possible interpretation of the Harris Act could result in “an extreme view of property rights under which any regulatory action that restricts a private property owner’s use of her property is deemed compensable.” This is the view, Vargas notes, that Professor Epstein advocates in his book on takings. See Epstein, *supra* note 6. Vargas also states that such an interpretation would “redistribute substantial public wealth to an already politically powerful and wealthy landowner group.” This same group of landowners, consisting of “mostly timber companies, agribusiness, and

scheme would be incapable of preventing potential harm by asserting the public interest.¹²² Under the proposed analysis, additional factors would not be considered unless the use invokes traditional notions of harm — notions which already exist in the state common law. In the meantime, the evolution of our understanding of what is harmful in reality has far surpassed the boundaries of common law nuisance.¹²³ If the current lack of compensation for regulatory takings does not go far enough to protect the interest of the landowner, then the compensation rules recommended by these proposals do not go far enough to protect the interests of the public. Reliance on Fifteenth Century property theory cannot change this reality

V. ALTERNATIVES

With the wave of property rights protection legislation has come some recognition by opponents that steps need to be taken to remedy those frustrations which have been the impetus of such harsh political reactions.¹²⁴ Private property rights have been burdened by sometimes heavy-handed regulations. The effects have been detrimental not only for landowners, but also to those advocating land-use planning and environmental protection.¹²⁵ It does no good to polarize on an issue of such importance. Steps need to be taken to avoid alienating landowners to the point where destruction rather than cooperation becomes

small-and-medium-sized farmers and developers," which stands to benefit from a pro-property rights interpretation of the statute actively sought its enactment.

122. Under the legislation proposed in H.R. 925 and S. 605 the agencies would have to choose between spending their own budget to compensate landowners or foregoing the regulations as promulgated. This is because the authors of these proposals did not find it necessary to allocate additional funding for compensation, but instead required the agencies to compensate landowners from their existing budgets, addressing Congress only when or if the need for additional funds arose.

123. Sax, *supra* note 52.

124. See Spokes, *supra* note 92. Spokes contends that the proposals would create an improper balance between private property rights and the public interest in maintaining the environment. She notes that the courts have rejected a "one-size-fits-all" approach and suggests alternative legislation which would create a "bright line" approach to compensating deserving landowners whose interests are not adequately protected by the current case law. See *infra* Part V.D. for an elaboration on her alternative approach. See also, Symposium, *supra* note 3 at 266.

125. See Craig Robert Baldauf, *Searching for a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive Endangered Species into Extinction*, 30 WAKE FOREST L. REV. 847 (1995) (discussing landowner attacks on endangered species as a backlash to the Endangered Species Act).

more individually beneficial. There are solutions which make more sense and which would help allocate the burden of managed restraint and thus maintain the necessary balance between private property rights and the public interest.

A. *Confront the Real Issues*

Those who have problems with federal laws should re-examine those laws rather than enact prohibitive legislation that will secretly and unwisely lead to their demise.¹²⁶ Although the bills in the House and the Senate have been proposed under the title of "property rights protection," the real aim of the bills may not be the protection of private property interests at all, but the deliberate undoing of government regulations aimed at environmental protection.¹²⁷ Proponents of the bills have expressed a desire to protect the Constitutional mandate of the Fifth Amendment, but they seem to ignore that the Constitution, as currently interpreted by the Supreme Court, has never called for such drastic measures.

House of Representatives 925 is most transparent in its goal to do away with the environmental protection developed over the last two and a half decades. The bill is directed only at those Acts which most concern the environment.¹²⁸ If the proponents are truly concerned with the impact of federal laws on property values, why would they target only these laws and leave other property owners unprotected?

The Senate proposal targets all regulations but still fails to appropriate funding. The lack of appropriations in both proposals indicates that their true purpose is to do away with the regulations rather than provide relief to property owners. Additionally, the disproportionate affect on big business provoke suspicions that this is yet another way to allow business to profit without concern for the long term impacts on the environment

126. See Sax, *supra* note 52.

127. See, e.g., David Helvarg, *Legal Assault on the Environment: 'Property Rights' Movement*, 260 NATION, Jan. 30, 1995, at 126 ("This compensation plan is one of several attempts by the 'property rights' wing of the anti-environmental backlash to use a radical reinterpretation of the Fifth Amendment to gut a generation of environmental laws and land-use reforms."); 141 CONG. REC. H2531 (daily ed. Mar. 2, 1995) (statement of Rep. Porter, "If we have a problem with protecting wetlands in the regulations issued under them, let us reauthorize the Clean Water Act in a way that more fairly takes into account the concerns of the private property owner."); *Id.* at H2528 (statement of Rep. Studds, "The absolute target of this bill is the statutes.").

128. See sources cited *supra* note 11.

and public health.¹²⁹ Why have the proponents not just come out and said that these regulations are burdensome so they should be done away with? Most likely because environmental protection is popular.¹³⁰ Therefore, it is much easier to disguise the legislation, thus avoiding the need to confront these difficult issues.

If laws aimed at environmental protection, such as the Wetlands Act and the Endangered Species Act, are found overburdensome to the individual landowner, then perhaps a compensation measure can be included in these laws and appropriations for such compensation be made. However, Congress must be careful not to provide an investment insurance policy for land prospectors.¹³¹ Land prospecting should be treated as gold prospecting once was — there is no guarantee that the piece of land you buy will be a gold mine. The character of the land and potential effects of its use on society should be considered factors which inhere in the title.

B. *End Misleading Incentives*

Another way to decrease the need for government compensation is to end the subsidies which create the need for subsequent regulations. This is the problem which Rep. Schroeder refers to as “makings”¹³² and others have referred to as “givings.”¹³³ This characterization most clearly applies to those granted government water rights who then sue when those rights are altered to meet the needs of a changing society.¹³⁴ Another example of this dilemma are the ranchers who are given grazing rights on government land and then sue under the Takings Clause when agencies try to restrict the use of over-grazed lands.¹³⁵ Under the proposed legislation these government subsidies are accounted for as an inherent part of the property value, while government

129. 141 CONG. REC. H2497 (daily ed. Mar. 2, 1995) (statement of Rep. Conyers); *Id.* at H2501 (statement of Rep. Richardson); *Id.* at H2517 (statement of Rep. Vento).

130. Helvarg, *supra* note 127. Helvarg's article presents an interesting look at the development of the property rights movement. He states that a Newsweek poll in December 1994 “found that 73 percent of the public would be upset if cutting back on government seriously weakened or eliminated environmental regulations.”

131. 141 CONG. REC. H2517 (daily ed. Mar. 2, 1995) (statement of Rep. Vento).

132. Bob Benson, *House Passes Property Rights Bill*, CONG. Q. WKLY. REP. 680 (Mar. 4, 1995).

133. Edward Thompson, Jr., *The Government Giveth*, 140 CONG. REC. S4912-01 (Apr. 26, 1994). See also Helvarg, *supra* note 127.

134. 141 CONG. REC. H2512 (daily ed. Mar. 2, 1995) (statement of Rep. Miller).

135. Thompson, *supra* note 133, at S4913 (statement of Rep. Miller).

action for diminution is not. Why should taxpayers pay twice, first to increase the value of the land and then again when the value decreases?

“By creating expectations of profit from land where none formerly existed, ‘givings’ have almost certainly encouraged takings litigation, the mere threat of which intimidates government officials into making questionable land use decisions.”¹³⁶ If these government “givings” are going to end up costing the taxpayer more than the price of the gift, then maybe government should reconsider their desirability. At the very least, government should seek a waiver from the landowner or lessee which stipulates that the subsidy will not be the source of a claim against the government for a property rights action.¹³⁷

C. *Smaller Procedural Changes*

Smaller changes directed at specific circumstances would prove less costly and ultimately more effective. In trying to enact a comprehensive law that would deal equally with all property owners despite disparate impacts, the authors of the proposals attempted to use means which are disproportionate to the actual problems.¹³⁸ These proposals would increase the amount of work which must be done by federal agencies and, therefore, would increase the cost to the public.¹³⁹ They would promote further litigation about the application of the law to individual landowners¹⁴⁰ and destroy the ability of agencies to do their jobs for public benefit because the agencies would be too busy dealing with diminution claims to deal with actual agency goals.

136. *Id.*

137. Another possible way to capture the increase in land value created by government action is to impose something equivalent to a green tax. Any request for more intensive land use should require payment by the land owner of an amount proportional to the value increase. This amount could go into a fund which could be used to offset the costs of government regulations which demand less intensive uses and therefore decrease the value, in real terms, paid for the property. We would probably see that the use increases would outweigh the decreases. After all, land has little actual inherent economic value. Property values increase because of what is going on around the land. While every government action that increases property values may not accurately be captured, society can take some actions to create a more even balance. If the government acts on its own to allow for more intensified use before the landowner requests it, there should be a waiver of the value-increase payment until such time as the property is sold for the more intensive use.

138. See Spokes, *supra* note 92, at 525; Symposium, *supra* note 3, at 266-67.

139. 141 CONG. REC. H2497 (daily ed. Mar. 2, 1995) (statement of Rep. Conyers).

140. Denise Baker, *House takings legislation could create costly, new entitlement*, NATION'S CITIES WKLY, Mar. 13, 1995, at 8.

Proponents of this legislation are “launching a missile to kill a mouse.”¹⁴¹ The avoidance of 20% or even 33% diminution in only “portions” of private property is an unrealistic goal and ignores Justice Holmes’ qualifying statement in *Pennsylvania Coal*: “Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁴² The problems with the existing takings law must be remedied on a smaller scale in order to acknowledge the existence of competing values.

Professor Sax recommends the solution of “program modification that responds to particular hardships.”¹⁴³ By seeking “tailored programmatic responses to real problems,” the goal of the laws passed to protect the environment and the health and safety of communities can be achieved while still addressing individual concerns.¹⁴⁴ Some examples of these would be the creation of a “presumptive exemption” for small landowners under the Endangered Species Act as well as a case-by-case analysis for larger landowners.¹⁴⁵ These resolutions recognize that individual interests cannot be ignored. They are also supportive of the notion that a one-size-fits-all rule is less effective than those which can be narrowly tailored.

Another alternative is to eliminate some of the barriers which exist for landowners seeking redress.¹⁴⁶ The lengthy court battles add to landowner frustration and prevent some disputes from being heard at all. The inability to seek redress for grievances may cause reactionary and extreme political action. Eliminating these barriers may be as easy as implementing the use of alternative dispute resolutions, expanding the jurisdiction of district courts¹⁴⁷ or setting standards for agencies to conduct hearings so that they may become more aware of the burdens they

141. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

142. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

143. Symposium, *supra* note 3, at 266-67.

144. *Id.* at 267.

145. *Id.* at 266.

146. The Senate bill attempts to accomplish this by amending the Tucker Act and expanding the jurisdiction of the federal courts so that both the Federal District Courts and the United States Claims Court can hear takings cases despite the remedy sought.

147. Currently, a claimant must seek individual compensation in the United States Claims Court. But when seeking a finding on the validity of a regulation or statute, even for the same reasons, the claimant must seek redress in the Federal District Court. Thus, the claimant must choose which remedy to seek.

impose. Some of the anger which fuels the regulatory takings debate probably comes from the threat of over-intrusive government bureaucracy. Agencies should recognize that refusing to acknowledge the rights of private citizens ultimately will not aid in agency goals. Thus, agencies should be willing to negotiate with those who propose less drastic uses which would not severely alter the land's natural state.

An assessment requirement may be another alternative which has the desired effects without the detriment and cost of the legislative proposals. However, the assessment requirement in the Senate bill, S.605, still has far too much substantive effect given that the bill would prohibit the agency action if the "Taking Impact Analysis" finds that it would result in an "uncompensated taking" as defined by the bill.¹⁴⁸ An assessment requirement unrelated to a compensation bill would be less restrictive, but would still operate to assure that any agency be fully informed as to regulation impacts.¹⁴⁹

D. *Modified Compensation*

An additional alternative is a modified version of the compensation proposals. The practical effects of the past proposals would be to ignore the public welfare and potentially cause a dramatic decline in the standards of environmental protection. As we begin to understand the effects land use has on the environment, we should realize the necessity to proceed cautiously. Doing away with caution in favor of protecting an antiquated notion of property rights is simply unwise.

One example of a less extreme compensation requirement statute is the Harris Act enacted in Florida in May of 1995.¹⁵⁰

148. S. 605, *supra* note 1, at Title IV, Sec. 404(A).

149. Federal agencies are already required under the National Environmental Protection Act to produce an "Environmental Impact Statement" ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). A procedural requirement similar to the EIS, but assessing economic impact of proposed regulations, could work to make agencies more aware of the financial impact of regulations promulgated. Federal agency rule-making procedures are already required by the Administrative Procedure Act to involve public participation. 5 U.S.C. § 553. This could facilitate agency discussion about the economic impact of proposed rules on private property values. *See also supra* note 21, discussing proposed assessment legislation in the 105th Congress attempting to codify Executive Order 12630. This assessment legislation may be more restrictive than necessary in that it would require strict compliance before agency regulations could take effect.

150. *See Harris Act supra*, note 104.

Susan Spokes recommends a different version of a compensation bill in her recent article.¹⁵¹ Spokes proposes that a rebuttable presumption should be created for the landowner when her property value is reduced by more than eighty percent (or a similarly significant amount). The government would then have the burden of showing that the regulation is justified without compensation. Spokes suggests that Congress examine and prioritize those factors presented by the Supreme Court. She places emphasis on investment-backed expectations and the necessity of regulatory control.

To overcome the presumption, the government would need to show that the "post-regulation" property use resulted in a reasonable return "in comparison with the purchase price of the parcel," taking into account investment return on earlier stages of development for a multi-development parcel.¹⁵² In other words, look at the actual investment without the benefit of conceptual severance. Additionally, the government would have to show that the need for the regulation is to protect health and safety rather than for aesthetic purposes. Applying this test may be more cumbersome than a set level of diminution, but the analysis is more clearly defined and both the private and public interests are represented.

A clear legal standard would also offset the problem of landowner frustration. The adoption of a clearer standard by the courts would help clarify which landowner expectations are legitimate and which are excessive. The adoption of such a standard may be illusive due to clashes of ideology. It is doubtful, however, that anyone would disagree that the health of our environment, our communities and our citizenry is a vital common goal. What is in dispute is how much must be done to achieve this goal. Even science comes up with conflicting data on nascent issues.¹⁵³ However, what we do know about land use, deforestation, and habitat destruction and perhaps even more importantly, our lack of knowledge, warrant caution. It is much easier to go forward with development once we can be certain of the consequences than it is to restore the environment from the damage that we

151. See Spokes, *supra* note 92.

152. *Id.* at 528.

153. Orians, *supra* note 99, at 6.

have already done.¹⁵⁴ We must consider what incentives are needed to achieve the goal of sustainable development and restraint in land use. As the population increases, so too does the pressure to develop where profitable. There is no need for government to provide incentives for further development. We should not be encouraging people to buy land secure in the knowledge that if they are not allowed to exploit it for a profit, the government will nevertheless compensate them.

VI.

CONCLUSION

The libertarian view of property rights, represented in some of the recent regulatory takings cases, has also emerged in recent legislative proposals supportive of expanding private property rights. Proponents of these proposals and similar rules contend that this view of property is in line with the Constitution and the framing of the Fifth Amendment Takings Clause. They ignore the existence of counter views during the framing of the Fifth Amendment and its interpretation in the early case law, both of which provide no basis for finding Lockean liberalism the sole foundation of the original understanding of takings jurisprudence. The proposed rules would enforce the role of limited government, but in doing so would compromise any consideration of the public interest in maintaining a sound policy of land use management. A balance of interests which considers both the interests of private landowners and the public is necessary to allow federal agencies to promulgate regulations aimed at protecting biodiversity and natural resources.

As our understanding of the environment evolves so must our understanding of land ownership. The problems which arise due to conflicts between individual property rights and those of the community must remain delicately balanced. Less extreme revisions of existing laws would facilitate relief to frustrated property owners without fully compromising environmental health and sound land-use planning.

154. One example of "undoing" past damage caused by lack of knowledge about the consequences is the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C. § 9601 et. seq.