PUBLIC NEED AND PRIVATE GREED – ENVIRONMENTAL PROTECTION AND PROPERTY RIGHTS

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I. INTRODUCTION

The Fifth Amendment of the U.S. Constitution and "takings" are the center of a popular controversy potentially affecting environmental protection. The debate has unearthed a new bandwagon, spurring rural landowners to suddenly speak out for what they have been led to believe are their unalienable rights under the Constitution. Although rural landowners do not first come to mind when thinking of outspoken constitutional rights advocates, some have been shown how to voice a sympathetic plea. The plea is that with the regulation of natural resources, private landowners carry the concentrated burden for the more abundant public constituency that receives the benefits. In the meantime, this nation's environmental progress is threatened, and lawyers across the country eagerly await a barrage of clients seeking advice on inverse condemnation and regulatory "takings" claims.

As agencies pass regulations restricting land use, many landowners are discovering that the Fifth Amendment of the Constitution states: "[n]o person shall . . . be deprived of . . . property, without the due process of law; nor shall private property be taken for public use without just compensation."[1] Most landowners, tired of not being able to do as they wish with their land, only want to be free of

1. U.S. Const. amend. V. The portion of the amendment before the semicolon is referred to as the "Due Process Clause." The part following the semicolon is commonly referred to as the "Takings Clause," "Eminent Domain Clause," and the "Just Compensation Clause."

restriction or receive compensation if a restriction is to remain. Landowners do not analyze constitutional theories about "legitimate public uses" or "substantial diminution of value." Conservative interest groups and a new Congress have turned the takings debate into a publicized constitutional issue from something that should be a question of value – the value society gives to environmental and natural resource protection.[2]

The Fifth Amendment has not changed since its ratification on December 15, 1791. However, the "Takings Clause" has only recently received much attention and been the subject of increased debate in a variety of settings. Whether the forum for debate is a wet field, overgrown forest, board meeting, federal agency office, court, or the floor of Congress, at a time when the new theme is "less restriction is better regulation," there is a sudden criticism of the government's efforts and power to protect the environment and natural resources.

The push for less government restriction and narrower police power "has the potential to disrupt a delicate balance between private greed and public need forged over two centuries of U.S. property law."[3] The commotion is over this question: when does a valid exercise of the police power[4] become so burdensome as to effectuate a taking for which just compensation must be paid?[5] This question may seem simple, but the answer requires a determination of which restrictions give value and how much weight society is willing to give that value.

This essay provides a perspective on the surge of attempts to strengthen individual property owners' constitutional rights, when the concern instead should focus on society's political ideology and the value society gives to environmental and natural resource protection. This essay begins with an examination of the concept of property rights under a democratic government. The discussion of property rights demonstrates the legitimacy of police power in achieving efficient environmental protection and considers how a taking cannot occur when society gives value to natural resource preservation. Next, this essay summarizes a histor-

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2. *See* Neil Hamilton, *The Value of Land*, J. SOIL & WATER CONSERVATION, July/Aug. 1993, at 280 (emphasizing that the debate is not a constitutional issue, but one of expectations, ideologies, and values).

3. Doug Harbrecht, *A Question of Property Rights and Wrongs*, NAT'L WILDLIFE, Oct./Nov. 1994, at 6.

4. Valid police power gives the legislature the authority to pass laws to protect the health, morals, safety, and welfare of the community. One of the constitutional limitations on police power is the due process clause of the Fourteenth Amendment, which states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." The legislation must only be "reasonable" although it may impose a burden on one's use or enjoyment. *See infra* note 21. *See also* Wilson v. Black Bird Creek Marsh Co., 27 U.S. 245, 2 Pet. 245 (1829) (where the state reserved a power to construct and regulate a dam to enhance the health of the people); Mayor of New York v. Miln, 36 U.S. 102, 11 Pet. 102 (1837) (where the Court found the law to be "not a regulation of commerce, but of police"); Miller v. Schoene, 276 U.S. 272 (1928); and Goldblatt v. Hempstead, 369 U.S. 590 (1962) (where a regulation competely prohibited a beneficial use to which the property had previously been devoted, but nevertheless found it justified as a "reasonable" noncompensable exercise of the police power).

5. The same question holds for cases of inverse condemnation, where monetary damages are sought by a private landowner alleging deprivation of property by a public agency. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946) (planes frequently flying over plaintiff's land constitutes a taking).

ical view of the judicial system's efforts to define what is a taking. In doing so, this essay does not attempt to summarize comprehensively the foundation of "takings" but instead examines holdings in the context of environmental and natural resource protection.

Furthermore, this discussion of the courts' interpretations of property rights and land use law comes with a caveat: implementation of a new private property protection act or provision by Congress may substantially and effectively cast a different light on judicial precedent. Recently, Congress has been considering federal laws that seek to define what is a "taking."[6] The laws require landowners to be paid if regulations reduce their property's value by a certain percentage.[7] The legislation will severely weaken regulations protecting the environment and natural resources. Judicial precedents upholding legitimate land use restrictions thus far will be in question. Nevertheless, to analyze how the status quo may change as a result of new federal law, this essay first explores the history of takings law.

Following an examination of the judicial interpretation of takings law, this essay discusses how a federal private property protection act may affect judicial precedent in interpreting unconstitutional takings, and what the implications of a new law may be on environmental quality and protection of natural resources.

II. PRIVATE PROPERTY RIGHTS

Under the Fifth Amendment to the Constitution, private property may not be taken for public use by the government without payment of just compensation.[8] Recently, property rights advocates claim that governmental regulation of private property is so burdensome that land use restrictions result in a "taking" and the government should pay due compensation.[9] The inception of this view may be found in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* where Holmes concluded that "if regulation goes too far it will be recognized as a taking."[10] Advocates of broader private property rights attempt to use regulatory takings as a tool, but they ignore a more accurate theory: protection of the environment and natural resources is a legitimate interest of the collective society which meets the requirement that regulation of private land must be legitimized by a valid police power.

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6. *See generally,* Private Property Protection Act, H.R. 925, 104th Cong., 1st Sess. (1995); Private Property Rights Restoration Act, S. 145, 104th Cong., 1st Sess. (1995). Additionally, the Congress has attempted to add compensation provisions to several federal laws. *See* § 404(d) of H.R. 961, 104th Cong., 2nd Sess. (1995) (reauthorization of the Federal Water Pollution Control Act (Clean Water Act)).

7. *See,* H.R. 925, 104th Cong., 1st Sess. (1995); S. 145, 104th Cong., 1st Sess. (1995).

8. U.S. Const. amend. V.

9. REGULATORY TAKING; THE LIMITS OF LAND USE CONTROLS v, (G. Richard Hill, ed., 1990). This differs from the established doctrine of eminent domain, where the government physically seizes property for public use after fair compensation is paid to the land owner.

10. 260 U.S. 393, 415 (1922).

In theory, there are two distinct analyses in assessing an individual's property rights; a due process inquiry and a takings inquiry.[11] However, some believe that the difference between police power and eminent domain in reality is not one of kind but one of degree. Theorists and realists agree that government regulation is checked not only by the restraints of due process but also by the gray area of the takings clause. At some indefinite point, depending on the circumstances, regulation of property crosses the line and becomes a taking.[12]

This section attempts to put the issue of takings into perspective conceptually. What immediately follows is a look at the concept of property rights and police power, and the history behind the requirement for compensation when property is unconstitutionally taken. Then, an understanding of the difference between the due process inquiry and takings inquiry will further demonstrate that there is a necessary and allowable power for the government to implement land use regulation of private property while avoiding unconstitutional takings. Government's concept of property rights and the need for environmental protection allow for what property rights advocates believe are takings.

A. *The Concept of Property Rights and Police Power*

The drafters of the Constitution and Bill of Rights did not intend individuals to have absolute rights, or the sovereign to have absolute dominion. Thus, they created a body of laws to divide the power between the states and the people. The system balances power between people collectively and individually, so that the good of the people as a whole is always protected. With the recent demand for broadened private property rights, however, the environment of the whole will suffer from the selfish demands of the individual.[13]

Early property concepts support the view that the government may regulate land use to promote conservation. The work of philosophers demonstrates this notion. Under the Hobbesian view, the solution to maintaining personal security and social order was to surrender some liberty and property to an absolute sovereign.[14] When government is allowed to regulate security and have some control of all property, it is able to achieve order of the people and resolution of conflict. Likewise, John Locke advocated that a central civil government was the best solution to resolve corruption and dispute.[15] Locke's theory of tacit agreement, manifest in *Of Civil Government*, stated that "every man that hath any possession or enjoyment of any part of the dominions of any government doth

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11. *See, e.g.*, Frank Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600, 1607 (1988) (discussing two separate inquiries).

12. *See* Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529 (1989).

13. *See* Usdin v. State, 414 A.2d 280, 289 (N.J. Super Ct. Law. Div. 1980), *aff'd*, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981) (where the court said: "[w]e are continuously being made aware that our vital natural resources, our whole society, and the quality of human life, may no longer be considered limitless or indestructible. . . . [T]he right to use land should be carefully measured against the environment's capacity to tolerate such a use.") Land is not a private means to make money in any fashion an owner desires.

14. THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

15. JOHN LOCKE, OF CIVIL GOVERNMENT ¶ 19 (1690).

thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it."[16] By agreeing to live by the rules of a government that maintains order, the individual also agrees to accept the sovereign's grant of property rights.

Once an individual has a title to property, he or she does not gain unfettered discretion to do as they wish with the land – the rights are subordinate to the good of society. Professor Joseph Sax says the essence of property is not fixity, but fluidity; property is the end result of a process of competition among inconsistent and contending economic values.[17] Some existing interests of property use may be mutually exclusive. Sax acknowledges a phrase used by Justice Douglas in the famous inverse condemnation case of *U.S. v. Causby* [18] stating, "[w]e can talk about a landowner having a property interest in 'full enjoyment' of his land, but in reality many of the potential uses (full enjoyment) of one tract are incompatible with full enjoyment of the adjacent tract"[19] or of society's expectations. Sax says it is more accurate to describe property as the value each owner has remaining after inconsistencies between the two competing uses are resolved. This more fluid concept of property, as economic value defined by a process of competition, makes it easier to ask the question of when to compensate for diminution in the value of property resulting from government activity. The question, as Sax phrases it, may be: to what kind of competition ought existing values be exposed; and, from what kind of competition ought values be protected?

Sax's comments imply the existence of a collective public interest, or society value, that the government must consider when determining whether one competing use is more favorable than another. Balancing competing uses and determining which use will better benefit society requires an evaluation of the sustainability[20] of the land as individuals attempt to use land for selfish purposes. The power of government to balance interests, maintain security, and resolve disputes comes from a police power.[21] Although the Constitution does not contain the phrase, police power is a universal part of maintaining organization in government, and thus in imposing regulations on property. Akin to Professor Sax's "fluid" description of property, the police power is also fluid and murky, and is sometimes described as a:

> certain power . . . existing in the sovereignty of each State in the Union, somewhat vaguely termed police power . . . the exact description and limitation of which [has] not been attempted by the courts. Those powers,

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16. *Id.*

17. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (Nov. 1964) (hereinafter Sax).

18. 328 U.S. 256, 264-65 (1946).

19. *See* Sax, *supra*, note 17, at 61.

20. *See infra* note 49 and accompanying text.

21. *See* RICHARD EPSTEIN, TAKINGS ch. 9 (1985). The meaning and significance of "police power" is beyond the scope of this paper. The concept is the most important justification for environmental regulation and protection of natural resources, as is discussed throughout this essay. Through context surrounding this paper's discussion of "police power," its meaning and significance will be obvious.

> broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.[22]

The police power is always changing according to society's collective needs and benefits. One must decipher society's values at the time of regulation to determine whether the restriction falls within the meaning of "valid police power." At one time in the history of the United States, constitutional amendments were passed abolishing slavery.[23] Owners of slaves believed the laws constituted a "taking" of their "property." However, society determined abolition laws were in the best interest of the health, morals, safety, and welfare of the community. Likewise, at one time in the history of the United States, a constitutional amendment was passed prohibiting the manufacture or sale of alcoholic substances for consumption.[24] Investors and manufacturers believed that regulation of their expectations and supplies by the government constituted a "taking." As with abolishing slavery, society at that time determined that prohibiting alcohol was in the best interest of the health, morals, safety, and welfare of the public. In both periods of history, takings claims were denied, and courts upheld the legitimate use of reasonable police power.[25] It would seem to follow that society is able to determine that disappearing natural resources such as endangered species, wildlife habitat, and wetlands are also worth protecting and regulating, either for economic reasons or because of a moral desire to maintain a "land ethic."[26]

In prohibiting the government from taking private property without just compensation, the writers of the Fourteenth Amendment likely were more concerned with preventing unjust takings by regulations outside the scope of valid police power where a regulation diminishes all value of the property or represents a physical or permanent public use on private property. It hardly seems plausible that the intent of the amendment was to prevent the government from protecting the collective values of society, which include land use regulations that protect the environment and natural resources.

B. *The Intent of the Compensation Clause*

What seemed to concern the writers of the Just Compensation Clause provision of the Fifth Amendment was not the loss of property, but the possibility of loss by unjust means.[27] The aim of the clause was to control the exercise of arbitrary and tyrannical powers. The English and American authorities who wrote during the adoption of the Fifth Amendment likened the provision to a safety device against unfairness, rather than against mere value diminution.[28] Although

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22. Lochner v. New York, 198 U.S. 45, 53 (1905).

23. U.S. Const. amends. XIII and XIV.

24. U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

25. *See generally,* Mugler v. Kansas, 123 U.S. 623 (1887).

26. ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949). *See infra,* notes 51-52 and accompanying text.

27. *See* Sax, *supra,* note 17, at 57-59. What follows is a summarization of Professor Sax's notion that a diminution in value test to determine whether government regulation sufficiently impedes individual rights is not supported by the contemporaneous history of the Amendment.

28. *Id.* at 57.

the Supreme Court has offered diminution in value tests to analyze recent takings claims, there are principles other than value maintenance *per se* that create a workable theory for takings law; if not ecological[29] values of land then possibly aesthetic[30] values to the public.

Although, prior to the adoption of the Bill of Rights, many land use regulations existed describing which activities were considered noxious and forbidden, the Fifth Amendment's Takings Clause originally did not extend to regulations of property, whatever the effect.[31] The authors designed the clause to prevent arbitrary government action, rather than to preserve the economic status quo.[32] St. George Tucker wrote about the purpose of the Takings Clause in 1803:

> That [provision] which declares that private property shall not be taken for public use without just compensation, was probably intended to strain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.[33]

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29. *See* David Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988). Hunter suggests:

> [O]ur laws cannot continue to ignore the restraints imposed on human activity by our natural environment. Current conceptions of land as a form of economic property subject only to the whims of the marketplace ignore these environmental restraints. The courts, in the past responsible for the current economic conceptions of land, must expand their view and uphold the public's legitimate interest in ecological stability and integrity. . . . Rather than manipulate economics-based takings analyses to include ecological factors, as the environmentally-aware judge must do today, courts must overtly expand the inquiry to account for the crucial ecological role of the land. . . . [The] economic view of land has dominated takings jurisprudence, apparently because courts have been slow to recognize the ecological importance of land and quick to make decisions which maximize short-term economic returns. . . . Recognizing these factors would lead the courts to reject a solely economics-based approach to land-use, to address the public interest in preserving the economic role of land and, in some cases, to deny owners of particularly sensitive land the right to destroy its ecological integrity.

Id. at 311-12.

30. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (where the U.S. Supreme Court said that "[t]he concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, *aesthetic* as well as monetary.") (emphasis added). *See also*, Samual Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 U.M.K.C. L. REV. 125 (1979-80); Leighton L. Leighty, *Aesthetics as a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347 (1971). Is it not true that beautiful surroundings help raise the values of property?

31. James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. *See* William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J., 694, 711 (1985).

32. *See* Sax, *supra*, note 17, at 58.

33. *Id.* (citing ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 305-06 app. (1803)).

Chief Justice Marshall's analysis in *Fletcher v. Peck*[34] leads to the same conclusion: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, *fairly and honestly* acquired, may be seized without compensation?"[35] Although one may interpret Marshall's language as supporting compensation rather than government authority, a review of the factual background more clearly shows what Marshall's statement represents.

At the time of the proceeding, the owner of the land (L2) recently received the land from one who convinced the state to convey the parcel to him (L1). Because L1 "convinced" the state to convey the land to him, there were acts of bribery and impropriety. The state later attempted to regain the land from L2, the subsequent and innocent land purchaser. As Chief Justice Marshall held the state could not divest L2 of the land, he said the state could not in effect punish a landowner for "fairly and honestly" acquiring the land. Professor Sax concisely summarizes the holding in saying "[t]he facts in *Fletcher v. Peck* illustrate the threat of the state's becoming the direct economic beneficiary of its own legislative acts; that threat, not the danger or extent of private loss, is the lesson of the case."[36] Sax concludes, "[t]he more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government."[37]

C. *Two Inquiries: Due Process and Takings*

The ability of society to place reasonable restrictions on an individual's land use is justified by a legitimate use of the police power. Legitimate police power comes from values of society, collectively, and the power to regulate for the health, morals, safety, and welfare of the public. However, when do regulations, under the guise of police power, become too oppressive and require the government to compensate the individual property owner under the Fifth Amendment? At least one author maintains that, in determining whether compensation is due for over-regulation of private property, one must keep in mind distinctions between "due process" and "takings" inquiries.[38]

One check on the use of police power, aside from the requirement that its value comes from the health, morals, safety, and welfare of the people, is its legitimacy under due process.[39] For regulation of private property to be valid under the Due Process Clause, the regulation must serve some legitimate government purpose.[40] Additionally, the legitimate government purpose of the restriction must have a relationship to the regulation itself; the regulation must help bring about the legitimate government purpose. This seems easy enough, except that

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34. Fletcher v. Peck, 6 Cranch 87, 10 U.S. 87, 135-36 (1810).
35. *Id.* at 135 (emphasis added).
36. Sax, *supra* note 17 at 59-60.
37. *Id.* at 60.
38. Michelman, *supra,* note 11, at 1607.
39. *See supra* note 1.
40. *See e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

sometimes a court may require that relationship to be very close, instead of only reasonable, rational, or conceivable. It is possible that the court may hold the government restriction to a higher scrutiny, requiring the regulation to be "substantially related"[41] or "roughly proportional"[42] to the legitimate government purpose.

The second inquiry is whether government regulation of private property violates the Takings Clause.[43] As mentioned, this is a murky area. Courts evaluate how much regulation is too much regulation, what part of the land is used to determine whether there was a substantial diminution in value, and which use of the land, if any, was burdened. The severity of the regulation's impact on the complaining landowner's interest is the heart of the current debate. The courts have offered some guidance, but have not explicitly established when a regulation crosses the line and regulates too much. Thus far, the Supreme Court has held that if the restriction deprives a landowner of "substantially all" the economic value of the property,[44] or imposes a physical or permanent occupation on the landowner's property,[45] the regulation effectively becomes a "public use" and violates the Takings Clause, thus requiring compensation. These occurrences would be easy for a deprived landowner to prove if they existed,[46] but land use restrictions rarely take all value from land or impose physical burdens on the property.

A landowner bringing a claim for a taking is not concerned about which legal inquiry's threshold calls for compensation. The landowner does not care whether the restriction on his land is rationally related to a government interest or whether the restriction on his land "goes too far" and becomes a taking; he simply wants compensation because he cannot use his land as he wishes. However, for the landowner's lawyer, the due process argument is often the analysis most relevant to private property rights claims. This is a difficult burden to overcome, but the attorney must hope the court applies a stronger level of scrutiny to the government's purpose. The Supreme Court recently required a higher standard of the government under the due process analysis in takings claims.[47] However, there still is no bright line test in arguing that a restriction "goes too far." Even if this is the argument of choice, there is a high burden in showing that the landowner has been deprived of "substantially all value." But with the due process argument, even though it is difficult to overcome the relationship test, the attorney at least has the contention that permit requirements for various uses of private land, or classifying private land as one resource or another, have nothing to do with a public function or value. Landowners seem to think of this analysis when they believe they have a takings claim. In other words, they believe the government has no right to force a landowner to succumb to restrictions that sup-

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41. Nollan v. California Coastal Commission, 483 U.S. 825 (1987).
42. Dolan v. City of Tigard, __ U.S. __, 114 S. Ct. 2309 (1994).
43. *See supra* note 1.
44. Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).
45. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
46. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
47. Some compare this higher standard set by the Court to *Lochner*. *See, e.g.*, Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988). *See also* Sax, *supra* note 17 at 59-60.

posedly benefit a public good (due process inquiry), rather than thinking in terms of the true takings analysis where they would believe the government restriction has rendered their land valueless.

Ironically, new property rights laws throughout the country seek to define the takings inquiry, rather than the due process inquiry. This aids the landowner in receiving compensation when some portion of his land is decreased in value. Landowners seem more concerned that the public should have to compensate for any benefit they wish to receive from the owner's private land. They contend that government land use restrictions on private land do not relate to a public benefit to the extent of requiring an owner to lose priority of his rights. However, instead of defining values for various land uses and functions of land, or prioritizing the values of land that are most important to society and sustainability, proposed private property rights laws define the takings inquiry by establishing a threshold percentage of allowable diminution. This seems backward when landowners, frustrated by land use restrictions, are more concerned with the "unequal" prioritization of their rights behind benefits for a public good. A more sensible approach, although not necessarily the answer, would be to define land values and prioritize benefits the public seeks to achieve through land use.

D. *Property Rights Must be Balanced with the Power of Government to Restrict Use of Private Property*

From the understanding that property ownership is not absolute and susceptible to regulation by a valid police power, one can see that property rights are analogous to a "bundle" of rights: "where an owner possesses a full 'bundle' of rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[48] With the power of government to maintain security, provide for the safety, health, morals, and general welfare of the public, there follows a necessity–a duty–to provide some sustainability to the land.[49] A valid use of the police power to regulate land use for the purpose of protecting natural resources is merely equivalent to restricting the use of one "strand" of the property owner's bundle and is part of the owner's "tacit consent" to reciprocate benefits to society.

The duty to reciprocate benefits to the collective society includes balancing ownership's bundle of rights against the necessity for society to place reasonable restrictions on land use. However, advocates for stronger private property rights believe their personal values on land are more important than public benefits.

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48. Andrus v. Allard, 444 U.S. 51 (1979).

49. The word "sustainable" comes from the concept of "sustainable development," which was introduced in WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987). This work helped lay the foundation for the 1992 United Nations Conference on Environment and Development, where more than 100 nations, including the United States, endorsed Agenda 21, a long-term commitment to sustainable development. UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, AGENDA 21, U.N. Doc. A/Conf./151/26 (1992). Sustainable development has been defined as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs." The concept has been endorsed in the United States by the President's formation of a national Council on Sustainable Development. Exec. Order No. 12,852, 58 Fed. Reg. 35,841 (1993).

They believe that sustaining resources and protecting the environment for future generations goes too far in stepping on the economic opportunities of the individual. This selfish conclusion prompts the question: should individual interests really receive this much value?[50] The reciprocity of benefits, including the maintenance of natural resources and protection of the environment for future generations, appears to be sufficient justification to balance the equation.

The great father of conservation, Aldo Leopold, believed there existed a "land ethic," and that the ethic is a necessary limitation on freedom of action in the struggle for an individual's existence.[51] Leopold stated the following:

> [A]ll ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to cooperate . . . The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. . . . Conservation is a state of harmony between men and land. . . . [Unfortunately], land-use ethics are still governed wholly by economic self-interest, just as social ethics were a century ago. . . . Lack of economic value is sometimes a character not only of species or groups, but of entire biotic communities: marshes, bogs, dunes, and "deserts" are examples. Our formula in such cases is to relegate their conservation to government as refuges, monuments, or parks. The difficulty is that these communities are usually interspersed with more valuable private lands; the government cannot possibly own or control such scattered parcels. The net effect is that we have relegated some of them to ultimate extinction over large areas. If the private owner were ecologically minded, he would be proud to be the custodian of a reasonable proportion of such areas, which add diversity and beauty to his farm and to his community. . . . When the private landowner is asked to perform some unprofitable act for the good of the community, he today assents only with outstretched palm. If the act costs him cash, this is fair and proper: but when it costs only forethought, open-mindedness, or time, the issue is at least debatable.[52]

Land use regulations serve a legitimate purpose. State and federal laws put restrictions on private lands for things such as wildlife habitat, flood-plain management, and coastal preservation. Private landowners, on the other hand, complain about regulation of their land use. There has been little discussion over the real issue – the legitimacy of land use regulations and the purposes they serve. Often, conservative periodicals and those posing as private property rights advocates attempt to shift emphasis away from the benefits of land use laws by using buzz words and superficial allegations asserting "takings" or "eminent domain"

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50. If so, proponents must believe this strand is the one to break the camel's back. One wonders if these advocates realize their complaints bring forward arguments and analyses far more complicated than assessing whether a regulation deprived them of twenty or thirty percent of an economic profit.

51. ALDO LEOPOLD, A SAND COUNTY ALMANAC 238 (1949).

52. *Id.* at 237-250.

claims.[53] These extremists believe they deserve compensation from any government restriction which economically hinders them in any way. However, claims that the government does not have the right to impose restrictions on private land advance a larger inquiry than diminution in land value.

It is true there is a line that, when crossed by too much regulation, triggers the same remedy necessary to remunerate victims of eminent domain or inverse condemnation. This difficult balance – the limit on the government's power to over-regulate even when for a legitimate government end – is the real issue at hand. This essay maintains that private property owners complaining of regulatory takings do not have a leg to stand on when the land at issue concerns a wetland, wildlife habitat for endangered species, or other parcel serving a purpose in protection of the environment and natural resources. As long as the regulations do not impose a public use upon the property in a physical manner that substantially diminishes all of the value of the property, no taking occurs.

The courts have attempted to clarify regulatory takings in their definitions of allowable land use regulations. What follows in the next section centers on the courts' analysis of this Takings Clause inquiry of the Fifth Amendment, rather than the Due Process inquiry, in dealing with land use regulation. This reveals that compensation is not due unless the government's regulation of an individual's property diminishes "substantially all" of the value of the property, or requires physical or permanent public use.[54]

III. JUDICIAL HISTORY IN DEFINING A "TAKING"

The constitutional issue of "takings" consists of weighing private landowners' rights against benefits for the public welfare. A due process inquiry requires that the relationship between the public benefit and the regulation imposed on the individual be legitimately close. The takings analysis holds that if a regulation infringes too far on an individual's right, the individual must be compensated because his land has been effectively taken. The crux of these concepts is in giving weight to the values society holds most important; to receive these benefits, there sometimes is a restriction on the individual. Thus the issue of defining "value" in land use should be concerned more with ideologies and objectives for the future sustainability of society than with economic values or percentages of diminution to an individual. Because courts do not have the duty or the privilege of defining the values of society, courts historically have interpreted property rights claims in a perspective of individual rights balanced with the undefined police power. The question for the courts then remains whether they can pick and choose among worthy benefits that land use restrictions try to instill, or if they can only condone public benefits through disallowing harmful uses on private land.

The previously mentioned concept laid out by Holmes in *Pennsylvania Coal* expanded on Justice Harlan's holding in *Mugler v. Kansas*, where Harlan used more traditional concepts for distinguishing between a taking and police

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53. *See infra,* note 91.

54. *See supra* notes 45-46 (referring to "substantially all" economic value and physical occupation).

power.[55] Justice Harlan used tools such as physical invasion giving rise to prescriptive easement, government intervention to prevent nuisance, and appropriation of a proprietary interest to distinguish takings from police power regulations.[56] In 1887, Justice Harlan held in *Mugler* that no compensation was due Peter Mugler for his investment in brewery buildings and machinery,[57] when the Kansas legislature passed a constitutional amendment prohibiting the sale of intoxicating liquors. Harlan believed that the public good conditions private property rights, and held that the government may regulate the injurious use of one's property under this notion.[58] In creating this "nuisance exception" or "harmful use exception," Harlan took a position supporting the police power and protecting society from an individual's harmful activity. This notion, in effect, laid a foundation for land use restriction by using the police power to prevent landowners from degrading environmentally sensitive land located on their property.

Justice Holmes took the issue further in *Pennsylvania Coal* when he had to determine how far the government could go in regulating the use of property to further the public interest. Holmes compared the government's authority to regulate injurious use of one's property to its authority to regulate the use of property to further public interest. He adopted a case-by-case analysis that favored a fairness test focusing on the extent of the economic harm. According to the test, the regulation of the property triggered compensation if it deprived the plaintiff of all or most of the economic value of his land. In *Pennsylvania Coal*, a coal company sold the surface rights to land to Mahon and explicitly reserved the subsurface mineral rights. Subsequent legislation prohibited mining where a company did not own the land's surface. Justice Holmes held that the legislation constituted a taking as he proposed the extent of the diminution in value to be "[o]ne fact for consideration."[59] He went on to say that when the extent of that diminution "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."[60]

How does one know if the government regulation reaches the threshold "magnitude" or "goes too far?" Under what circumstances will the regulation be deemed a taking? If a taking is found, does the government have to remunerate the property owner or are the owner's rights recompensed by invalidating the

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55. *See* Sax, *supra* note 17 at 37. Sax discusses how there were two basic theories for distinguishing a taking from authorized use of police power. Justice Harlan was the first justice to define elements of a taking, and he did so using "traditional legal concepts" in the case of Mugler v. Kansas, 123 U.S. 623 (1887). Later as Sax explains, Justice Holmes' approach denied the utility of the "artificial legalisms" when the expansion of governmental regulation caused greater numbers of takings claims. *Id. at* 37.

56. *Id.*

57. Mugler, 123 U.S. at 657.

58. *See* Anderson, *supra* note 12 at 538, n. 53: this was the beginning of the "nuisance exception," which justified the government's prohibition of "noxious" uses without compensation. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928). However, one treatise notes that "nuisance doctrine seldom plays a pivotal role in modern regulatory taking analysis." J. SHONKWEILER & T. MORGAN, LAND USE LITIGATION § 5.02, at 177 (1986).

59. Pennsylvania Coal, 260 U.S. at 413.

60. *Id.*

regulation? These are all questions faced by the Court since the decision in *Pennsylvania Coal.*

For example, in *Penn Central Transportation Co. v. New York City,* the Court modified the "diminution in value test" to determine that a landmark preservation law enacted by the city of New York did not diminish the value of Grand Central Terminal enough to constitute a taking.[61] Instead of focusing solely on the loss of the property's value, the court looked at the character of the regulation to see whether the owners lost reasonable "investment backed expectations."[62] The owners of Grand Central Terminal were not allowed to construct a 55-story skyscraper on their base building, which had been designated as a "landmark."[63] By examining the character of the regulation and investment-backed expectations, the Court at least supplemented the diminution in value test. The Court held: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[64]

Although, in the *Penn Central* decision, the Court acknowledged that damaging prior investment backed expectations could constitute a "taking," it gave some weight to expectations of the public interests as well. Even if investors believed that the Grand Central Terminal was available for development, the landmark preservation law, when established, also carried with it expectations: landmarks had value and were worthy of restriction and preservation. A landmark preservation law easily equates with restrictions to preserve wetlands and endangered species' habitat. Society believes each is deserving of value, and this value justifies the government's use of police power.[65]

Nine years later, in *Keystone Bituminous Coal Ass'n v. DeBenedictis,*[66] Justice Stevens adhered to the test factors laid out in *Penn Central,* but also revisited the "harmful use exception" developed in *Mugler.* Interpreting a statute similar to that in *Pennsylvania Coal,* Stevens found the Act to be analogous to government action to abate a public nuisance, and he found that the coal mine owners kept an economically viable use of their land. To determine any diminution in land value, the Court had to compare the value that had been taken from the property with the value that remained in the property. One of the critical questions then was to determine how to define the unit of property "whose value is to furnish the denominator of the fraction."

Unlike those considered in *Pennsylvania Coal,* the mining regulations in *Keystone* were accompanied by specific legislative findings manifesting intent to provide for the protection and promotion of the citizens of Pennsylvania.[67] Thus, the statute easily passed the due process inquiry as Justice Stevens analyzed

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61. 438 U.S. 104, *cert denied,* 439 U.S. 883 (1978).

62. *Id.* at 124.

63. *Id.* at 117.

64. *Id.* at 130 and 130 n. 27.

65. *See infra* notes 99-100 and accompanying text, concerning the many benefits which private landowners receive from government actions that enhance the value of private property at no costs to individuals.

66. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

67. *Id.* at 485.

whether a statute was "intended to serve genuine, substantial, and legitimate public interests in health, the environment, and the fiscal integrity of the area."[68] The majority decided that the adverse impact on the viable use of the land did not cross the imaginary line to constitute a "taking." Justice Stevens interpreted the Act to affect only two percent of all the coal that could be mined, and he said, "there is no basis for treating the less than two percent of petitioner's coal as a separate parcel of property."[69] Finally, the Court considered where to draw the line between nuisance-like uses and whatever other public benefits a law wants to secure.

The Court, in upholding the statute, continued to lend strength to the "harmful use exemption," but failed to differentiate between regulations preventing nuisance-like uses and restrictions conferring a public benefit.[70] This is significant because the nuisance exemption tends to have stronger justification in property law, based on the premise that no one can obtain a property right to injure or endanger the public:[71]

> [w]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of governmental enterprise which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.[72]

Therefore, once a statute's purpose is declared to prevent public injury, the regulation will not constitute a taking, regardless of the economic effect on the restricted property owner.[73] Going back to the previously discussed property rights theory, the government, in these instances, cannot "take" a right that the property owner does not possess.[74] However, with the benefit conferring statute,

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68. *Id.* at 471.

69. *Id.* at 498. In his dissent, Chief Justice Rehnquist strongly disagreed with Justice Stevens' characterization of the "relevant parcel" for takings purposes. All of the coal mine operators' interest in more than 27 million tons of coal had been taken by the state regulation, and this interest, Chief Justice Rehnquist contended, was without question an identifiable and separable property interest. Id.

70. In theory, the distinction is that "harmful use exemption" refers to a physical harm from individual land that legislation attempts to prevent in protecting the public, and "benefit conferring" refers to legislation aimed at benefiting the public through regulation of individual land.

71. This is based on the maxim, "sic utere tuo ut alienum non laedas," or "use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990). *See also* Mugler v. Kansas, 123 U.S. 623, 665 (1887) (stating that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.")

72. Sax, *supra* note 17 at 67.

73. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279 (1928) (upholding a law requiring disposal of cedar trees within two miles of any apple orchard, because cedar trees spread cedar rust disease, which killed apple trees).

74. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. at 491 n. 20 (stating that "since no individual has a right to use his property so as to create a nuisance or otherwise harm

"compensation is required when the public helps itself to good at private expense. . . ."[75] Obviously, defining the presence of an acquisition or invasion by the government adds to the elusiveness of defining a taking.

In the same year, the Court ruled that if a government regulation deprives the landowner of all economically viable use of the land, the government must pay the landowner interim damages for the period beginning when the regulation first deprives the landowner of all economic value and ending on the date the government chooses to rescind or otherwise amend the regulation.[76] If, after the ordinance is declared a taking, the government decides to keep the regulation in force, it then must pay permanent damages. In *First English Evangelical Lutheran Church v. County of Los Angeles*, a regulatory flood control ordinance prohibiting construction on a landowner's property denied the landowner of all use of its property. In the 6-3 opinion, the Court held that once the landowner proved this kind of taking, the government must compensate the landowner for the time period before a court finally determines that the regulation constituted a taking.[77] In effect, the Court ignored the difference between the government temporarily regulating the land through its police power and physically or permanently taking the land through an eminent domain action.[78] According to Justice Rehnquist, this "inverse condemnation" by the government took all economic use away from the landowner and thus required compensation in addition to invalidating the regulation.[79] Contrary to the assertions of private property rights advocates, *First English* stands for the proposition that the government does not have an unbridled power to regulate as it wishes under the guise of police power. However, at that time, the point where regulation of private property becomes "too much" regulation, and thus a taking, was still unclear.

The definition of "all economically viable use of land" was left unanswered in *Lucas v. South Carolina Coastal Council,*[80] although the Court reaffirmed that a regulation that denies a landowner of all economically beneficial use will constitute a taking, unless the regulation prohibits a use that was already impermissible under nuisance law. In determining the loss in value of land, Justice Scalia described two situations where a conclusion could be made without examining the facts of the case: where there is a regulation resulting in a "physical invasion" and where a regulation denies "all economically beneficial or productive use of land."[81]

Justice Scalia pointed out the difficulty of distinguishing between "harm-preventing" and "benefit-conferring" regulation; they are "often in the eye of

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others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity").

75. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196 (1967).

76. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 305 (1987).

77. *Id.* at 305.

78. *See id.* at 329 (where Stevens J., dissenting, says he is concerned about the majority's lack of recognition concerning temporary takings, and physical or permanent takings).

79. *Id.* at 322.

80. __ U.S. __, 112 S. Ct. 2886 (1992).

81. *Id.* at 2893.

the beholder."[82] Scalia was concerned that if a legislature simply declared all takings challenges as results from harm-preventing purposes, there would be no limit to the state's exercise of the police power. In an attempt to remedy the concern, Scalia announced that a government could only avoid the just compensation requirement in cases of total economic loss if the regulation prohibits uses that were not part of the landowner's title because of restrictions already imposed by nuisance principles.[83] "This framework is used because, historically, according to Justice Scalia, property owners have recognized that their property rights are subject to an implied limitation imposed by legitimate exercises of the police power."[84] "The real concern with the *per se* categories developed in *Lucas* lies in the lack of deference to legislative judgment and, thus, is a removal of a portion of the legislature's regulatory power."[85]

Lucas does not seem to be the final word from the courts. Although *Lucas* took a non categorical diminution in value test from *Pennsylvania Coal* and added a categorical rule,[86] even this hard core version of the soft diminution in value test is ambiguous absent some definition of the interest to which it applies.[87] This is the "conceptual severance"[88] or part-of-a-whole, all-of-a-part issue. Does *Lucas* in effect transfer authority from legislatures to courts? Currently Congress is trying to prevent the takings trend from going down that path by proposing a private property rights act containing legislative-made definitions of diminution in value.[89]

IV. CONGRESS AND THE NEW TAKINGS LAWS

This essay's introduction indicated that private property rights and the takings issue are a popular subject for debate over environmental protection. Evidence of this is in newspaper headlines,[90] magazine articles,[91] newly formed

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82. *Id.* at 2897

83. *Id.* at 2899

84. Jill Dickey Protos, *Lucas v. South Carolina Coastal Council: A Tremor on the Regulatory Takings Richter Scale*, 43 CASE W. RES. L. REV. 651, 686 (1993) (citing *id.*).

85. *Id.* at 693 (citing *Lucas*, 112 S. Ct. at 2921). (The dissenting opinion of Justice Stevens in *Lucas* makes a reference to a return to the era of *Lochner v. New York*. Stevens stated that refusals to defer to legislative determinations represents a "return to the era of *Lochner* . . . when common-law rights were . . . immune from revision by State or Federal Government.")

86. If a regulation works as a taking when it goes "too far," *then* total economic loss must always be a taking, with nuisance controls somehow aside. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 1270 (3d ed. 1993).

87. *Id.*

88. *See infra* note 129 and accompanying text.

89. S. 22, 104th Cong., 1st Sess. (1995).

90. *See, e.g.*, Tom Kenworthy, *GOP Plan to Broaden Property Rights Could Cost Public Dearly*, WASHINGTON POST, Dec. 13, 1995, at A7;

91. *See, e.g.*, Dick Thompson, *Congressional Chain-Saw Massacre*, TIME, Feb. 27, 1995, at 58.

property rights organizations,[92] and especially the political arena.[93] Unfortunately, those with the money and ability to influence have "taken the takings issue" away from the rural landowner and used the topic to fuel the fire of an "anti-regulation" theme of the present Congress.

Admittedly, the government is guilty of imposing some regulations, toward the goal of environmental protection or land stewardship, that could be implemented in a more effective manner. However, drastic steps to amend the Takings Clause or create a federal definition of a taking that supersedes historic precedent are in haste. Unfortunately, state legislatures and the U.S. Congress are not considering potential negative impacts on the environment as they push forward using "a litany of 'horror stories'"[94] to point out small landowners deprived of the maximum use of their land by agency regulation. Action by the legislature on the issue has the potential to unravel years of successful conservation management, and to increase the chances of massive irreversible environmental degradation in the future.

This section initially suggests that the current trend for broader property rights consists of ulterior motives rather than legitimate concerns of landowners who may lose their livelihood because of environmental regulation and land use restriction. This includes an examination of the source of support for this issue, and how new takings laws will largely benefit economic interests of land developers and urban investors. Next, there will be many ramifications from the decision to implement new takings laws. Society might lose the progress made toward protection of the environment and natural resources, the present balance within property law as seen in present Supreme Court holdings will be in question, and courts may have to face an inevitable new wave of takings claims. Following, this essay considers how the government will not be able to afford compensating private landowners for takings claims at a time when a new Congress emphasizes a national agenda to balance the federal budget and cut spending. Finally, this section looks at the barriers new federal takings legislation will have to overcome, as legislators attempt to codify "diminution in value," "intended use" of a parcel of land, and the "relevant parcel" of land which would be in question in takings claims.

A. *The Property Rights Issue is no Longer an Attempt to Grant Relief from Unduly Burdensome Regulation*

Suppose I want to turn my farm into a residential suburban housing area. I plan to blast out the sandstone, grind the tree stumps, and run cleaning solvent through the old storage tanks and barrels on the property. I estimate the land will sell for $500,000. "What?" I say. The land is not zoned for development? The town well is just downstream? A third of my farm is protected wetland? The solvent runoff may kill the endangered river otter in the Mississippi River? Well too

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92. *E.g.*, Defenders of Property Rights; The Property Rights Foundation, which publishes a periodical titled POSITIONS ON PROPERTY, containing articles such as *Environmentalism's Iron Grip," and Ways to go Dealing with Environmentalists*, May–Sept. 1994, v. 1, n. 2.

93. *See, e.g.*, Kenneth Pins, *Extent of Property Rights? Debate Reaches Capitol Hill*, DES MOINES REGISTER, Feb. 16, 1995, at 3A.

94. *U.S. House Sides With Landowners*, DES MOINES REGISTER, Mar. 4, 1995, at 1A.

bad. If you block my plan, you are impeding my private property rights. Under the Fifth Amendment of the Constitution that is a "taking." If you want me to preserve wetlands or keep water pure, pay me. Otherwise I will sue the town (zoning), the state (water regulations), and the feds (Endangered Species Act). Collectively, you owe me $500,000![95]

The current property rights issue is about economics. During recent debate on the House floor, representatives told many stories of the small defenseless landowner who stood to suffer great losses because of the over-regulation by the government.[96] "Private property rights are not about harming the environment. They are about fundamental fairness – asking the government to share the costs of public benefits" said one representative.[97] Others spoke of the need to cut red tape and deregulate the government.[98] These arguments seem to be more associated with political agenda and economic profit than efforts to establish fundamental fairness.

There is little doubt that there are cases of bureaucratic overzealousness in applying environmental regulation to individual landowners, but most of the push to ease environmental regulation comes from powerful economic interests. Proponents of the property rights movement hold up the small landowner as the poster child of their cause. Landowners suffering legitimate losses are no longer represented by the legislators who speak of those initial good faith claims. In a majority of cases it appears that the representative who receives funding and support from larger oil companies, timber companies, mining companies, and developers is the one looking for sympathy in telling the story of the small rural landowner deprived of his or her land.[99] One does not hear about the corporate interests in the takings rhetoric; only pleas for compassion for the so-called "little guy" who lost his livelihood.

Property rights advocates who complain about fundamental fairness and the government's duty to share the costs of public benefits are strikingly silent about government projects and decisions that give some private property virtually all its value. Some refer to this theory as a "givings" or "makings" approach to remind property rights advocates that there are two sides to the argument of

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95. *See Perspective on Property Rights; Pay me to be Good – or I'll Sue*, LOS ANGELES TIMES, Mar. 10, 1995, at Metro 7 (hereinafter Times). The owners of the Summitville gold mine in Colorado, having extracted $6 million in gold and poisoned 17 miles of the Alamosa River, demand compensation for a "taking." The owners argued that because the EPA declared their cyanide mess a Superfund site, they can no longer mine the land or sell it. *Id. See also*, 141 CONG. REC. H2472 (daily ed. Mar. 1, 1995) (statement of Rep. Skaggs), for further explanation of the facts of the Summitville gold mine clean-up.

96. *See generally, 141* CONG. REC. H2466 (daily ed. Mar. 1, 1995) (statement of Rep. Hansen speaking about Joe the grape farmer); 141 CONG. REC. H2471 (daily ed. Mar. 1, 1995) (statement of Rep. Bryant speaking about Anthony the tree harvester); 141 CONG. REC. H2472 (daily ed. Mar. 1, 1995) (statement of Rep. Fields speaking about the Fields family and their eagle's nest); 141 CONG. REC. H2495 (daily ed. Mar. 2, 1995) (statement of Rep. Smith speaking about a farmer and "a couple of cattails").

97. 141 CONG. REC. H2498 (daily ed. Mar. 2, 1995) (statement of Rep. Smith).

98. *See generally*, 141 CONG. REC. H2498 (daily ed. Mar. 2, 1995).

99. *See* Times, *supra* note 95. Among the supporters of this view are Weyerhaeuser, Exxon, DuPont, Boise-Cascade, Texaco, the National Cattleman's Association, the American Mining Congress, and the National Association of Realtors.

sharing costs.[100] Often royalty-free mines on public lands, subsidized logging roads, under-priced grazing permits, tax breaks for oil drillers, publicly funded roads, bridges, and water projects increase the value of adjacent or nearby private land.[101] However, the private property owners are not to be found when asked to share private gains that come at the public expense. "If it's right to compensate property owners for the economic harm caused by actions taken in the name of the public interest, for example, why shouldn't property owners reimburse some portion of the cost of public projects that benefit them?"[102] One conservationist explained the argument when he said,

> [w]e have to look at both sides of the ledger – federal give-a-ways of public resources as well as so-called takings of private property. The equation as it stands is grossly unbalanced. Bring fees for irrigation water in the West, federal flood insurance in flood plains and coastal zones, federal grazing fees, timber sales, and mining patents up to market prices, and then we can consider merits of further compensation for the alleged burdens of regulation.[103]

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100. 141 Cong. Rec. H2497 (daily ed. Mar. 2, 1995) (statement of Rep. Schroeder). Shroeder explained:

> Makings are when actions by federal agencies increase the value of private land. Makings should be included in the takings debate . . . in many takings cases, the taxpayer will be paying twice. First, to increase the value of the property so that it is useful, then again to compensate the property owner who cant do exactly what they want with it. . . . The Federal Government engages in a myriad of activities on a daily basis that increase the value of private property, or make money for private property owners. . . . The largest and most easily quantifiable making that the Federal Government creates for private property owners is the agricultural subsidy program. The taxpayer spends $10 billion on farm subsidies a year, and those subsidies increase the value of farm property by 15-20 percent. . . . The only taking going on will be the farmland owners taking their loot to the bank.

See also Edward Thompson, Jr., *Takings and Givings: Toward Common Ground on the Property Rights Issue*, AMERICAN FARMLAND TRUST issue paper, 1992;, Edward Thompson, Jr., Givings: *the Other Side of the "Takings" Coin*, AMERICAN FARMLAND TRUST, 1993; and Edward Thompson, Jr. *The Government Giveth*, THE ENVIRONMENTAL FORUM, at 22. (1993).

101. This notion also should concern the taxpayer, who in effect subsidizes others making profits from government contracts.

> Americans own the national forests, but lumber companies rip off the trees for a fraction of their value. The same taxpayers own much of the Western rangeland, but local ranchers overgraze the dryland grasses and pay a fraction of the market rent. Miners move onto taxpayer-owned land, much of it in the most scenic areas of the Southwest, extract the gold and silver and other minerals and pay absolutely nothing to the owners for what they walk off with. A Canadian firm will net $10 billion in gold profits from a Nevada mine, but pay taxpayers just $5 per acre on 1,000 acres for the right to dig.

Editorial, *The Property Rights Agenda*, DES MOINES REGISTER., Dec. 2, 1994, at 14A (hereinafter Editorial).

102. Brad Knickerbocker, *Private Property vs. Protection of Species: Two Tales of "Taking,"* THE CHRISTIAN SCIENCE MONITOR, Mar. 7, 1995, at 11.

103. *Federal Subsidies Should be Target, Not "Takings," Says Trout Unlimited*, U.S. NEWSWIRE, Mar. 2, 1995.

The debate over property rights does not hinge on whether one is for or against private property or even whether one favors a more powerful government; everyone enjoys the freedom and economic potential offered by private property.[104] Professor Neil Hamilton expressed that view in Congressional subcommittee testimony, and said further, "[t]he issue is what balance does the Constitution require between property rights of individuals and the ability of society to place reasonable restrictions on how land is used?"[105] Granted, the attraction of the property rights movement to landowners who feel the burden from increased land use regulations may be the natural result of political frustration and seem like the proper path to follow.[106] However, following this new short-sighted trend, which seeks to hastily change takings laws for self-interest reasons, may have drastic implications.

B. *Implications – Effects of a Federal Private Property Protection Law*

Efforts to pass a private property protection act will affect the courts, taxpayers, state constitutions, the quality of the environment, and progress made with natural resource protection. The takings issue is complex and cannot be settled with one federal law.

> [I]t's fanciful to believe that the legislative branch of the federal government alone can solve all our private property rights problems. Land use and zoning cases by their nature are unique, and are best considered on a case-by-case basis at the local level, sometimes with the assistance of the courts, not through some one-size-fits-all federal formula.[107]

By enacting a single federal property rights law defining a "taking," Congress will take away the power of society to regulate land use that is detrimental to the health, safety, and welfare of the people.

> The fact the Constitution, at least as it is now interpreted, does not protect whatever a landowner might want to do with property is not seen as an insurmountable obstacle to the property rights movement. [Property rights advocates, however, still seek a] change [in] the law so that what today might be seen as a reasonable regulation, would tomorrow become a taking for which compensation must be offered if the restriction is to have effect. Regrettably, [this effort will] change our nation's laws and limit the ability of society to protect the health, safety and welfare of all citizens. . . .[108]

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104. *Hearing on Private Property Rights and Agriculture Before the Subcomm. on Conservation, Research, and Forestry of the Comm. on Agriculture*, 104th Cong., 1st Sess. (1995) (testimony of Neil D. Hamilton, Director of the Drake Agricultural Law Center) (hereinafter Hamilton).

105. *Id.*

106. *Id.*

107. 141 CONG. REC. H2464 (daily ed. Mar. 1, 1995) (Statement by Rep. Goss).

108. Hamilton, *supra* note 95.

Through implementing new compensation requirements, a drastic loss of progress in environmental protection and natural resource preservation will result. This has been a repeating theme of this essay, if not *the* theme, and deserves recognition as the most critical ramification that will result from broader takings legislation.

If new laws force government agencies to compensate individuals for every instance when a regulation diminishes the value of an owner's land, or if new cost/benefit analysis laws require agencies to evaluate the effect of proposed regulations on private property,[109] one of two things will occur: agencies will quickly exceed their budget capacity, or the government will become effectively powerless to regulate land use. Agencies will be so fearful of massive compensation claims that they will narrowly interpret the concept of a property rights act, thereby jeopardizing public health and environmental protection. Government agencies will be faced with the inability to protect or control threats such as toxic wastes, sensitive areas prone to flooding, and dangerously low numbers of endangered species. Once the ecosystem is destroyed, there is no going back; the effects will be irreversible. Unfortunately, future generations will be the ones to suffer. Present day property rights advocates will collect the benefits from bulldozers and chain saws taking only minutes to erase sensitive lands and trees that took decades for nature to create.

A federal private property rights law would not be manageable unless drafters limit the scope of its subject matter. Even if broadening private property rights is limited to federal regulation of wetlands, endangered species, food safety and water rights,[110] some believe such a law will open a Pandora's box as to how far the property rights pushers would go in prioritizing an owner's right to do as he or she pleases:

> Cleaning the slate of regulations and enforcement would allow Farmer A to poison the wells and foul the air of Farmer B, who lives downstream and downwind. It would enable the people in the house next door to operate an all-night, drive-up fast-food joint out of their kitchen, advertised with a 30-foot billboard on the front lawn. And the owner of the lakeside lot next to yours could uproot every tree and blade of grass, erect a tar-paper shack, raise mink and sell pelts from the front yard. The difference between such behav-

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109. *See* S. 22, 103rd Cong., 2nd Sess. (1995). Sen. Robert Dole introduced S. 22, which requires agencies to complete a "private property rights taking impact analysis" before issuing or promulgating any actions. *Id. See also* H.R. 1022, 104th Cong., 1st Sess. (1995), named the Risk Assessment and Cost Benefit Act of 1995. The Act would have profound adverse consequences on, among other things, hazardous waste clean-ups and creation of health standards and quality control. Carol Browner, EPA Director, estimated that compliance within her agency alone would require nearly a thousand additional employees and $200 million annually. *Environment – Did America Vote to Trash Regulation?*, MINNEAPOLIS STAR TRIBUNE, Feb. 25, 1995.

110. This was one suggestion, and the final outcome, of H.R. 925, 104th Cong., 1st Sess. (1995), titled the Private Property Protection Act. An amendment offered by Congressman Tauzin, author of the bill, to the amendment in the nature of a substitute offered by Congressman Candy, defined "specified regulatory law" as: "(A) section 404 of the Federal Water Pollution Control Act [wetlands]; (B) the Endangered Species Act of 1979; (C) title XII of the Food Security Act of 1985; or (D) with respect to an owner's right to use or receive water only ...." 141 CONG. REC. H2504 (daily ed. Mar. 2, 1995).

> ior and bulldozing some wetlands or destroying wildlife habitat is a matter of immediacy. It just takes a bit more time for the latter to erode your quality of life.[111]

Small landowners and farmers believe they already take good care of the land or practice sustainable agriculture without the restrictions from federal laws, but many do not think ahead to what consequences may affect them as a result of economic interests from larger organizations with better leverage.[112] Senator Patrick Leahy, former chairman of the Senate Committee on Agriculture, said in a *Farm Journal* article that,

> many farm groups have jumped onto the "regulatory takings" bandwagon, thinking legislation aimed at preventing "regulatory takings" may shield them from further health and environmental regulation. What these groups may not have carefully considered, however, is that this takings legislation may not be a shield at all. Instead, it may be a powerful sword to attack federal farm programs, which are worth more than $20 billion to U.S. farmers.[113]

Senator Leahy predicted two law suits that farmers may expect as a result of takings legislation: 1) The oil companies sue the EPA to stop the EPA's pro-ethanol rule, arguing that it takes their property because it reduces the value of their product, a derivative of natural gas; and 2) grain trading companies sue the USDA to stop it from extending the Conservation Reserve Program because it cuts back the amount of grain the company could export.[114]

Also, it is ironic that many agricultural groups supporting right-to-farm laws are quick to argue land use regulations imposed by state legislatures are *not* takings when economic benefits are in their favor.[115] This is the "flip side" to regulatory takings.[116] Right-to-farm laws essentially exempt landowners from nuisance suits where odors from feedlots may interfere with the use and enjoyment of neighboring property. The rationale behind this protection is to establish priority of rights in the landowner who was there first, and to protect a "reasonable" reallocation of property rights by offering the landowner a "coming to the nuisance" defense. Right to farm laws, though seemingly a "taking" of the neighbor's use and enjoyment of his or her land, "illustrate that society does not write property rights in stone, but instead those laws draw both definition and legal support from society"[117] – at least when there is economic incentive at stake.

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111. Editorial, *supra* note 101.

112. *See e.g.*, Hamilton, *Property Rights, Takings Issue Oversold to Agriculture*, FEEDSTUFFS, Jan. 23, 1995, at 14-16.

113. Patrick Leahy, *Takings Legislation a Double-Edged Sword*, FARM JOURNAL, Jan. 1995, at E-4.

114. *Id.*

115. *See* Hamilton, *supra* note 104 at 15-16.

116. *Id.* at 15.

117. *Id.* at 16.

Limiting who is allowed to bring a takings claim will add to the confusion of limiting takings claims by subject matter. What about the neighbor who depends on wetland management or flood plain control restrictions for his viability? Imagine the number of lawsuits that could be filed from neighbors suddenly "flooded out" because the neighbor up the road recently received a permit to fill in wetlands or bulldoze levees and dikes located on his property.

Other effects of federal takings legislation will be an increase in the number of takings claims, uncertainty in state constitutions that contain environmental "Bill of Rights" provisions,[118] and the unpredictability of judicial interpretations of takings claims. Although legislators are attempting to clarify the issue, only the Supreme Court, not Congress, can interpret the Fifth Amendment. Instructing the justices of the Supreme Court on how to interpret the Takings Clause of the Fifth Amendment through a private property protection act is neither a good idea, nor a defined power of Congress.[119]

The increased number of takings claims will require a new bureaucracy. Many new administrative proceedings will be necessary to sort through the cries for compensation. One Congressman called the proposed Private Property Protection Act of 1995 the "Bureaucrats and Lawyers Relief Act."[120] Indeed, there will be many new opportunities for assessors, evaluators, arbitrators and, of course, lawyers.

C. *The Costs of New Compensation Requirements*

The notion of creating an act that broadens private property rights and reconciling it with an attempt to balance the federal budget is a notion of mutually exclusive goals, especially if present levels of progress in environmental protection are to be maintained. Costs of enforcing a new federal compensation law will turn into a new entitlement program for landowners. Simply stated, the government will not be able to afford compensating private landowners for takings claims at a time when a new congress emphasizes a national agenda to balance the federal budget and cut spending.

Under new federal takings laws, property owners who successfully claim that a government regulatory action diminishes the value of their property would be entitled to compensation. Payments would be required even for regulatory actions that the government is required to take under other existing laws. Costs of

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118. *See* Fla. Const. art II, § 7; Ill. Const. art. XI, § 1; Mass. Const. amend. art. 97; Mich. Const. art. IV, § 52; Mont. Const. art. XI; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV; N.C. Const. art. XIV, § 5; Pa. Const. art. 1, § 27; R.I. Const. art. I, §17; Va. Const. art. XI, §§ 1, 2. The Pennsylvania Constitution states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

Pa. Const. art. I, § 27. *See also*, Richard J. Tobin, *Some Observations on the use of State Constitutions to Protect the Environment*, 3 ENVTL. AFF. 473 (1974).

119. Can you imagine one justice believing a land's value has been diminished by 21 percent, and another justice dissenting because she believes the land is only diminished by 19 percent?

120. 141 CONG. REC. H2465 (daily ed. Mar. 1, 1995) (statement of Rep. Conyers).

this entitlement program could be extremely large. Landowners would have incentives to apply for all sorts of federal permits – even for actions they never previously planned to take. If any agency denied any land use permits, the landowner would be entitled to a check. Compensation would be due even when the government was simply denying permission for an act that the landowner knew would not be allowed when he or she acquired the land.

The Office of Management and Budget stated that, "preliminary estimates indicate that the effect of [a new property rights law] would be to increase the deficit by at lease several billion dollars during fiscal year 1995 through 1998."[121] The fact that this new federal law will cost a great deal is no secret to lawmakers. A report of the House Rules Committee acknowledged that the law creates a new entitlement, and that this entitlement requires numerous Budget Act waivers.[122] In fact, to pass the law, legislators created a rule "waiving almost every major provision of the Congressional Budget Act."[123] The rule waived section 302(f), which is the point of order against bills that breach the allocations of spending authority to committees. It waived section 311(a), the point of order against bills that breach the ceiling on total spending set by the budget resolution, and also section 308, which requires committee reports on new entitlement bills to disclose and justify new entitlement. Finally, the rule used to pass the takings bill in the House of Representative waived section 401(b), which is the point of order against new entitlements effective before the start of the new fiscal year.

D. *Problems with Defining a "Taking" in a Federal Law*

In addition to cost concerns and added bureaucracy for the government, a federal private property act will face interpretation problems with, among other things, defining a "taking," "diminution in value," the "intended use" of the land, and the "relevant parcel" of land to which the diminution will apply.

From *Mugler v. Kansas* [124] to *Lucas v. South Carolina Coastal Council,*[125] the Supreme Court has attempted to develop a threshold for an unconstitutional taking. The present test is when a "regulation denies all economically beneficial or productive use of land then"[126] a restriction becomes a public use and compensation is due. From the language of the Court, it seems clear that land value diminished by one-third would not come close to the requirement of "*all* economically beneficial or productive use." However, in the "Contract with America," the Republicans proposed thirty three per cent as the threshold which, when crossed, would trigger compensation for an owner under the Fifth Amendment.[127] The root of defining a taking, and even the term "diminution in value," comes from the U.S. Constitution, which states, "nor shall private prop-

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121. 141 CONG. REC. H2464 (daily ed. Mar. 1, 1995) (statement of Rep. Sabo).

122. *Id.* Passing the Private Property Rights Act required Congress to ignore budget limits established by previous session rules.

123. *Id.*

124. 123 U.S. 623 (1887).

125. __ U.S. __, 112 S. Ct. 2886, 2893 (1992).

126. *Id.*

127. H.R. 925, 104th Cong., 1st Sess. (1995). Final passage of the Private Property Protection Act set the threshold at 20 percent.

erty be taken for public use without just compensation."[128] Private property is taken, according to the Supreme Court, when there is no viable use left in the property as a result of government regulation. The Court has developed this standard over almost 100 years, and it seems ridiculous to force judges to determine whether diminution in value of property has occurred to an extent of thirty two, thirty three, or thirty four per cent.

If a private property protection act states that a taking occurs when a government land use restriction diminishes the value of certain property by a defined percent, the next problem is, diminished from *what*? Defining the "intended use" of the property or what value the regulation diminished would be the means for calculating the "diminution in value." A regulation that restricts a speculative or even imaginary, but very profitable, land use notion could quickly add up to the threshold diminution in value—especially if the landowner's only plan for the proposed use is in his or her imagination. Furthermore, plans for an extravagant land use, halted by regulation, could be expensive because the landowner loses the opportunity to develop. (After all, why would a landowner claim she wanted to fill in a wetland merely to plant corn when she could claim the plan was to build a casino?) Would a landowner who, at the time of acquiring property, knew, or should have known, that use of the property would be limited by an agency action still be able to recover for diminution in value?[129]

The "relevant parcel" of land that is being diminished by regulation also presents a problem with interpretation. When one asks what portion of the "property" is destroyed, it is necessary to define "property" to clarify the relevant parcel. For example, if the Army Corps of Engineers delineated as a wetland a two hundred by ten yard riparian waterway that ran through the middle of a field, would the diminution in value of the "relevant parcel," restricted by the regulation, affect the landowner's use of the waterway, of the whole field, or the entire farm? Is the potential use/value of the field diminished by seventy percent, or is the value of the whole farm merely reduced by five percent?

The problem of determining which value to use in the denominator of the equation is nothing new. Harvard Law Professor Frank Michelman speaks of a "conceptual severance"[130] that goes back to the "bundle of sticks" analogy; exactly how will Congress conceptualize (or codify) the bundle? In *Pennsylvania Coal v. Mahon*, the Court only acknowledged the coal rights that a land use law effectively severed from the surface.[131] The statute almost completely destroyed the value of the coal, and the Court did not consider the investments in the surface and the coal together.[132] Couldn't the surface still be put to many good uses? In *Penn Central*, the Court focused on the surface rights and the air rights together and held that even though the regulation totally deprived Penn Central of the air rights, valuable surface rights remained.[133] Further, compare the *Penn Central* holding to *Keystone v. DeBenedictis*, where the Court looked at the entire mining

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128. U.S. Const. amend. V.

129. House committee action rejected such an amendment. *See* 141 CONG. REC. H2500 (daily ed. Mar. 2, 1995).

130. Michelman, *supra* note 11, at 1614.

131. 260 U.S. at 402.

132. *Id.*

133. 438 U.S. at 109.

operation in upholding a Pennsylvania Subsidence Act requiring coal operators to leave about two percent of the coal in the ground to serve as pillars.[134] The *Keystone* decision framed the conceptual severance analysis not in terms of absolute or relative value lost but rather in terms of absolute value left.

V. CONCLUSION

The debate, between those advocating stronger takings laws and those who believe the environment and natural resources will suffer as a result thereof, may have reached its culmination. However, the property rights issue behind the debate is not so contemporary or even so hard to conceptualize. There always have been and always will be competing land uses. Professor Alexander believes these competing uses come to irreconcilable differences when one compares a "self-regarding" view (individual property rights) and the "communitarian" view (police power for the good of society).[135]

> The communitarian ethic stresses the importance of responsibility to others as well as to oneself. It means that you are not free to use your land or other resources in any way you want. The self-regarding vision believes life in our political and legal culture is that each person is free to do or say pretty much what he or she wants. The purpose of property and its constitutional protection is basically to create a wall between the individual and the collective that will guarantee the individual the space, literally as well as figuratively, to satisfy his own desires.[136]

Professor Alexander proposes that the objective in mediation of the parties ought to be reconciling the conflicts in a way that acknowledges that neither vision is privileged.[137] Alexander says, "[a]s a judicial technique, ad hoc balancing is the only way to assure that the dialectic is not closed by one vision preempting the other through some formal rule that effectively codifies it."[138]

Protection of environmental and natural resources and respect for property rights are interdependent, not inconsistent. Environmental laws maintain the value of property and protect present and future use and enjoyment. Environmentally based restrictions on property use enabled the concept of property rights to develop in its current form. Thus, "there is no inherent conflict between environmental protection and property law; they are two sides of the same coin."[139] Against this background, most regulatory takings claims are best understood as attempts to redefine, rather than to preserve, the rights associated with private

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134. 480 U.S. at 481.

135. Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 CONST. COMMENT 259 (Summer, 1992).

136. *Id.* at 260.

137. *Id.* at 276-77.

138. *Id.* at 277.

139. James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 ENVT'L. L. REP. 10231, 10249 (May 1994).

property. "Disconnected from property's roots, such claims lack vitality and must fail."[140]

The Republicans' Contract with America leaves out the word "environment" for good reason. In a poll conducted by Newsweek, results showed that seventy-three per cent of Americans would be "upset" if cutting back on government seriously weakened or eliminated environmental regulations.[141] However, polls are not needed to realize that there is a public necessity for sustaining the environment and natural resources. This task is enough of an uphill battle in getting the nation to comply with what resource protection laws and regulations exist currently, not to mention if land use and environmental laws are weakened further by increased private property rights and takings laws. The government's limitations on property use are traditional and constitutional. The public should not be taken by the takings issue.

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140. *Id.*

141. *The Newsweek Poll*, NEWSWEEK, Jan. 9, 1995 (results from polling December 27-28, 1994).