

Fordham Environmental Law Review

Volume 8, Number 3

2011

Article 7

Takings Bills Threaten Private Property, People, and the Environment

Glenn P. Sugameli*

*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

TAKINGS BILLS THREATEN PRIVATE PROPERTY, PEOPLE, AND THE ENVIRONMENT

Glenn P. Sugameli*

INTRODUCTION

Proponents of takings bills rely on two unfounded claims: that “takings” bills will protect private property and that such bills track the Constitution’s Fifth Amendment clause, “nor shall private property be taken for public use, without just compensation.”¹

* Counsel, Office of Federal and International Affairs, National Wildlife Federation, 1400 16th Street, N.W., Suite 501, Washington, D.C. 20036-2266 (202) 797-6865; sugameli@nwf.org. Portions of this article are adapted from Glenn P. Sugameli, *Environmentalism: The Real Movement to Protect Property Rights*, in *A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE* 59 (Philip D. Brick & R. McGreggor Cawley eds., 1996) [hereinafter Sugameli, *Environmentalism*]; and Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council*, 12 VA. ENVTL. L.J. 439 (1993) [hereinafter Sugameli, *Takings Issues in Light of Lucas*], which was reproduced in the 1994 ZONING AND PLANNING LAW HANDBOOK (Kenneth Young ed.); excerpted in the LAND OWNERSHIP AND USE casebook (Curtis Berger & Joan Williams eds., 4th ed. 1997), and will be reprinted in the three volume set ENVIRONMENT, PROPERTY AND THE LAW (Ronald L. Rosenberg ed., forthcoming 1998).

1. U.S. CONST. amend. V. For example, Senate Committee on the Judiciary Chairman Orrin G. Hatch (R-Utah), in his opening statement at a Committee hearing on S. 605, the unsuccessful Omnibus Property Rights Act of 1995, declared that:

excesses in land use regulations collectivize property by prohibiting the owners of their property the ability to use productively their property. S. 605 was written to fulfill the promise of the fifth amendment that no property shall be taken by the Government except for public use and with just compensation to the property owner It codifies recent Supreme Court decisions and clarifies the meaning of sometimes confusing case law.

The Right To Own Property: Hearings on S. 605 Before the Comm. on the Judiciary of the Senate, 104th Cong. 139 (1995) [hereinafter S. Hrg. 104-535] (statement of Sen. Orrin G. Hatch). As described

In fact, as this article demonstrates, takings bills would harm property and other rights of average Americans *because* they would radically redefine property rights by using standards that are contrary to the Fifth Amendment's balanced approach.² It is not unconstitutional for Congress to require payments to companies and developers who have not lost any property rights under established Supreme Court jurisprudence. The result, however, should be recognized for what it is — a new entitlement that would impose massive costs on taxpayers, trigger a litigation explosion, generate more bureaucracy and cause an inability to enforce protections for people, private property and public resources. Takings bills would create a right in developers, factories and others to be bad neighbors: extracting profits at the expense of nearby people, property, and the environment. Nearly everyone lives, works or recreates downstream, downwind, or nearby property on which harmful activities would be allowed.

Since 1990, the author³ and others at the National Wildlife Federation (NWF),⁴ the nation's largest membership-supported conservation organization, have been in the forefront of the

below, overwhelming evidence was presented at Senate Judiciary Committee hearings that the bill contradicted unanimous, established Supreme Court precedent. Subsequently, Sen. Hatch essentially repeated his assertion in describing a slightly revised bill that tracked the S. 605 standards. *See* 142 CONG. REC. S7888 (daily ed. July 16, 1996).

2. *See* John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423 (1995); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409 (1995); Sugameli, *Environmentalism*, *supra* note *, at 59.

3. *See, e.g.*, articles by the author cited *supra* note *. *See also* *Courts Reject Wetland Takings Claims*, NAT'L WETLANDS NEWSL. (Envtl. L. Inst. 1994); *Species Protection and Fifth Amendment Takings of Private Property*, in TRANSACTIONS OF THE SIXTIETH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE (Kelly G. Wadsworth & Richard E. McCabe eds., Wildlife Management Inst. 1995); Colloquium, *The Fifth Amendment's Just Compensation Clause: Implications for Regulatory Policy*, 6 ADMIN. L.J. AM. U. 674 (1993) (Sugameli cmts.); Glenn P. Sugameli, *A Most Extreme Takings Bill*, WASH. POST, Dec. 3, 1995 (letter to the editor).

4. *See, e.g.*, Editorial, *Balancing Private Rights and Public Well-Being*, NAT'L WILDLIFE, Oct.-Nov. 1994, at 3; Doug Harbrecht, *A Question of Property Rights and Wrongs*, NAT'L WILDLIFE, Oct.-Nov. 1994, at 4.

broad coalition opposed to state and federal takings bills. NWF and others who oppose takings bills are the genuine private property protection movement, not the self-styled "property rights" advocates. NWF strongly supports the Fifth Amendment's balanced protection of private property. If a court determines that a government limit on the use of private property goes so far as to be a taking, just compensation must be paid.⁵ NWF opposes takings bills because they threaten a wide range of protections of private property, people and public resources which do *not* take private property rights. As discussed below, takings bills would delay, block, or be so prohibitively expensive as to force repeal of these protections.

Takings bills are a reaction to environmental, zoning, health, safety and other laws that restrain inappropriate uses of private property.⁶ For example, pollution control laws were enacted because common law nuisance doctrine was inadequate to protect people and property. Passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)⁷ was prompted by the collapse of a massive coal company waste refuse pile which had dammed a stream.⁸ The resulting 20-to-30-foot tidal wave killed more than 125 people and destroyed 1,000 homes.⁹

5. In contrast with a physical taking where the government physically appropriates or invades private property, a regulatory taking refers to the constitutional principle that the government can "take" private property by severely restricting its use through regulation, thus, requiring payment to the property owner.

6. See, e.g., Nancie G. Marzulla, *Property Rights Movement: How It Began and Where It is Headed* [hereinafter Nancie G. Marzulla, *Property Rights Movement*], in *A WOLF IN THE GARDEN*, *supra* note *, at 39.

7. Pub. L. No. 95-87, 30 U.S.C. § 1201 (1994).

8. See generally *Virginia Surface Mining and Reclamation Ass'n, Inc., et al. v. Andrus*, 483 F. Supp. 425 (W.D. Va. 1980); Bruce Babbitt [Secretary of the Interior] & Robert Uram [Dir., Off. of Surface Mining Reclamation & Enforcement], *GOP Bill Puts King Coal Back on Throne*, *CHARLESTON GAZETTE* (W. Va.), July 17, 1996, at 5A ("Buffalo Creek was one of the worst manmade disasters in U.S. history. More than any other event, Buffalo Creek led to the passage of the surface mining law by showing that control of surface coal mining operations is a matter of life and death, not mere landscape aesthetics.").

9. See Gerald M. Stern, *Prologue to THE BUFFALO CREEK DISASTER* ix-x (Vintage Books 1976).

Much of the concern behind takings bills is based on a misconception that the Constitution's Takings Clause was drafted to reflect a situation in which the government regulated private property minimally, if at all.¹⁰ Under the guise of protecting property rights, however, takings bills actually contradict fundamental principles that have been repeatedly reaffirmed by the Supreme Court.¹¹ Takings bills favor profits at the expense of homeowners and the public, essentially reversing established law.¹² Under the Court's approach of balancing the property and other rights of all affected people, very few conservation laws result in takings. For example, courts have rejected a series of takings claims against SMCRA's protection of the safety and property of coalfield residents from the devastating effects of strip mining and underground mining.¹³ These included a sweeping takings claim against SMCRA's prohibition of coal mining in buffer zones around cemeteries, historic sites, homes, and other sensitive areas. The Supreme Court rejected the claim that the law had taken the coal that could not be mined.¹⁴

Part I of this article discusses the origin and structure of various takings bills. Part II considers takings bills in light of long-

10. See, e.g., S. REP. NO. 104-239, at 13. For a refutation of this misconception, see John F. Hart, *Colonial Land Use Law and Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996). See also James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,231 (1994).

11. See *infra* Part II.A.

12. While takings bills would not change the standard for determining whether property has been taken under the Constitution, they would alter the results of cases that have found no taking. Takings bills would require payments under a new entitlement in cases where courts have found that no property rights have been taken.

13. See, e.g., *Hodel v. Indiana*, 452 U.S. 314 (1981).

14. See *id.* at 329 ("Congress adopted [SMCRA] in order to insure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety . . ."). See also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (rejecting takings challenge to Pennsylvania law requiring that 50% of the coal be left in place under protected homes to prevent collapse and "to protect the public interest in health, the environment, and the fiscal integrity of the area").

standing legal precedents. Part III demonstrates how enactment of these bills would seriously undermine important protections for people, property and the environment.

I. TAKINGS BILLS

A. *Origin of Takings Bills*

The concept of a duty to avoid takings is fueled in part by rhetoric regarding alleged “unconstitutional” takings. In this regard, it is important to recognize that the Fifth Amendment Takings Clause does not prohibit takings of private property for public use; it only requires that just compensation be available through the courts where such a taking is found to have occurred. “[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.”¹⁵ Where compensation is available, as it is generally against the United States under the Tucker Act,¹⁶ monetary payments obtainable through Tucker Act suits, not injunctive relief, constitute the remedy for an alleged “constitutional taking” of private property for public use.¹⁷

15. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

16. 28 U.S.C. § 1491 (1994).

17. *Preseault v. ICC*, 494 U.S. 1, 11 (1990). The Ninth Circuit rejected an argument that a statutory amendment “amounts to a taking and therefore is unconstitutional. . . . Because appellants can sue the United States in the Court of Federal Claims, the 1995 Amendment is not an uncompensated taking. We therefore have no basis for holding [the amendment] invalid as appellants suggest.” *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1284-85 (9th Cir. 1997). This opinion was written by Judge Kozinski, who was formerly Chief Judge of the trial-level United States Claims Court, since renamed the United States Court of Federal Claims. Thus, a question of an “unconstitutional” taking only arises in one of two very rare situations. The first is a taking that is not for public use. As the *Bay View* court recognized: “After *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), . . . a legislative determination of what constitutes ‘public use’ is subject to ‘an extremely narrow’ review, and will be upheld so long as it’s rational.” *Id.* at 1286 (citing 467 U.S. at 240, 243). Second, the legislature could explicitly preclude a monetary remedy. *See id.* at 1285 (“the availability of a Tucker Act remedy is presumed unless Congress in enacting a specific

Much of the pro-takings bill rhetoric consists of argument by mythical anecdote. Prominent takings bill advocates often misinterpret court rulings.¹⁸ Proponents of takings bills have also repeatedly failed to substantiate their assertions of widespread takings.¹⁹ This is especially true of assertions that widespread takings of property rights result from conservation and other laws that protect private property, public health and safety by limiting destruction of wetlands, floodplains and other natural resources.

statute has 'withdrawn the Tucker Act.' " (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)).

18. For example, according to her new book, "Nancie G. Marzulla is the nationally recognized leader of the property rights movement." **Nancie G. Marzulla & Roger J. Marzulla**, *PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION* xvii (1997). She has repeatedly stated or implied that the *First English* and *Florida Rock* cases found takings. See Nancie G. Marzulla, *The Property Rights Movement*, in *LAND RIGHTS: THE 1990s' PROPERTY RIGHTS REBELLION* 15 (Bruce Yandle ed., 1995) ("In the *First English* decision, the Court held that the county was required to compensate a church barred by a flood control ordinance from reconstructing summer camp buildings destroyed during a 1978 flood."). See also Nancie G. Marzulla, *Property Rights Movement*, *supra* note 6, at 46-47; Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to 'Environmental Takings'*, in *REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS* 87, 98 (Roger Clegg ed., 1994) [hereinafter Marzulla, *State Rights*]. In *First English*, the Supreme Court declined to decide whether barring reconstruction of a summer camp destroyed by a flood was a taking. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (focusing on appropriate remedy in cases where a taking is found). Subsequently, the state court decision on remand found no takings, 210 Cal. App. 3d 1353, 1372-73 (1989), a decision the Court let stand, *cert. denied*, 493 U.S. 1056 (1990). In *Florida Rock*, the Supreme Court denied the company's petition to review the Federal Circuit's decision which vacated a trial level finding of a taking. *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

19. See Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENVTL. L.J. 637 (1995) (rebutting hyperbolic arguments and horror stories of private property proponents); see also Patrick A. Parenteau, *Who's Taking What? Property Rights, Endangered Species, and the Constitution*, 6 FORDHAM ENVTL. L.J. 619 (1995).

For example, in the 1996 Vice Presidential candidate debate, Republican nominee Jack Kemp spoke vaguely of an unnamed Oregon farmer who allegedly had voluntarily declared 25 percent of his property to be wetlands and then found that

[T]he bald eagle began to use it as a habitat. The Corps of Engineers, the Bureau of Wildlife and Fisheries [sic], all of the federal agencies came onto his property, declared it a federal wetland and said he couldn't drive. They took away the road. He couldn't mend his fences. And they wouldn't pay the value of the loss²⁰

Attempts to locate the source of this story were unsuccessful.²¹

These anecdotes appear to be versions of what a court described in a different context:

[T]he "urban legends" that Jan Harold Brunvand writes about in "The Vanishing Hitchhiker," and "Curses! Broiled Again!" (1989). According to Brunvand, a distinguishing feature of an urban legend is that no one is ever able to produce an eyewitness to the actual event — only a "friend of a friend." Another is that the stories crop up over and over again, in many different settings.²²

In fact, wetlands, species protection and other conservation laws are extremely unlikely to take private property. For example, in the over 20 year history of the Endangered Species Act (ESA), courts have only decided four Fifth Amendment takings cases on the merits, all of which have found that the ESA did not take private property.²³ In Fiscal Year 1995, there were over 62,000 wet-

20. *Campaign '96: Transcript of the Vice Presidential Debate*, WASH. POST, Oct. 10, 1996, at A25.

21. See Al Kamen, *Next Time, Perhaps, a Shorter Speech*, WASH. POST, Oct. 23, 1996, at A21. The Fish and Wildlife Service and the Democratic National Committee checked, but "no one has been able to find anything in their files that remotely resembles this incident." *Id.*

22. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 781 F. Supp. 1385, 1394 n.7 (W.D. Wis. 1992), *modified on other grounds*, 991 F.2d 1249 (7th Cir. 1993).

23. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (rancher fined for killing grizzly bears that were eating sheep); *United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (ban on interstate or foreign transport of endangered species as applied to species lawfully possessed before passage of the ESA); *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995) (no taking from ESA prohibition on sale of animal parts; defendant was not denied all value as other uses remained, defendant

lands section 404 permit applications, yet only 274 (or 0.5 percent) of the permits were denied.²⁴ Even in the rare cases where permits are denied, there is no limitation on use of upland portions of property or on grazing, agricultural or other uses of wetland areas for which a permit is not required.

Until recently, takings legislation has generally assumed two forms: (1) so-called "compensation" or "payment" bills, and (2) "assessment" bills.²⁵

Payment bills purport to compensate property owners whose property has been "taken" through use restrictions. The term "compensation bill," however, is a misnomer. "Compensation" means payment for something that has been lost or taken. These bills do not offer "compensation" for property that has been taken. In fact, these bills would use funds from federal, state or local taxpayers to pay property owners who have not lost any property rights, according to every Justice of the Supreme Court. Thus, as demonstrated below, payment bills would pay developers, factory owners and others to obey laws that protect the rights of all Americans.

Assessment bills are typically based on an impossible premise. They require that each regulating agency perform costly studies to make a takings determination and a dollar assessment when any regulation is proposed. Such a requirement is inconsistent with Supreme Court rulings and would generate costly and obstructive red tape that can block or delay needed protections for people and property.²⁶

The fact that takings bills would undermine fundamental protections for people, property and the environment is indicated by the origins and history of the self-proclaimed "property

had never applied for an ESA sale permit and defendant had no property right in animal parts he obtained after they were subject to ESA proscriptions); *Good v. United States*, 39 Fed. Cl. 81 (1997), *appeal pending*. See also *Four Points Utility Joint Venture v. United States*, 40 Env't Rep. Cas. (BNA) 1509, 1511 (W.D. Tex. 1994) (takings claim was not ripe because plaintiffs failed to apply for an ESA section 10(a) incidental take permit).

24. See U.S. ARMY CORPS OF ENGINEERS, FISCAL YEAR 1995 REGULATORY PROGRAMS STATISTICS (Nov. 8, 1995).

25. See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 137 (1995) [hereinafter Byrne, *Ten Arguments*].

26. See *infra* Part II.A.

rights" movement. Former Solicitor General Charles Fried (1985-89) described the approach of the Reagan Administration's Department of Justice as:

[a] specific, aggressive, and, it seemed to me, quite radical project . . . to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation *as for a taking* of property every time its regulations impinged too severely on a property right. . . . [T]here would be, to say the least, much less regulation.²⁷

Government compensation for actual takings of property is required by the Fifth Amendment. What Fried termed the "radical" agenda of the Reagan Justice Department, however, would have required compensation or forced the repeal of regulations, not only for *actual* takings, but in thousands of other instances "*as for a taking*."²⁸

This agenda was embodied in President Reagan's Executive Order 12,630.²⁹ The Order requires that all federal regulations be approved under a takings test which, as the Congressional Research Service and others have demonstrated, severely misrepresents Supreme Court rulings.³⁰ The primary authors of the Exec-

27. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT* 183 (1991) (emphasis added).

28. *Id.* (emphasis added).

29. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).

30. See Congressional Research Service, *Comparison of Taking Principles In Executive Order No. 12,630 with Supreme Court Taking Jurisprudence, and Related Questions*, CRS-6 (released memorandum Dec. 15, 1988); Kirsten Engel, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulation*, 14 VT. L. REV. 213 (1989); Robin E. Folsom, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639 (1993); Jerry Jackson & Lyle D. Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,463 (1988); James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,474, 10,476 (1988); Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 FED. B. NEWS & J. 95 (1990); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 288, 291 (1996) [hereinafter Rose, *A Dozen Propositions*]; Sugameli, *Takings Issues in Light of Lucas*, *supra* note *, at 443-45; Charles R. Wise, *The Changing Doctrine*

utive Order were Mark Pollot and Roger Marzulla,³¹ who have since left the Justice Department and pursued careers as zealous pro-takings advocates.³²

In 1991, the United States Office of Surface Mining (OSM) proposed a rule³³ that relied on the flawed Executive Order to allow coal companies to destroy homes and other sensitive areas. In effect, the rule would have nullified the congressional protection afforded by SMCRA section 522(e) for sensitive national lands and private property³⁴ by defining the statutory exception for "valid existing rights" of coal companies contrary to the rights of surface private property owners and the public.³⁵ OSM

of Regulatory Taking and the Executive Branch: Will Taking Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?, 44 ADMIN. L. REV. 403, 426 (1992).

31. See MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 161 (1993); Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation — Collision or Cooperation?*, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10,254 (July 1988).

32. See S. Hrg. 104-535, *supra* note 1, at 59-60, 70-78 (testimony of Roger Marzulla); *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Env't and Pub. Works*, 104th Cong. 33, 87 (1996) [hereinafter S. Hrg. 104-299] (statement and testimony of Roger Marzulla); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1, *reprinted in* LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT 36, 39-40 (John Echeverria & Raymond Booth Ely eds., 1995) (Mark Pollot "has drafted a new, stronger proposed takings law The idea is that a property owner should be able automatically to obtain compensation if he or she can show that his or her land lost 50 percent of its value as the result of a new zoning law, or wetlands regulation, wildlife habitat preservation plan, or other regulation."); Debate, *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253 (1995) [hereinafter "*Takings Rights*" Debate].

33. 56 Fed. Reg. 33,152-65 (1991). The author submitted extensive comments opposing OSM's proposal on behalf of the National Wildlife Federation and other citizen and environmental groups.

34. SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988), protects these areas, subject to "valid existing rights," which the Act does not define.

35. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (upholding Pennsylvania's power "to protect the public interest in health, the environment, and the fiscal integrity of the area"); *Hodel v. Indiana*, 452 U.S. 314, 329 (1981) ("Congress adopted

proposed to open to strip mining areas including National Parks and the nation's backyards, schoolyards, churchyards and graveyards.

OSM's proposed rule also reaffirmed a 1988 Interior Department Statement of Policy³⁶ which effectively confirmed that the Reagan Administration agenda was motivated by concern for development interests like the coal industry, not by a concern for the property rights of average citizens.³⁷ The Statement of Policy declared that if companies initiated action to conduct mining in National Parks and other federal areas protected under SMCRA section 522(e)(1), then "subject to appropriation the Secretary of the Interior [would] use available authorities to seek to acquire such rights through exchange, negotiated purchase or condemnation."³⁸ This policy did not extend to the other subsections, including SMCRA section 522(e)(5), that protect the private property and other rights of surface owners in their homes, schools, churches and cemeteries.³⁹

The public rejected this distorted view of property rights. When the Bush Administration stated its intention to finalize the OSM rule after the 1992 presidential election, the *New York Times* reported on the plan in a widely syndicated front-page article.⁴⁰ As a result of the firestorm of public and editorial criticism that

[SMCRA] in order to insure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety").

36. Department Policy Pertaining to the Exercise of Valid Existing Rights in Areas Covered by section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 53 Fed. Reg. 52,384 (1988).

37. 56 Fed. Reg. 33,152, 33,154 (proposed July 18, 1991).

38. *Id.* (citing the 1988 Statement of Policy).

39. By its terms this policy was restricted to § 522(e)(1), and thus did not address land that is "within three hundred feet from any occupied dwelling, . . . within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery." See SMCRA § 522(e)(5), 30 U.S.C. § 1272(e)(5) (1988).

40. See Keith Schneider, *U.S. Set to Open National Forests for Strip Mining*, N.Y. TIMES, Sept. 28, 1992, at A1; see also Boyce Rensberger, *Strip Mining on U.S. Land Debated: Environmentalists Say Interior Dept. Rule Would Threaten Acreage*, WASH. POST, Sept. 29, 1992, at A10; Keith Schneider, *Public Lands May Be Open for Mining; Bush Administration Makes Policy Change*, HOUSTON CHRON., Sept. 28, 1992, at A1.

followed,⁴¹ the House-Senate conference committee inserted a provision blocking this rule for one year in the final version of the Energy Policy Act of 1992.⁴²

B. *Early Bills*

In 1990, the first legislative takings proposal was offered by Senator Steve Symms (R-Idaho) in the form of an unsuccessful Floor amendment to the farm bill that would have required certain types of future regulations to be "in compliance with Executive Order 12,630 or similar procedures."⁴³ The next year, Senator Symms introduced S. 50, the "Private Property Rights Act of 1991,"⁴⁴ a separate bill that expanded the 1990 Symms amendment to all federal agencies. On June 12, 1991, the Senate approved S. 50 as a Floor amendment to the surface transportation bill.⁴⁵ This takings provision was removed in conference committee with the House of Representatives,⁴⁶ in response to strong opposition by House Democratic Committee Chairs and by labor,

41. Editorials which criticized the proposed rule included *Coal Cash*, ST. PETERSBURG TIMES, Sept. 29, 1992, at 16A; *Just Say No to Strip Miners*, ATLANTA CONST., Sept. 29, 1992, at A8; *Minerals Rights and Wrongs*, ST. LOUIS POST-DISPATCH, Oct. 1, 1992, at 28; *National Parks: Bush Is Much Too Willing to Invite in Strip Miners*, DETROIT FREE PRESS, Oct. 18, 1992, at 2G; *Strip Mining National Parks*, S.F. EXAMINER, Sept. 29, 1992, at A16. See also *Stripping a National Asset*, BOSTON GLOBE, Sept. 30, 1992, at 16 (prompting an exchange involving the author in the *Globe's* "Letters to the Editor" on the takings issue: Richard L. Lawson, President, National Coal Ass'n, *Strip Mining Issue Is Not About a Giveaway*, Oct. 10, 1992, and Glenn P. Sugameli, National Wildlife Fed'n, *Interior Strip-Mining Proposal Must Be Blocked*, Oct. 23, 1992).

42. See § 2504(b) of the Energy Policy Act of 1992 as reported at 138 CONG. REC. H12,146 (daily ed. Oct. 5, 1992).

43. See 136 CONG. REC. S10,909-17 (daily ed. July 27, 1990) (the amendment was tabled by a vote of 52 to 43).

44. See S. 50, 102d Cong., 1st Sess. (1991). For a description of 1991-92 takings bills, see Robert Meltz, *Private Property Protection Legislation in the 102nd Congress*, CRS Issue Brief, Sept. 18, 1992.

45. See 137 CONG. REC. S7542-49, S7552-62 (daily ed. June 12, 1991) (The amendment passed after a motion to table was defeated 44 to 55).

46. See H.R. CONF. REP. NO. 404, 102d Cong., 1st Sess. 354 (1991), reprinted in 1991 U.S.C.C.A.N. 1734.

environmental, consumer, historic preservation, planning, civil rights and other public interest groups.⁴⁷

Subsequent federal takings bills were even more radical. In 1991, Representative Jimmy Hayes (D-La.) introduced a wetlands bill with the first takings payment provision.⁴⁸ By 1993, there were a variety of takings proposals and the first Congressional hearing on a federal takings bill.⁴⁹

In May, 1993, Senator Robert Dole (R-Kan.) discussed, but did not offer, his takings assessment bill, S. 177, as an amendment to the Department of the Environment Act, a proposed bill to elevate EPA to Cabinet level.⁵⁰ One year later, the Senate approved a modified version as an amendment to a bill to reauthorize the Safe Drinking Water Act.⁵¹ This provision died when the House failed to move the drinking water bill.

Near the end of the 103rd Congress, takings bill proponents suffered a setback on the Floor of the House when Representative W.J. "Billy" Tauzin (D-La.) unsuccessfully attempted to add a compensation takings amendment to H.R. 5044, the American Heritage Areas Partnership Program Act of 1994. Under Representative Tauzin's amendment the local governments that would manage these areas would have been required to establish procedures, including "an administrative process to provide compensation to the owner of private property if the use or value of all or any portion of the private property is substantially diminished as a result of the designation of the American Heritage Area or the management plan for the American Heritage Area."⁵² An alternative, bipartisan amendment offered by Representative Nick J. Rahall II (D-W.Va.) and Representative Ralph Regula (R-Ohio) only required "a process to provide information to the owners of private property with respect to obtaining just compensation due as a result of a taking of private property under the Fifth

47. See Sugameli, *Takings Issues in Light of Lucas*, *supra* note *, at 447 nn.39, 40.

48. H.R. 1330, 102d Cong. (1991).

49. Private Property Protection Act of 1993, H.R. 561, 103d Cong. (1993).

50. 139 CONG. REC. S5337-5342 (daily ed. May 4, 1993).

51. 140 CONG. REC. S5989 (daily ed. May 19, 1994).

52. 140 CONG. REC. H10,903 (daily ed. Oct. 5, 1994).

Amendment of the Constitution of the United States."⁵³ After a spirited debate, the House voted 234 to 187 to reject the Tauzin amendment in favor of the Rahall-Regula substitute.⁵⁴

C. *The "Contract with America" Takings Fight*

While opposition to takings bills has always been bipartisan, supporters made a major push for passage in the wake of the 1994 congressional elections which ushered in Republican control of the House as well as the Senate. In 1995-96, unsuccessful federal takings bills would have mandated unlimited payments from taxpayers to corporations and individuals whose property has not been taken according to Supreme Court standards.

1. The Private Property Protection Act of 1995, H.R. 925

In the beginning of the 104th Congress, an extraordinarily broad takings provision was introduced in the U.S. House of Representatives buried in the fine print of the new Republican House majority's Contract With America as Title IX of H.R. 9, the Job Creation and Wage Enhancement Act of 1995.⁵⁵ The takings portion of H.R. 9 later was split off as H.R. 925, the Private Property Protection Act of 1995.⁵⁶

In one of its earlier versions, H.R. 925 would have required payment to any corporation, partnership or individual when the value of the affected portion of their property was diminished by 10 percent or more as a result of any federal government regulation.⁵⁷ In the early, heady days of the 104th Congress, the new House Republican leadership rushed H.R. 925 through the House. Considering its massive scope and impact, it is remarka-

53. *Id.*

54. *See id.* at H10,913 (Roll No. 485).

55. H.R. 9, 104th Cong. §§ 9001-9004 (1995). As Professor Sax has pointed out, the takings provision was "tucked away in just about one and a half pages of an eighty-two page bill [H.R. 9] entitled the 'Job Creation and Wage Enhancement Act of 1995,' a provision called Title IX." Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 *ECOLOGY L.Q.* 509, 509 (1996).

56. H.R. 925, 104th Cong. (1995).

57. *See* H.R. 925, 104th Cong. § 2(a) (version introduced on Feb. 14, 1995).

ble that there was only one hearing on the bill, which took place in the subcommittee.⁵⁸ Rather than mark-up the bill, the subcommittee sent it directly to the full Committee on the Judiciary, which marked up the bill without further hearings.

In March, 1995, on the Floor of the House, the breathtaking scope of H.R. 925 was limited for the first time. The House amended the bill, so that it would have created a new entitlement requiring payments whenever the value of any portion of land and water rights was diminished by 20 percent or more as a result of federal laws protecting endangered species and wetlands and certain laws regarding use of water.⁵⁹

The full House's rejection of a bipartisan homeowners protection amendment offered by Representatives Ron Wyden (D-Or.) and Wayne Gilchrest (R-Md.), was particularly revealing. The amendment would have added an exception "with respect to an agency action that would prevent or restrict any activity likely to diminish the fair market value of any private homes."⁶⁰ Representative Wyden argued that the bill would result in increased permits to fill wetlands that would harm downstream property owners. He also argued that the bill was unbalanced: it "sets out a double standard that treats development interests better than the typical homeowner. Development interests get compensated if their property values are merely diminished, but the neighboring homeowners have to meet a higher standard, requiring physical damage to their properties for the exemption in the bill to apply."⁶¹ Supporters of the bill opposed the amendment by arguing

58. See *Protecting Private Property Rights From Regulatory Takings: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) [hereinafter *Hearing: Property Rights*].

59. See H.R. 925 § 3(a) (version introduced on Mar. 3, 1995); see also 141 CONG. REC. H2502-04, 2529-30 (Roll No. 190) (daily ed. March 2, 1995). In unsuccessfully opposing this amendment, the ranking Democrat on the House Resources Fisheries, Wildlife and Oceans Subcommittee argued on the Floor that: "The committees of jurisdiction [over] these two statutes have had no hearings on this. They have not even had a sequential referral for 1 minute of this bill in this Congress." *Id.* at H2528 (statement of Rep. Gerry Studds (D-Mass.)).

60. 141 CONG. REC. H2556 (daily ed. Mar. 2, 1995).

61. *Id.* at H2559.

that injured homeowners could file suits at common law.⁶²

The Judiciary Subcommittee and the full House rejected other amendments that would have reduced at least a few of the additional ways in which the bill's standards were contrary to those governing takings under the Constitution. These included the subcommittee's rejection of an amendment offered by Representative Barney Frank (D-Mass.) to "bar an owner from receiving [payment] under the Act if at the time he acquired the property he knew or should have known that the property was or would be limited by an agency action."⁶³

On the Floor, the House rejected, by a vote of 211 to 210, an amendment offered by Representative Porter Goss (R-Fla.) that would have changed the standard to require looking at the overall property, not just the affected portion (and incidentally to raise the percentage test from ten percent, as the bill then stood, to thirty percent).⁶⁴ A bipartisan amendment by Representative

62. *See id.* at H2559-60 (statement of Rep. Fields (R-Tex.)). A contemporaneous news account contrasted the views on this vote of bill supporters and those of the author:

Rep. Charles T. Canady, R-Fla., a co-sponsor of the bill, said that property owners who are harmed have recourse to local zoning and nuisance laws. But environmentalists argue that obtaining such relief is often difficult, if not impossible. Many states limit citizens' recourse to nuisance law. Some farm states, for example, don't allow citizens to sue for agricultural runoff. "The irony is that all day long, the bill's sponsors were talking about the poor developers who have to go to court to enforce their rights under the Constitution," says Glenn Sugameli, counsel to the National Wildlife Federation, of the March 2-3 debate. "But the homeowners who suffer because of polluters? they have to go to court."

Marianne Lavelle, *Closing the Property Rights Contract: Opponents Say the Environment and Home Owners Would Lose Under Federal Bills*, NAT'L L.J., Mar. 27, 1995, at A1.

63. H.R. REP. NO. 104-46 at 6 (1995).

64. 141 CONG. REC. H2551-55 (daily ed. Mar. 2, 1995). As explained herein, the Supreme Court has unanimously rejected any percentage test for a taking. Therefore, the attempted change from 10% to 30%, like the change that was later agreed to on the Floor from 10% to 20% of the value of the affected portion, does not alter the bill's inconsistency with the Constitutional standard.

Davis (R-Va.) and Representative Mineta (D-Cal.) was then offered to change the standard to twenty percent of the overall property.⁶⁵ In the face of the sponsors' repeated offer to have an immediate vote, the House Republican leadership recessed the House.⁶⁶ By the next morning, the leadership had whipped the issue and regrouped. The amendment was defeated 252 to 173, followed immediately by a 338 to 83 vote in favor of a leadership-endorsed amendment to change the standard from ten percent of the affected portion to twenty percent of the affected portion.⁶⁷

On March 3, 1995, the House passed H.R. 925⁶⁸ (and then immediately recombined it with the rest of H.R. 9).

Supporters of takings bills focus heavily on alleged tales of small property owners who suffer from takings. As Representative Sam Farr (D-Cal.), stated in debate on H.R. 925, however:

Who are the special interests supporting this? The National Mining Association, the Chemical Manufacturers Association, the National Association of Manufacturers, the American Petroleum Institute, the American Independent Refiners Association, American Forest and Paper Association, and International Council of Shopping Centers. Those do not sound like small landowners to me.⁶⁹

No federal or state takings bill that has been introduced has been limited in any way to small property owners or even to real people as opposed to corporations. The Fifth Amendment Takings Clause, of course, applies to all property owners. Takings bills like H.R. 925, however, establish a new entitlement for those who have not lost any property rights, and thus, the omission of any limitation offers an insight into the intention of the sponsors.

2. The Omnibus Property Rights Act of 1995, S. 605

On March 23, 1995, Senate Majority Leader and 1996 Republican Presidential candidate, Robert Dole (R-Kan.), introduced S.

65. *Id.* at H2562-66.

66. *Id.*

67. 141 CONG. REC. H2590-98 (daily ed. Mar. 3, 1995).

68. *Id.* at H2606-07.

69. 141 CONG. REC. H2532 (daily ed. Mar. 2, 1995).

605 with 31 original cosponsors.⁷⁰ The bill began and ended as a sweeping payment and assessment bill. It covered all types of property, as well as actions or inactions by federal agencies, and actions by state agencies carrying out regulatory programs under any federal law. The bill would have required federal taxpayers to pay for any regulatory action that reduces by one-third or more the speculative value of any affected portion of a real, personal or intangible piece of property.

The Dole bill was "really a blend of four legislative proposals that were floated during the 103rd Congress."⁷¹ These included "Dole's proposal to require federal agencies to conduct a 'takings' analysis before issuing any new regulations," and "A measure by Senator Phil Gramm (R-Tex.), requiring the federal government to compensate property owners when any government action reduces the value of their property."⁷²

At the time Senator Dole introduced S. 605, he and Senator Gramm were major rival contenders for the Republican Presidential nomination. In this context, Senator Dole's bill can be seen in part as a political effort to forestall any attempt by Senator Gramm to make a "property rights" appeal to right-wing Republican primary and caucus voters. As the *New York Times* reported on May 15, 1995:

Senator Phil Gramm of Texas has made property rights one of the items in his campaign for the 1996 Republican Presidential nomination. In so doing, he has pushed the Senate majority leader, Bob Dole of Kansas, regarded as the front-runner for the nomination, into supporting broad compensation measures, which Mr. Dole earlier opposed as budget-busting.⁷³

70. See S. REP. NO. 104-239, at 12.

71. Margaret Kriz, *Taking Issue*, NAT'L J., June 1, 1996, at 1200, 1201.

72. *Id.*

73. Timothy Egan, *Unlikely Alliances Attack Property Rights Measures: Oppose Bills to Pay Owners for State Actions*, N.Y. TIMES, May 15, 1995, at A1. See also Allan Freedman, *Dole Gambles on Legislation to Protect Property Rights*, CONG. Q., May 4, 1996, at 1215 ("Dole introduced the property rights bill in March 1995. At the time, he faced a challenge from the party's right wing in the presidential primaries. With a well-financed Phil Gramm, R-Texas, knocking his conservative credentials, Dole sought to shore up his base on the right.").

Senator Gramm could not credibly contrast his more draconian 103rd Congress "compensation" measure with Senator Dole's 103rd Congress "assessment" measure when Senator Dole had combined the two measures, along with a proposal by Senate Judiciary Chairman Orrin Hatch (R-Utah) and another by Senator Richard C. Shelby (R-Ala.) and Don Nickles (R-Okla.),⁷⁴ into the comprehensive S. 605. On April 6, 1995, Senator Gramm testified in favor of S. 605 before the Senate Judiciary Committee: "I think, except for the balanced-budget amendment to the Constitution, that this bill is the most important thing that we are going to vote on this year"⁷⁵ It was likely not a coincidence that, while running against Senate majority leader Dole, Senator Gramm pinpointed these two issues. The balanced-budget Constitutional amendment had already failed in the Senate, and a filibuster threat and rising bipartisan opposition already had made a Senate floor vote on S. 605 unlikely.

Senator Hatch's Judiciary Committee held hearings on S. 605 with an unequivocal title, *The Right to Own Property*, which included two days of Washington, D.C. hearings weighted toward supporters and a separate day of hearings in Utah devoted exclusively to boosters of the bill.⁷⁶ Nevertheless, as evidenced by the citations throughout this article, the hearings produced ample testimony on the fatal flaws in S. 605. This testimony was considerably supplemented by two days of parallel hearings entitled *Private Property Rights and Environmental Laws*, that were held before the Senate Committee on Environment and Public Works,⁷⁷ whose Chairman, John H. Chafee (R-R.I.) has long been a major opponent of takings bills.⁷⁸

President Clinton criticized S. 605 and promised to veto it or any similar legislation, in a December 13, 1995 letter to the Sen-

74. See 141 CONG. REC. S4492-01, S4497-98 (daily ed. Mar. 23, 1995).

75. S. Hrg. 104-535, *supra* note 1, at 7.

76. See *id.*

77. S. Hrg. 104-299, *supra* note 32 (June 27, 1995 and July 12, 1995).

78. See, e.g., *id.* at 1-3; 140 CONG. REC. S5924 (daily ed. May 19, 1994); 137 CONG. REC. S7556-S7557 (daily ed. June 12, 1991); 136 CONG. REC. S10,913-15 (daily ed. July 27, 1990); see also, e.g., Freedman, *supra* note 73, at 1215 (" 'It is very severe on the environment,' said Senate Environment and Public Works Chairman John H. Chafee, R-R.I., of S. 605. He added a word of advice for Dole: 'I would say: Don't get near it. It's a loser.' ").

ate Judiciary Committee: "S. 605 does not protect legitimate private property rights. The bill instead creates a system of rewards for the least responsible and potentially most dangerous uses of property. It would effectively block implementation and enforcement of existing laws protecting public health, safety, and the environment."⁷⁹

The Judiciary Committee approved S. 605 on December 21, 1995, by a 10-7 vote.⁸⁰ Despite heavy pressure from Judiciary Committee Chairman Hatch and Majority Leader Dole, however, Senator Arlen Specter (R-Pa.) did not vote.⁸¹ During the Judiciary Committee hearings, Senator Mike DeWine (R-Ohio) had expressed serious doubts about S. 605.⁸² During the mark-up, Senator DeWine explained that "while I vote to report S. 605 out of the Judiciary Committee today, I have serious reservations and questions about certain aspects of this legislation."⁸³ Senator Howell Heflin (D-Ala.) orally raised similar concerns that the bill needed a major rewrite⁸⁴ before providing the only Democratic vote in favor. Months later, Senator Heflin was reported to have "said he continues to have concerns about the bill, including the potential drain on the Treasury."⁸⁵

79. Letter from President Bill Clinton to Orrin Hatch, Chairman of the Senate Judiciary Committee (Dec. 13, 1995), *quoted in* S. REP. NO. 104-239, at 55 (1996).

80. *See* S. REP. NO. 104-239, at 30-31.

81. *See id.*

82. Sen. DeWine stated that it was his "initial analysis that this will be one more piece of legislation, one more law which will spawn a great deal of more litigation, more work for lawyers, more work for bureaucrats and ultimately, more power for Federal courts. That is my problem with this bill" S. Hrg. 104-535, *supra* note 1, at 246.

83. Written Statement of Sen. DeWine Regarding S. 605, the Omnibus Property Rights Act of 1995 (on file with the *Fordham Envtl. L.J.*). Specifically, Sen. DeWine stated that:

I am concerned that this bill could engender excessive litigation. I also want to be certain that we do not pass a bill that undermines public health and safety. And I want to have a better sense of the costs associated with this bill to local, state and federal governments. Finally, I do have federalism issues that I want to look at.

Id.

84. From the author's contemporaneous notes.

85. Freedman, *supra* note 73, at 1216.

As Majority Leader, Senator Dole controlled the Floor Schedule. Several Republican Senators, however, including John H. Chafee (R-R.I.), James M. Jeffords (R-Vt.) and Judd Gregg (R-N.H.), all “stated publicly their opposition to S. 605.”⁸⁶ Other Republican Senators were strongly signaling private opposition or their desire to avoid a vote.⁸⁷

On April 29, 1996, Senator Dole cited S. 605 as a campaign issue, stating that “we believe we will get that legislation passed. . . . But President Clinton opposes it. . . . We want Senators and House Members to vote on it so that you will know in the 1996 election where people stand on issues of importance to you.”⁸⁸ As a measure of the political support for takings, there is no evidence that an emphasis on takings helped either Senator Gramm’s campaign, which was expensive, but short-lived,⁸⁹ or Senator Dole’s unsuccessful effort to defeat President Clinton.⁹⁰

Senator J. Bennett Johnston (D-La.), the leading Democratic proponent of Sen Dole’s separate, drastic, unsuccessful regulatory reform legislation,⁹¹ strongly opposed passage of S. 605. In a

86. See Lisa Caruso, *Property Rights Legislation May Be Running Out of Time This Year*, CONG. GREEN SHEETS SPECIAL REP., Aug. 15, 1996, at 25.

87. See *id.* (“[A]nywhere from five to 15 Republicans are said to be either opposed to [S. 1954, the successor bill] or undecided.”).

88. Kriz, *supra* note 71, at 1200 (speech to the National Association of Realtors).

89. See Bill Lambrecht, *Bob Dole Embraces Property Rights Issue*, ST. LOUIS POST-DISPATCH, May 12, 1995, at 4B (“During the Republican primary campaign, Dole had little to say about property rights. The issue belonged to Texas Sen. Phil Gramm, whose presidential quest crumbled early.”).

90. See Freedman, *supra* note 73, at 1215.

While Senate Majority Leader Bob Dole’s property rights bill is energizing many core Republicans, it could tarnish his standing among key swing voters worried about a potentially harmful regulatory rollback. . . . David W. Almasi, a spokesman for Defenders of Property Rights . . . said that if Dole backed away from a floor vote — given his command of the Senate schedule — it would temper enthusiasm for his campaign among many of his supporters.

Id.

91. See Caruso, *supra* note 86, at 25 (Sen J. Bennett Johnston wrote to then-Majority leader Robert Dole (R-Kan.) in May that despite having co-sponsored Dole’s regulatory reform bill (S 343), he did not support S. 605.); Freedman, *supra* note 73, at 1215 (“Last July, Dole took a

May 6, 1996 personal letter to Senator Dole, Senator Johnston urged that the bill not be brought up:⁹²

S. 605 is a radical departure from the original intent of the Framers, over 200 years of constitutional jurisprudence, and our ancient common law traditions. The notion that anyone has a call upon the public treasury for a partial loss of the value of his property because of a valid public welfare regulation . . . has never found a place in our laws or history.⁹³

Meanwhile, a strong grassroots reaction against a wide range of perceived Republican attacks on environmental protections was growing.⁹⁴ While the scope of S. 605 extended far beyond the environment, much of the debate focused on protections for wetlands and endangered species that had been the core of the House-passed bill.

However, a Congressional Research Service Report and Department of Justice testimony detailed problems with S. 605 other than its departure from Constitutional standards for triggering a

beating in the press for his failed efforts to push through a major regulatory overhaul bill (S. 343), and some in the party are nervous about a rerun on a related issue.”).

92. See Caruso, *supra* note 86, at 25 (“Johnston urged Dole not to bring up the legislation at all, writing that ‘S. 605 sweeps too broadly. Its enactment would be a terrible mistake. It does not merit the Senate’s consideration during the brief time remaining to us in the 104th Congress.’”).

93. Letter from J. Bennett Johnston, Senate Comm. On Energy & Nat. Resources, to Robert J. Dole, Senate Majority Leader 1 (May 6, 1996) (on file with the *Fordham Envtl. L.J.*). See also *Senator Warns Dole About Anti-Environmental ‘Takings’ Bill*, NAT’L WILDLIFE ENVIROACTION, June 1996, at 20.

94. See Jessica Mathews, *Earth First at the Polls*, WASH. POST, Nov, 11, 1996, at A29.

Environment was the first issue to crack the lock-step Republican unity in the House, eventually provoking a rebellion by some 60 moderates led by Rep. Sherwood Boehlert (R-N.Y.). By early [1996], the tide began to move in the opposite direction, eventually leading to the defeat of nearly all the anti-environmental measures.

Id. This tide culminated in the 1996 general election, in which 16 of 19 defeated Republican incumbents — 85 percent — were on League of Conservation Voters and Sierra Club lists of priority opponents (overall only six percent of incumbents lost). See *id.*

right to payment.⁹⁵ One provision reallocated federal court jurisdiction to allow any Federal District Court or the Court of Federal Claims to either award payments or to invalidate challenged agency actions.⁹⁶ This could override preclusive review provisions in many federal regulatory statutes. Preclusive review provisions result in expeditious and uniform resolution of disputes over new agency rules and orders. For example, the Clean Air Act requires that challenges to regulations can only be decided in cases filed in the U.S. Court of Appeals for the D.C. Circuit within 60 days of the Federal Register notice of the final rule.⁹⁷

Another provision would have imposed an absolute ban on agencies administering the Endangered Species Act or the wetlands program from entering onto private property to collect information unless the owner has consented in writing.⁹⁸ As the Senate Judiciary Committee minority report on S. 605 stated, "These provisions are made all the more indefensible, in our view, in light of existing privacy protections, such as state trespass law and the constitutional prohibition against unreasonable searches and seizures."⁹⁹ S. 605 could have barred even execution of search warrants and court orders to determine whether ESA or wetland violations have occurred.¹⁰⁰

For those concerned about overreaching federal government intrusions, there was also an ironic aspect to both this S. 605 provision and an amended Senate version.¹⁰¹ As a practical matter,

95. See Memorandum from American Law Division, Congressional Res. Serv., to Hon. Diane Feinstein (May 6, 1996) [hereinafter CRS Memo] (on file with *Fordham Envtl. L.J.*); S. Hrg. 104-535, *supra* note 1, at 389 (statement of John R. Schmidt, Associate Attorney General, Criminal Division of the Department of Justice).

96. Omnibus Property Rights Act of 1995 § 205, S. 605, 104th Cong. (1995). This provision was revived in 1997 as a separate House bill, H.R. 992 and part of a Senate bill, S. 1256.

97. Clean Air Act § 307(b), 42 U.S.C. § 7607(b) (1970).

98. S. 605 § 504(a).

99. S. REP. NO. 104-239, at 76.

100. See Robert Meltz, Am. L. Div., *Property Rights: Comparison of H.R. 9 as Passed and S. 605 as Reported* (Cong. Res. Serv. No. 95-509A) (visited Mar. 28, 1998) <<http://www.cnie.org/nie/econ-10.html>>.

101. See *infra* Part I.C.3. In response to criticisms, one of the revisions Judiciary Committee Chairman Sen. Orrin G. Hatch described in introducing S. 1954, "a new version" of S. 605 was to "amend the owner's consent to enter land provision to allow for nonconsensual

these provisions would have required a comprehensive, continually updated federal database of all owners of all potentially affected property. Any effort to comply with their substantive agency obligations would require immediate access to the ever-changing web of corporate, partner, and individual owners from whom consent would have been required.¹⁰²

Other problems included requirements that federal agencies "reduce takings of private property to the maximum extent possible within existing statutory requirements."¹⁰³ Apparently, this could require drafting regulations and enforcing laws to avoid any conceivable chance that a single taking (*as redefined by the bill*) could result. This might be required even if it meant maximizing actual or threatened injuries to children's health, civil rights, neighboring private property and a host of other values. As long as the agency did not actually violate other laws, this could mandate skewing against such other values the considerable agency discretion that is possible under most laws.

Despite tentatively listing S. 605 on the floor schedule on several occasions, however, Senator Dole never brought about what he had said he wanted: a vote to mark out where Senators stood. In mid-May, "Republican staff members announced they were canceling plans to bring S. 605 to the Senate floor before the Memorial Day break. The reason: The measure didn't have the 51 firm votes Dole needed to save face, let alone the 60 required to break an expected Democratic filibuster."¹⁰⁴

agency access to private land pursuant to criminal law enforcement and emergency access exceptions." 142 CONG. REC. S7888 (daily ed. July 16, 1996) (statement of Sen. Hatch).

102. A similar result would be mandated under an approved Floor amendment to the Private Property Rights Implementation Act of 1997, H.R. 1534. Section 5 of H.R. 1534 states:

Whenever a Federal agency takes an agency action limiting the use of private property that may be affected by the amendments made by this Act, the agency shall give notice to the owners of that property explaining their rights under such amendments and the procedures for obtaining compensation that may be due to them under such amendments.

Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. § 5 (1997), *quoted in* 143 CONG. REC. H8955 (daily ed. Oct. 22, 1997) (statement of Rep. Traficant).

103. S. 605 § 404(b)(1). *See also id.* §§ 102(4), 503(a)(2).

104. Kriz, *supra* note 71, at 1200.

Even House Speaker Newt Gingrich (R-Ga.) urged Senator Dole to drop plans to call up S. 605.¹⁰⁵ Then, on May 15, 1996, Senator Dole further dismayed S. 605 supporters by announcing that he was resigning from the Senate effective June 11, to run for President full time.¹⁰⁶

3. The Omnibus Property Rights Act of 1996, S. 1954

On July 16, 1996, Senate Judiciary Committee Chairman Orrin G. Hatch attempted to revive the issue by introducing S. 1954, a slightly revised version of S. 605 that would have continued to create a new, virtually unlimited corporate and individual entitlement.¹⁰⁷ At the end of the 104th Congress, despite a push for new co-sponsors, S. 1954 had only 33 co-sponsors (the same number as S. 605). As with S. 605, the only Democratic cosponsor of S. 1954 was Senator Howell Heflin. Senator Heflin was also the only Democratic Senator in the author's detailed, contemporaneous vote counts who was likely to support either cloture on a filibuster or the bill itself on the Senate Floor.

The new Majority Leader, Senator Trent Lott (R-Miss.) was a supporter of S. 1954, but, like his predecessor, he repeatedly failed to schedule the bill for Floor debate and a vote. Strong bipartisan opposition to the new bill continued. This included a

105. *Gingrich Urges GOP To Lower Profile on Regulatory Issues: Worried About Environmental Image, Speaker Urges Dole to Back off from Broad 'Takings' Bill*, CONG. Q. MONITOR, May 15, 1996, at 4 (Gingrich "specifically urged Dole to dump plans to call up his broad property rights bill."). Shortly before Gingrich's re-election by the House as Speaker,

Rep. Collin Peterson, D-Minn., a leader of the conservative Democratic "Blue Dogs," told the American Farm Bureau Federation that "If Newt Gingrich becomes speaker again, we're going to have a much tougher time moving property rights legislation . . . What happened in the end of this last session, with the blessing of Newt Gingrich, was to empower the people on the other side of this issue . . . equal with people who've been trying to straighten this out."

NAT'L J.'S CONG. DAILY/A.M., Jan. 7, 1997, at 3.

106. See Evette Reiss Davis, *Dole's Departure Creates Uncertainty Over Fate of Property Rights Bill*, EESI WKLY. BULL., May 20, 1996, at 5 ("All bets are off when and if S. 605, a comprehensive property rights bill, will come to the floor.").

107. 142 CONG. REC. S7888 (daily ed. July 16, 1996).

renewed promise of a filibuster by Senator Chafee, the Republican Chairman of the Environment and Public Works Committee.¹⁰⁸

In at least one respect, the scope of S. 1954 was actually expanded in comparison to S. 605; the new entitlement would have covered developers and other property owners who claim even a *temporary* loss of part of the value of any part of their property.¹⁰⁹ Although the payment provisions of S. 1954 were limited from S. 605's "property" to "real property," S. 1954 defined "real property" very broadly to include not only fixtures such as buildings and machines; minerals, crops, oil and gas, coal, geothermal energy, and water rights; but also "contracts or other security interests in, or related to, real property."¹¹⁰ This latter provision was broad enough to implicate regulations of the \$1 trillion dollar market in mortgage-backed securities.¹¹¹

S. 1954, like S. 605, would have required an assessment of the likelihood of a taking, as drastically redefined under the bill, before agency actions or inactions that even temporarily affect any kind of property. As the Senate Judiciary Committee minority report on S. 605 stated, the bill's application of this requirement to "even the most minor rules or policies, will hamstring countless regulations necessary to protect our environment,

108. Anna Hebner, *Property Rights Advocates Not Backing Down in Push for Senate Vote*, LEGISLATE NEWS, July 23, 1996.

109. See S. 1954, 104th Cong. § 204(a)(2)(c) (1996).

110. S. 1954 § 203(5)(A)(vii).

111. See Fred B. Bosselman, *Land As a Privileged Form of Property*, in TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER LUCAS 29, 40 (David L. Callies ed., 1996) [hereinafter TAKINGS: LAND DEVELOPMENT CONDITIONS] (quoting Peter J. Culver, *The Dawning of Securitization*, PROB. & PROPERTY, Mar./Apr. 1994, at 34, 36 ("the mortgage-backed securities market has outstripped the corporate bond market. Today, the total amount of outstanding mortgage-backed securities is more than \$1 trillion, making residential mortgage loans the most widely securitized financial asset.")). The author stressed this point at the time. *E.g.*, Hebner, *supra* note 108 ("Including 'security interests' in real property could invite takings claims against any rule that affects the trillion-dollar market in mortgage backed securities, Sugameli suggested.").

health or safety.”¹¹² According to both bills, prior assessments would have been required even where the delay would result in destruction of other private property or public resources, budget impacts or threats to morality and other values. Even agency actions taken in health and safety emergencies would have required a post-agency action takings analysis.¹¹³

Senator Hatch’s bill included a cosmetic change that raised the threshold for payment from S. 605’s 33-percent diminution in value to a fifty percent diminution.¹¹⁴ This change was trivial since the diminution threshold test still applied to any “portion” of the property affected by the agency action, and in theory, any agency action or regulation could be viewed as reducing the value of some portion of any property by 100%.

Professor Carol Rose of Yale Law School testified that:

Once land can be apportioned into “relevant” portions, any diminution can be manipulated to become a 100% diminution. This effectively means that virtually any regulation with *any* adverse impact on an owner’s parcel could become an occasion for compensation, without regard to the owner’s expectations and whether they were reasonable.¹¹⁵

As discussed below, the Supreme Court has recognized this in repeatedly rejecting both any “affected portion” test and any percentage test for a taking.¹¹⁶ Indeed, the Federal Circuit rejected an “affected portion” standard under which “protection of wetlands via a permit system would *ipso facto*, constitute a taking in every case where [the Army Corps of Engineers] exercises its statutory authority.”¹¹⁷

Unlike S. 605, S. 1954 specifically excluded diminutions in property value arising from civil rights statutes, including the Americans with Disabilities Act.¹¹⁸ However, S. 1954 continued to

112. S. REP. NO. 104-239, at 74 (discussing S. 605 § 403).

113. See S. 1954 § 403(a)(2)(H).

114. See S. 1954 §§ 204(a)(2)(D), 508(a).

115. S. REP. NO. 104-239, at 58 (minority views), quoting written statement of Carol M. Rose, Apr. 6, 1995, at 12-13 (statement reproduced at S. Hrg. 104-535, *supra* note 1, at 91). See also Rose, *A Dozen Propositions*, *supra* note 30, at 290-91.

116. See *infra* Part II.A.

117. *Tabb Lakes v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993), cited in S. REP. NO. 104-239, at 58 n.7 (minority views).

118. S. 1954, 104th Cong. § 602 (1996).

apply to laws that protect children from having to drink polluted water or breathe dirty air. Nor did it exclude laws that provide for safe and humane work places and prevent destruction of wetlands that will result in flooding and other harm to neighboring and downstream property.¹¹⁹ S. 1954 also failed to exclude the Surface Mining Control and Reclamation Act (SMCRA)¹²⁰ provision that protects homes, schools, churches, cemeteries and National Parks from surface mining of coal.

Like S. 605, S. 1954 would have created a right to pollute and a right to harm the property, health and safety of others. Both bills basically provided that corporations and developers do not have to obey laws that limit their ability to profit at the expense of neighboring homeowners and the public unless they are paid to comply. For example, as discussed below, these bills could have forced Americans to choose between allowing the destruction of homes, National Parks and Native American burial, archaeological and historic sites or paying mining companies not to desecrate these sensitive areas.¹²¹ Thus, S. 1954 would have still required taxpayers to pay owners of real property to obey laws that protect the health, safety and property of American citizens and would have delayed the implementation of laws that affect other kinds of property.

On September 6, 1996, Senate Majority Leader Trent Lott (R-Miss.) decided against scheduling a Floor vote on takings, citing

119.

The clean air laws say that a polluter cannot use his property to cause a child to get asthma. The occupational health statutes say that an employer does not have a right to use his property in a way that injures or kills his employees. The labor laws say that an employer does not have the right to use his property to exploit children. (Parenthetically, the opponents of child labor laws claimed they interfered with the private property of the mill owners.) Wetland laws say you cannot use your land to flood my land or lower the water table and dry your neighbor's well. Many of the so-called property rights bills disagree with this premise of our legal heritage. Their premise is that a citizen must be *paid* not to use his property in a way that injures his neighbor.

S. REP. NO. 104-239, at 79 (Additional views of Sen. Patrick Leahy (D-Vt.)).

120. SMCRA § 522(e), 30 U.S.C. 1272(e) (1994).

121. See *infra* Part III.C.

the Senate's crowded legislative calendar and the lack of support. " 'When . . . [Lott] started doing some counting [of supporters], some of the people that were thought to be "yeses" turned out not to be so definite,' Nancie Marzulla, president of Defenders of Property Rights, said after speaking with Lott."¹²² Senator Lott's abandonment of the bill reflected the bipartisan opposition to, and widespread concerns about, the merits and politics of the bill. All indications are that proponents lacked even 51 votes on a potential procedural vote to end a promised bipartisan filibuster (cloture requires 60 votes).¹²³ Even fewer Senators would have voted to pass the bill.

Harvard Law Professor Frank I. Michelman eloquently described the horns of the dilemma facing proponents of the House and Senate bills. First, there is no "remotely principled basis" for the H.R. 925 approach of limiting the scope of protections to "land value losses stemming from agency actions under two or three selected laws."¹²⁴ Prominent ideological supporters of federal takings bills agreed with this analysis.¹²⁵

As Professor Michelman explained, however, extending the bill's "protections to all property as affected by all regulation," as S. 605 and the original version of H.R. 925 did,

122. Chuck McCutcheon et al., *Lott Tells Lobbyists Property Right Bill is Dead for This Year*, CONG. Q. MONITOR, Sept. 9, 1996, at 5.

123. See Caruso, *supra* note 86, at 25.

124. Michelman, *supra* note 2, at 416-17. Indeed, Congressional Research Service reviews of takings cases involving claims against the federal government reveals that the vast majority of pending and recently decided cases have nothing to do with environmental protection laws. See Robert Meltz, Am. L. Div., *The Property Rights Issue* (Cong. Res. Serv. No. 95-200 A, 1995) pt. 3 (visited Mar. 28, 1998) <<http://www.cnie.org/nie/econ-11.html>>.

125. For example, Jonathan H. Adler of the Competitive Enterprise Institute testified that: "Any bill that seeks to protect the property rights of Americans must cover all Federal laws that deprive land owners of the reasonable use of their land. There is no principled basis upon which to pick and choose which laws, environmental or otherwise, should be covered." S. Hrg. 104-299, *supra* note 32, at 222. He repeated this passage in subsequent testimony, but italicized "all" to emphasize the point. S. Hrg. 104-535, *supra* note 1, at 205. See also *id.* at 82 ("There are a huge number of Federal regulations which have the effect of taking private property") (statement of Nancie G. Marzulla, President of Defenders of Property Rights).

... stands no chance of enactment. No American Congress would dare enact legislation that would openly, honestly, and consistently carry out [the original version of] H.R. 925's pretended high moral precept that government action should never — ever — limit the use of private property so as in the least to diminish its value, because the American public is nowhere near accepting any such precept and it never has been."¹²⁶

Thus, House proponents narrowed the takings bill, without any principled basis, to certain laws. This revealed that the issue was not property rights, but a Trojan Horse attack on laws that supporters of H.R. 925 did not like. Under the guise of protecting property rights, H.R. 925 would have made those laws too expensive to enforce. When Senate proponents extended their bills to cover all laws (S. 605) or nearly all (S. 1954), the absurd and draconian payments that would have resulted clearly revealed that the purported property rights principles they embodied are contrary to the Constitution's balanced approach and to the views of the American public.¹²⁷

126. Michelman, *supra* note 2, at 417. In contrast, numerous states have introduced, and some have enacted, takings bills, typically calling for some version of assessment. The federal bills are far more draconian than any state laws, however. For example, S. 1954 is more radical than the takings bills that prompted bi-partisan vetoes in 1996 from western governors (Gov. Philip E. Batt (R-Idaho) vetoed a takings bill that was limited to billboards and Gov. Roy Romer (D-Colo.) vetoed a takings assessment bill). For an overview of the property rights movement in the states, see David Coursen, *Property Rights Legislation: A Survey of Federal and State Assessment and Compensation Measures*, 26 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,239 (1996); Robert Meltz, *Property Rights' Laws in the States*, CRS Report for Congress, Dec. 2, 1996 (citing Larry Morandi, *Takings for Granted*, 21 *ST. LEGISLATURES* 22 (June 1995); American Resources Info. Network, *Summary of State Takings Legislation* (visited Nov. 22, 1997) <<http://www.arin.org/arin/states.html>>; David Thomas, *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 26 *URB. L.* 223 (1996)).

127. In an attempt to explain the Senate strategy, which he views as politically counter-productive to the S. 605 sponsors, Professor Sax has ventured:

this speculation: the constituency for compensation legislation has two main branches. One, represented by people like [Rep.] Billy Tauzin [(R-La., formerly D-La.)], is primarily concerned about what they perceive as excessive regulation

II. PRECEDENTS

A. *Constitutional Standards*

Under the Supreme Court's analysis of takings issues, which balances the property and other rights of all those affected, there are several reasons why conservation laws will rarely, if ever, constitute a taking.¹²⁸ For example, threshold principles state that: (1) takings are limited to actions that eliminate property rights, as defined by wetlands, wildlife, public trust, federal land law and other "background principles of property and nuisance law;"¹²⁹ and (2) takings only can result from authorized government actions.¹³⁰

Even if challenges to conservation laws passed this initial threshold, a taking is unlikely under general takings principles. Takings decisions must take into account several factors, including whether there are reasonable investment-backed expectations regarding use of the property. Therefore, it is not a taking to regulate only part of the parcel as a whole, nor does prohibiting only particular uses of land cause a taking. Consequently, takings challenges to conservation laws have not been, and are unlikely to be, successful. However, these radical attempts to rewrite the constitutional standard through state and federal takings bills could severely undermine laws that protect wetlands, natural resources, and the health and safety of Americans.

under the wetlands and endangered species laws For that constituency, property rights serves as a tool to cut back on regulation in those areas. The other group consists of those with an ideological concern about property rights, who are no more troubled by uncompensated wetlands regulation than they are about uncompensated zoning laws, or laws that protect Americans with disabilities, laws that promote worker safety, or regulate pension plans. My impression is that the legislative proponents of property rights bills are reluctant or politically unable to abandon this broader constituency.

Sax, *supra* note 55, at 518.

128. Wolf, *supra* note 19, at 637.

129. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992).

130. See *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802-03 (Fed. Cir. 1993).

Indeed, Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*¹³¹ — the very opinion that created the concept of a regulatory taking — warned that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power.”¹³²

For example, while ESA takings claims have not been, and are unlikely to be, successful, they could, theoretically, have a detrimental impact on efforts to conserve and recover threatened and endangered species. Takings cases do not just concern plaintiff property owners and the municipal, state, or federal treasury; if successful, the budgetary impact of these claims could have virtually the same practical effect as invalidating the law in question. This effect can, in turn, have far-reaching impacts on public policy, potentially damaging the ability of government to enforce other important protections of people and property, such as public health and safety and civil rights, as well as the environment.

As discussed herein, Committee hearings provided extensive, irrefutable testimony and evidence that S. 605 employed a takings standard that is contrary to the Fifth Amendment as interpreted by unanimous rulings of the Supreme Court.¹³³ Nevertheless, the Senate Judiciary Committee majority report on S. 605 claimed that the “most important function” of Title II, the compensation portion of the bill, “is to codify the substantive standards that apply to takings.”¹³⁴ Similarly, Senator Hatch explained his introduction of S. 1954, by claiming “that our critics’ real problem is not with the overall bill, but with the U.S. Supreme Court. . . . All we did in our bill was to codify the ‘law of the land.’ The bill codifies and clarifies recent Supreme Court standards as to what constitutes a ‘taking’ of private property. . . .”¹³⁵

131. 260 U.S. 393 (1922)

132. *Id.* at 413.

133. See S. Hrg. 104-535, *supra* note 1, at 86-102 (testimony and statement of Prof. Carol M. Rose).

134. S. REP. NO. 104-239, at 23.

135. 142 CONG. REC. S7888 (daily ed. July 16, 1996).

Proposed takings payment bills, such as S. 605 and S. 1954, would have created an unlimited new entitlement to those who have not lost any property rights according to every Supreme Court Justice. As more than 370 law professors wrote Congress regarding the takings test in S. 605, "Not only has the [Supreme] Court never adopted that radical view of the Fifth Amendment; no single past or present Justice on the Court has."¹³⁶

That is not to say that the Supreme Court had not reached the issue. For example, in 1993, the Supreme Court's *Concrete Pipe* decision¹³⁷ unanimously reaffirmed the Court's long-standing specific *rejection* of premises and standards at the heart of S. 605 and other takings bills.¹³⁸ The Court ruled that regulatory takings

136. Letter from 371 law professors to U.S. Senators (May 2, 1996) (on file with the *Fordham Envtl. L.J.*); accord Sax, *supra* note 55, at 515 ("the standard they are advocating — a specified diminution of value as the sole test of compensation — is one that every justice of the Supreme Court, conservative and liberal alike, over more than a century has rejected as a standard."); S. Hrg. 104-299, *supra* note 32 (statement of Richard Lazarus, Professor, Washington University School of Law at 168) ("In fact, no single Justice has ever embraced this view of the Fifth Amendment. . . . This is constitutional cuckoo land.").

137. *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 642-46 (1993). The Court's unanimity on the takings issue is all the more remarkable given that several Justices concurred or dissented on other issues in the case.

138. The Senate Judiciary Committee majority report on S. 605 failed to cite *Concrete Pipe*, despite extensive discussion of the case in the minority report. See S. REP. NO. 104-239, at 58 n.6 ("Nowhere does the majority in its 74 footnotes mention *Concrete Pipe*. So we also recommend: *Penn Central*, 438 U.S. at 130-31 [and other cases]."). At least one commentator has attempted to distinguish *Concrete Pipe* on the ground that it was not a land use case. See Michael M. Berger, *Lucas v. South Carolina Coastal Council: Yes, Virginia, There Can Be Partial Takings*, in TAKINGS: LAND DEVELOPMENT CONDITIONS, *supra* note 111, at 148, 161 (quoting *Guimont v. City of Seattle*, 896 P.2d 70, 79 n.10 (Wash. App.), *rev. denied*, 127 Wash. 2d 1023 (1995)). Such efforts ignore the fact that all of the cases specifically relied upon by the *Concrete Pipe* Court in reaffirming the property as a whole doctrine (and in rejecting any percentage test for a takings) were land use cases. See exchange among the author, Roger Marzulla and Professor Sax on *Concrete Pipe*, in "Takings Rights" Debate, *supra* note 32, at 280-85. Moreover, *Guimont* actually distinguished only the due process portion of *Concrete Pipe*, not

decisions must consider many factors, including benefits to neighboring homeowners and the public:

[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 . . . (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution).¹³⁹

Indeed, *Lucas v. South Carolina Coastal Council* also recognized that "It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full."¹⁴⁰ This statement from Justice Scalia's majority opinion for the Court in *Lucas* reaffirmed the Court's consistent rejection of the approach of S. 605 and other takings bills that a percentage reduction in value equals a taking.

Second, the *Concrete Pipe* Court reaffirmed that takings analysis must focus on the overall property, not just the affected portion.

[Y]ears ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 . . . (1978), . . . we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable.¹⁴¹

Third, the Court reiterated the importance of a fact-specific analysis that focuses on three factors: the nature of the governmental action; the severity of the economic impact and the de-

the takings rulings. Federal and state courts have had no difficulty in applying *Concrete Pipe* to land use cases. *E.g.*, *Tabb Lakes*, 10 F.3d 796, 802 (Fed. Cir. 1993); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 532-33 (Wis. 1996). Efforts to distinguish *Concrete Pipe* in the context of S. 605 are ironic for another reason: because S. 605 applied to every federal law and all types of property, it would have applied to the specific facts of the claim in *Concrete Pipe*.

139. *Concrete Pipe*, 508 U.S. at 645.

140. 505 U.S. 1003, 1019 n.8 (1992).

141. *Id.* at 644. The "parcel-as-a-whole" principle is deeply and solidly rooted in Supreme Court jurisprudence. *See Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498 (1987) (if segmentation were allowed, "one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking"); *Gorieb v. Fox*, 274 U.S. 603, 606 (1927) (upholding "setback" regulation prohibiting development on part of acreage).

gree of interference with reasonable investment-backed expectations.¹⁴² As part of the third factor, the Court focused in rejecting the takings claim on a reiteration of the doctrine that “those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”¹⁴³

In contrast, takings bills like S. 605 and S. 1954 require payments when there is: (1) a specific diminution in the value of (2) any affected portion of property (3) without applying the fact-specific factors. Because these bills ignore fact-specific elements, payments would be required regardless of whether, for example, the claimant was in a highly regulated field or had any reasonable investment-backed expectations that were denied. This radical redefinition of property rights in proposed takings bills typically fails to consider impacts on other people and property, except for a wholly inadequate nuisance exception discussed below.¹⁴⁴

Proponents of the bill¹⁴⁵ and the Senate Judiciary Committee’s majority report on S. 605 erroneously claimed that “the Committee has also codified the ‘affected portion’ doctrine as articulated by the U.S. Court of Appeals for the Federal Circuit in the [sic] *Loveladies Harbor, Inc. v. United States*.”¹⁴⁶ In fact, Judge Plager’s opinion for the Federal Circuit in that case rejected the developer’s argument that 11.5 acres, the area “for which the owner seeks a permit” to fill wetlands, should be the relevant parcel.¹⁴⁷

Moreover, the Supreme Court’s subsequent decision in *Dolan v. City of Tigard*¹⁴⁸ also applied a geographic parcel as a whole analysis in determining that prohibition of development of the floodplain portion of the property did not unlawfully deprive the

142. *Concrete Pipe*, 508 U.S. at 642-45.

143. *Id.* at 645 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

144. *See infra* Part II.B.

145. *See, e.g.*, S. Hrg. 104-299, *supra* note 32, at 45 (statement of Roger Marzulla) (“The Federal circuit court of appeals has held in *Loveladies Harbor v. United States*, a wetlands case, that it is only the property which is affected by the regulation which is to be looked at in determining whether a taking has occurred.”).

146. S. REP. NO. 104-239, at 24 (citing 28 F.3d 1171 (Fed. Cir. 1994)).

147. *Loveladies*, 28 F.3d at 1181.

148. 512 U.S. 374 (1994).

petitioner of economically beneficial use of her land because she was presently able to derive *some* economic use from the section of her land unaffected by the regulation.¹⁴⁹ Thus, while the Court questioned the requirement of public access to part of the property, the Court affirmed that, in determining the impact of a regulation on the economically beneficial use of property, the portion that is required to be left undeveloped may not be segmented from portions not affected.¹⁵⁰

In the 1997 *Suitum v. Tahoe Regional Planning Agency* case, Justice Scalia reaffirmed that the Supreme Court's *Penn Central* decision necessarily, and correctly, considered not only Grand Central Station, but also adjacent and possibly nearby properties where transferable development rights could be used as part of the parcel a whole.

Penn Central . . . was applied to landowners who owned at least eight nearby parcels, some immediately adjacent *The relevant land*, it could be said, *was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels)*; and the use of that land, as a whole, had not been diminished.¹⁵¹

Therefore, S. 605, S. 1954, and other takings bills would force taxpayers either to give up needed protections or to pay billions of dollars to maintain health, safety and other measures that do not take any property.

149. *See id.* at 385 n.6.

150. *See id.* at 387. *But see id.* at 400-01 (Stevens, J., dissenting) (arguing the the Court's decision actually undercuts the nondivisiibility principle in *Penn Central*). The Tenth Circuit subsequently interpreted and applied this aspect of *Dolan*. In *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577 n.19 (10th Cir. 1995), the court noted that *Dolan* had "clearly indicated that [the economically beneficial use] test must be viewed in light of [plaintiffs'] entire property." *See also Zealy v. City of Waukesha*, 548 N.W.2d 528, 530 (1996) ("the United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel: rather, the Court has consistently held that a landowner's property in such a case should be considered as a whole.").

151. ___ U.S. ___, 117 S. Ct. 1659, 1672 (1997) (Scalia, J. concurring) (emphasis added). Justice Scalia was joined by Justices O'Connor and Thomas. The remaining Justices joined in an opinion for the Court that did not reach this issue.

B. *The Inadequate Nuisance Exception in Takings Bills*

One of the ways in which many takings bills depart from the constitutional standard is what Joseph L. Sax has termed an "effort to exalt nuisance into an all-embracing and exclusive defense to compensation . . . the [Supreme] Court has expressly rejected a takings standard that required a determination of whether regulated activity was 'a nuisance according to the common law.'"¹⁵²

Thus, takings bill proponents typically rely on a very narrow exception in S. 605 and other takings bills for actions to prevent a nuisance.¹⁵³ Historically, however, nuisance (unwritten law developed by judges) did not prevent massive pollution and other harms to people and property.¹⁵⁴ As the Senate Judiciary Committee minority report on S. 605 stated:

Indeed, when the Congress passed our landmark environmental laws, it was with the full realization that State nuisance law could not adequately or uniformly protect nearby landowners or the community at large. For example, when Congress was considering the Clean Air Act in 1970, it heard about a rendering plant in Bishop, Maryland, whose emissions were doing damage to the health and welfare of people nearby. Some of the problems that the plant's neighbors were having included nausea, vomiting, labored breathing and respiratory problems. Not surprisingly, property values in the area were depressed, and businesses stayed away. The report's conclusion:

152. S. Hrg. 104-535, *supra* note 1, at 178, citing *Miller v. Schoene*, 276 U.S. 272, 280 (1928).

153. *See, e.g.*, S. REP. NO. 104-239, at 28-30; 142 CONG. REC. S7888 (July 16, 1996) (statement of Sen. Orrin G. Hatch introducing S. 1954, Omnibus Property Rights Act of 1996); S. Hrg. 104-535, *supra* note 1, at 25 (statement of Sen. Charles E. Grassley (R-Iowa)); 204, 209-11 (statement of Jonathan H. Adler, Competitive Enterprise Institute); S. Hrg. 104-299, *supra* note 32, at 38, 103-05 (statement of Roger Pilon, Cato Institute).

154. *See* Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1156 (1996) (noting standard of state action to prevent harm to community under nuisance law is set down by courts, not legislature, which accounts for the creation of environmental laws). *See also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 72 (2d ed. 1996).

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but *all efforts to obtain abatement by local and state officials through public nuisance laws have been fruitless.* (S. DOC. NO. 63, 91st Cong., 2d Sess. 1679 (1970)) (emphasis added).

Similarly, in 1979, when the Senate was developing Federal hazardous waste legislation, it heard testimony about 17 industries that were polluting the Warrior River in Alabama, and damaging neighboring riparian owners. The person representing the owners testified that:

[t]here was every sort of polluter involved in that case, just about. They continued to pollute. Why? *Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.* (Hazardous and Toxic Waste Disposal: Hearings before the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on Environment and Public Works, 96th Cong., 1st Sess., Sept. 7, 1979, at 693) (emphasis added).¹⁵⁵

Indeed, the Supreme Court has recognized that the Clean Water Act's goals of efficiency and predictability would be undermined by applying the vague and uncertain nuisance laws of various affected states to a source of pollution.¹⁵⁶ During the Senate Environment and Public Works Committee Hearings, Senator Joseph Lieberman (D-Conn.) vividly described the uncertainties regarding the reach of a particular State's nuisance law under S. 605 by quoting "Dean Prosser, who wrote one of the great treatises on tort law, 'There is perhaps no more impenetrable jungle in the entire [area of law than] . . . nuisance.'" ¹⁵⁷

During hearings on S. 605, expert testimony¹⁵⁸ and testimony from a representative of affected homeowners¹⁵⁹ illustrated the

155. S. REP. NO. 104-239, at 63 (1996); *accord* Sax, *supra* note 55, at 512.

156. *See* International Paper Co. v. Ouellette, 479 U.S. 481 (1987).

157. S. Hrg. 104-299, *supra* note 32, at 7 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984) (brackets added)).

158. S. Hrg. 104-299, *supra* note 32, at 180, 219 (statements of Richard J. Lazarus, Professor, Washington University School of Law).

159. S. Hrg. 104-535, *supra* note 1, at 170 (statement of Merrily Pierce, homeowner and vice president of the Fairfax County Federa-

limitations of a nuisance exception by describing how, under a 1995 Fourth Circuit decision, pollution that reduces neighboring property values may *not* be a nuisance in Virginia.¹⁶⁰ As detailed in the testimony of Joseph L. Sax, Counselor to the Interior Secretary,¹⁶¹ and Associate Attorney General John R. Schmidt,¹⁶² numerous cases illustrate how homeowners have been unable to use common law nuisance to defend their property and families.¹⁶³ For example, it is not necessarily a nuisance in at least some states to inflict a variety of harms upon homeowners and the environment. In Pennsylvania, carcinogenic surface water pollution that is a statutory violation may *not* be a nuisance.¹⁶⁴ In Maine, flooding neighboring homes by filling a wetland may *not* be a nuisance.¹⁶⁵ In Massachusetts, contaminating and then selling private property may *not* be a nuisance.¹⁶⁶

tion of Citizens Associations).

160. *Adams v. Star Enter.*, 51 F.3d 417 (4th Cir. 1995) (holding that although a 300,000 gallon oil spill created an underground plume of contaminated soil under a residential neighborhood resulting in a marked decline in property values, it was not a nuisance because the contamination was, at the time, imperceptible to human senses and, therefore, was not an "unreasonable interference with the use and enjoyment of property.").

161. See S. Hrg. 104-299, *supra* note 32, at 79-87; S. Hrg. 104-535, *supra* note 1, at 173, 178-79, 191-202.

162. See S. Hrg. 104-299, *supra* note 32, at 71-72; S. Hrg. 104-535, *supra* note 1, at 46.

163. See S. Hrg. 104-535, *supra* note 1, at 178-79, 191-202; S. Hrg. 104-299, *supra* note 32, at 79-80.

164. See *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 658 (E.D. Pa. 1981) (holding that a landfill's repeated discharges of contaminated, carcinogenic liquids (leachate) into a navigable stream were not shown to be a nuisance, but ordering the earliest possible "complete and permanent containment of leachate generated by the landfill" based on violations of the Clean Water Act and the Resource Conservation and Recovery Act).

165. See *Johnson v. Whitten*, 384 A.2d 698 (Me. 1978) (holding that filling property and blocking water drainage is not a nuisance; a plaintiff must prove that the defendant artificially stored and then discharged water or established a water course — with a stream bed and banks — onto the plaintiff's land.).

166. See *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D. Mass. 1990) (Mobil sold a site that it had heavily contaminated with toxic chemicals for over 60 years, which significantly im-

Thus, pollution control and other laws were passed because nuisance law proved extremely inadequate.¹⁶⁷ Reliance on nuisance law to counter the ill-effects of the new takings legislation is either hypocritical or extremely naive. For example, nuisance does not cover cumulative damage to health and property from many sources. As Joseph L. Sax has written, "state nuisance law does not provide anything like comprehensive protection even from conventional pollution. Thus, the statement 'we're going to be paying polluters not to pollute [under S. 605].'"¹⁶⁸

The largely undefined and evolving scope of each State's unwritten nuisance law would create massive uncertainties for regulated industries and protected citizens alike. National laws that provide safeguards against national problems like air and water pollution would vary from state to state; companies would have to be paid to comply with laws in one state, but not in another depending on how each State interprets the reach of its nuisance law.¹⁶⁹

paired the new owner's use and enjoyment of the land. Mobil was not liable for remediation, however, because state nuisance law can only be applied in conflicts between neighboring contemporaneous land uses). See also, e.g., *American Glue & Resin, Inc. v. Air Prods. & Chems., Inc.*, 835 F. Supp. 36 (D. Mass. 1993) (holding that a chemical spill and migration into groundwater and neighboring property was not a nuisance).

167. See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 7 n.34 (1993).

168. Sax, *supra* note 55, at 513.

169. The uncertain scope of background principles of property and nuisance law is an obstacle to every potentially successful takings claim. Takings bills, however, massively magnify that uncertainty by applying it far beyond the narrow field of takings claims that satisfy the numerous other requirements for a successful constitutional claim. For example, takings bills would apply to cases where there was a: (1) temporary denial of permission to fill in a (2) small wetland part of a contiguous parcel that the purchaser had (3) no reasonable investment backed expectations of being able to fill. The owner may have purchased the parcel after negotiating the price down to reflect swamp-land prices for the wetland portion. Moreover, the delay may have no effect or even a positive effect on the value of the overall parcel. Any one of these factors would preclude a constitutional takings claim, obviating the need to look at background principles such as whether the developer had a right to increase pollution and flooding downstream.

Thus, S. 605 would have created a right to pollute and a right to discriminate unless taxpayers paid companies to comply with anti-pollution and discrimination laws that go beyond the narrow confines of state nuisance law.¹⁷⁰ State nuisance laws simply do not sufficiently or uniformly protect against complicated, broad environmental, health and safety harms. As the Senate Judiciary Committee minority report on S. 605 stated, in the view of the bill's proponents, nuisance "seems to mean something like 'things that are bad' or 'actions which cause harm.'"¹⁷¹ In fact, however,

It is as true today as it was yesterday: State nuisance law cannot adequately safeguard our environment, and it cannot see to it that the health, safety and property values of neighboring land-owners are protected. Furthermore, nuisance law does not even address other vitally important public interests — like civil rights protections, worker safety rules, and product safety guidelines. Discrimination may be shameful — but it is not a "nuisance."¹⁷²

C. *Political and Policy Considerations*

As Professor John Martinez has pointed out:

By enlarging the scope of private property, takings statutes are thus an attempt to *indirectly amend* every legislative enactment which may affect private property — and it is hard to imagine a statute which does not. . . . Takings statutes can affect *all* governmental programs which might potentially affect private property, including price controls, landlord-tenant relations, zoning, building setback and height requirements, health and safety regulations, and business regulation."¹⁷³

The Senate Judiciary Committee minority report on S. 605 concluded that: "The scope of the bill is itself breathtaking, as it goes beyond mere land-use restrictions and covers environmental, public health, financial, safety, and civil rights regulations."¹⁷⁴

170. State nuisance law normally covers only immediate and demonstrable harm that is substantial and cumulative. Additionally, state laws differ and therefore environmental and public health and safety protections would vary from state to state. See S. REP. NO. 104-239 at 61.

171. *Id.*

172. *Id.* at 63-64.

173. John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 339, 342 (1994).

174. S. REP. NO. 104-239, at 60 (1996).

The scope of the takings agenda has ignited broad opposition on all levels of government, across political parties, and among a broad range of groups. Opponents of takings bills include citizens and groups representing civic associations, labor, taxpayer, planning, historic preservation, public health, conservation, hunting,¹⁷⁵ "fishing industry organizations; state and local government officials; and child welfare, civil rights, religious and senior citizen groups."¹⁷⁶ These opponents, who are working to protect people, property and natural resources, range from the League of Women Voters¹⁷⁷ to the United Steelworkers of America,¹⁷⁸ from conservative Christians¹⁷⁹ to the American Public Health Association.¹⁸⁰

A broad range of religious denominations have opposed takings bills from a moral and theological perspective. These include detailed written testimony submitted by the United States Catholic Conference;¹⁸¹ statements submitted by the National Council of Churches¹⁸² and by numerous Protestant denomina-

175. S. REP. NO. 104-239, at 68.

176. Kriz, *supra* note 71, at 1201. "As a result, opposition to Dole's property-rights legislation has grown in the Senate." *Id.*

177. See Dana B. Larsen, *Building Broad-Based Coalitions to Oppose Takings Legislation*, in *LET THE PEOPLE JUDGE: WISE USE AND THE PROPERTY RIGHTS MOVEMENT* 304, 309 (John D. Echeverria & Raymond Booth Ely eds., 1995).

178. "Steve Francisco, legislative representative for the United Steelworkers of America: 'This bill is really about opening the doors of the public treasury to corporate special interests.'" Kriz, *supra* note 71, at 1203.

179. See Michele Kay, *Environmentalists Form Unlikely Relationships*, J. REC. (Okla. City), Aug. 12, 1994, available in 1994 WL 4764480. See also *infra* Part III.D.

180. See S. REP. NO. 104-239, at 68 (1996).

181. See S. Hrg. 104-535, *supra* note 1, at 154-158 (prepared statement of Most Reverend John J. McRaith, on behalf of the U.S. Catholic Conference). For an even more detailed discussion of this opposition from a Catholic (and more generally a Christian) perspective, see David E. DeCosse, *Beyond Law and Economics: Theological Ethics and the Regulatory Takings Debate*, 23 B.C. ENVTL. AFF. L. REV. 829, 831 (1996) ("takings bills have as their premise notions of private property, the state, and the common good which are sharply at odds with these concepts as they appear in Catholic social teaching.").

182. See *Hearing: Property Rights*, *supra* note 58, at 41-42 (statement of Rev. Joan Campbell, general secretary to National Council of

tions;¹⁸³ and opposition from a Jewish perspective.¹⁸⁴ Religious group representatives, including the Evangelical Environmental Network, the Coalition on Environment and Jewish Life, the National Council of Churches, and the U.S. Catholic Conference, also opposed S. 1954 in a meeting with Majority Leader Lott's staff.¹⁸⁵

As stated above, President Clinton promised to veto the House, Senate or any similar takings compensation bills and strong bipartisan opposition repeatedly blocked Senate consideration of takings legislation in 1996.¹⁸⁶

A national poll showed that by a 53-35% majority, those who voted for Republican candidates in 1994 rejected takings compensation "if environmental laws restrict what they can do with their land."¹⁸⁷ This result was confirmed by a July 1996 national poll by Peter Hart and Republican pollster Vince Breglio, in which citizens, by 52-38%, rejected takings compensation for wetlands and endangered species protections.

Voters have consistently and overwhelmingly rejected statewide takings referenda. Every time voters have been faced with this issue they have rejected takings. In November, 1995, Washington State's Referendum 48 was rejected 60-40%, as was an Arizona takings impact assessment bill in a November, 1994 statewide

Churches of Christ in the USA).

183. *E.g.*, *id.* at 128-129 (statement submitted for the hearing by the Lutheran Office for Governmental Affairs Evangelical Lutheran Church in America). *See also id.* at 130 (statement submitted for the hearing by Dr. Thom White Wolf Fassett, General Secretary of the General Board of Church and Society of the United Methodist Church), 131 (statement submitted for the hearing by Rev. Elenora Giddings Ivory, Director of Washington Office Presbyterian Church USA), 132 (statement submitted for the hearing by the Peace Section Mennonite Central Committee U.S.), 133 (statement submitted for the hearing by Dr. Patrick W. Grace Conover, Policy Advocate Office for Church in Society United Church of Christ).

184. *E.g.*, Letter from Rabbi Daniel Swartz, Director of Congressional Relations, Religious Action of Reform Judaism, to Representative, United States House of Representatives (February 28, 1995) (on file with the *Fordham Envtl. L.J.*).

185. Hebner, *supra* note 108.

186. *See supra* note 79 and accompanying text.

187. Peter D. Hart Research (Dec. 1-4, 1994).

vote.¹⁸⁸ In Arizona and Washington, takings bill supporters outspent opponents by 2-to-1. In 1986, Rhode Island voters endorsed a state constitutional amendment narrowing takings liability.¹⁸⁹

Even prominent backers of takings bills recognize that they dare not let the people vote. For example, Jonathan H. Adler of the Competitive Enterprise Institute, in his July 12, 1995 testimony in support of S. 605, cited public opinion polls that allegedly showed popular support of compensation for regulatory takings.¹⁹⁰ After the Washington state vote in November, the *Seattle Times* reported that, "R.J. Smith of the conservative Competitive Enterprise Institute, a Washington, D.C., think tank, said the defeats in Washington and Arizona may have taught another lesson: that property-rights leaders shouldn't take the issue directly to voters through initiative or referendum."¹⁹¹

Throughout the country, newspapers have almost unanimously denounced proposed state and federal takings bills. Dozens of newspaper editorial boards opposed takings bills in 1995 alone.¹⁹²

188. Keith Bagwell, *Property Rights Proposal Rejected By Wide Margin*, ARIZ. DAILY STAR, Nov. 9, 1994, at 13A (both referendums rejected by a 60-40% margin); Doug Conner, *Property Vote Losers to Keep Fighting*, L.A. TIMES, Nov. 9, 1995, at 35; see also Bruce Rushton & Heath Foster, *Property Rights Initiative Swamped/ Property. 48 Boosters Blame the Weather*, NEWS TRIB. (Tacoma, Wash.), Nov. 8, 1995, at A1; Dennis Wagner, *'War' In Wings As Voters Reject Property Rights Issue*, PHOENIX GAZETTE, Nov. 9, 1994, at A13 (opponents of takings bills outspent by 2-1).

189. The vote was 67.5% in favor of the amendment. See Memorandum from Michael Rubin, Assistant Attorney Gen. & Envtl. Advocate, Dep't of the Attorney Gen., State of R.I. (June 1, 1995) (on file with the *Fordham Envtl. L.J.*).

190. S. Hrg. 104-299, *supra* note 32, at 221, citing "poll results pertaining to property rights" in Brian Seashores, *Are Property Rights Popular?*, in PROPERTY RIGHTS READER 46-50 (J. Adler ed., Competitive Enterprise Inst., Jan. 1995). See also Adler's testimony before the Senate Judiciary Committee on October 18, 1995, S. Hrg. 104-535, *supra* note 1, at 203, 249.

191. Eric Pryne & David Postman, *Ref. 48 Defeat Has Louder Echoes: A Property Rights Stall in Congress, Too?*, SEATTLE TIMES, Nov. 9, 1995, at A1.

192. E.g., *Common Sense and Property*, MIAMI HERALD, Mar. 1, 1995, at 24A; *Deregulation Over the Edge*, MILWAUKEE J. SENTINEL, Feb. 28, 1995, at A6; *Don't Be Taken by 'Takings'*, ROANOKE TIMES (Va.), Mar. 1, 1995, at A-8; *Don't Toss Out Good with Bad By Stifling All Regulation; New House Bill Would Undermine Safeguards*, BUFFALO NEWS (N.Y.), Mar. 2, 1995, at B2;

Representatives of state and local government have been major opponents of federal takings bills. New Hampshire Republican State Senator Richard Russman testified on behalf of the National Conference of State Legislatures (NCSL) against the House and Senate bills.¹⁹³ NCSL, the National Governors Association, the National League of Cities, the U.S. Conference of Mayors, the National Institute of Municipal Law Officers, the National Black Caucus of State Legislators, the International Association of Fish and Wildlife Agencies, and the Western State Land Commissioners Association all have approved resolutions opposing takings payment bills for budgetary and other reasons.¹⁹⁴ Also, thirty-three state Attorneys General wrote Congress that: "[Takings bills] purport to implement constitutional property rights protections, but in fact they promote a radical new takings theory that would severely constrain the government's ability to protect the environment and public health and safety."¹⁹⁵

Academic experts on takings have offered detailed criticisms of takings bills. Over 370 law professors wrote Congress that "S. 605

Environmental Reform Via Sledgehammer: GOP's Anti-Regulation Package in the House Goes Too Far, L.A. TIMES, Mar. 8, 1995, at 6; *A Law That Would Take the Public*, CHIC. TRIB., Feb. 20, 1995, at 18; *Let's Leave It to the Courts to Settle 'Takings' Questions*, DENVER POST, Feb. 20, 1995, at B07; *The 100 Day Hurricane*, N.Y. TIMES, Apr. 9, 1995, at B6; *Private and Public*, BANGOR DAILY NEWS (Me.), Mar. 1, 1995, available in 1995 WL 5818849; *Second Take on Takings*, SACRAMENTO BEE, Mar. 9, 1995, at B6; *'Taking' Liberties: Property Owners Have Responsibilities as Well as Rights*, PITTSBURGH POST-GAZETTE, Mar. 10, 1995, at B2; *Taking Wrong Turn: Compensation Bills Would Clog Courts, Cost Taxpayers*, HOUSTON CHRON., Apr. 26, 1995, at 24; *Tricking the Taxpayers: So Called 'Takings' Legislation Would Force the Public to Pay Bribes*, DES MOINES REG., May 15, 1995, at 10; *The Twisted "Takings" Bill*, NEWS & OBSERVER (Raleigh, NC), Mar. 1, 1995, at A12; *Wrong Way on Takings*, WASH. POST, Mar. 9, 1995, at A20.

193. See S. Hrg. 104-299, *supra* note 32, at 51, 117; *Hearing: Private Property*, *supra* note 58, at 73-78.

194. See NGA 1995 Annual Meeting Resolution 18; NCSL policy resolution passed July 28, 1994; NLC Resolution #1 adopted Dec. 4, 1994; USCM Resolution Adopted Jun. 1995; NIMLO Resolution adopted Apr. 8, 1995; NBCSL Resolution adopted Dec. 1995; IAFWA Resolution adopted Mar. 1996; WSLCA Resolution adopted Jan. 12, 1995. The NLC, NCSL and WSLCA Resolutions are reproduced in *Hearing: Property Rights*, *supra* note 58, at 69-72.

195. *Hearing: Property Rights*, *supra* note 58, at 64.

would radically expand the government's compensation obligations beyond those required by the Fifth Amendment. . . . [and] would impose an enormously burdensome and costly obstacle to government action and undermine balanced efforts to protect private property and the public welfare."¹⁹⁶ Witnesses against the Senate takings bills included some of the most prominent authorities on takings. These included authors of two of the classic articles on takings: Professor Joseph L. Sax (who testified in his then capacity as Counselor to Interior Secretary Bruce Babbitt),¹⁹⁷ and Harvard Professor Frank I. Michelman;¹⁹⁸ as well as Yale Professor Carol M. Rose,¹⁹⁹ Washington University Professor Richard J. Lazarus, who "During the past 16 years, . . . participated in most of the Supreme Court cases involving takings challenges to environmental regulations,"²⁰⁰ and Georgetown Profes-

196. Letter from 371 law professors to U.S. Senators, May 2, 1996, *supra* note 136; see also S. REP. NO. 104-239, at 147 (1996).

197. Martínez, *supra* note 173, at 329 n.10, citing five "Classic analyses of the takings problem," including Prof. Michelman's 1967 article, *infra* note 198, and Joseph L. Sax's articles *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); and *Takings and the Police Power*, 74 YALE L.J. 36 (1964). Joseph L. Sax's articles also include: *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993); and *Takings*, 53 U. CHI. L. REV. 279 (1986).

198. "Perhaps the best-known and most cited article in this voluminous literature [on takings] is Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967)." Carol M. Rose, "Takings" and the Practices of Property: Property as Wealth, Property as "Property," in PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 49, 66 n.1 (1994). See Frank I. Michelman, *Testimony Before the Senate Committee on Environment and Public Works*, 49 WASH. J. URB. & CONTEMP. L. 1 (1996) (slightly edited version of prepared testimony); Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605*, 49 WASH. J. URB. & CONTEMP. L. 17 (1996); Frank I. Michelman, *A Brief Response to Richard Epstein*, 49 WASH. J. URB. & CONTEMP. L. 25 (1996).

199. Some of Prof. Rose's most important articles are collected in Carol M. Rose, PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP (1994). See also Rose, *A Dozen Propositions*, *supra* note 30.

200. S. Hrg. 104-299, *supra* note 32, at 215 (statement of Richard J. Lazarus).

sor J. Peter Byrne.²⁰¹

III. CONSEQUENCES OF TAKINGS BILLS

A. *Takings Bills Are Budget Busters*

Proposed takings legislation would force repeal, or block implementation, of basic protections for people, property, and natural resources by making them too expensive to enforce. The Office of Management and Budget (OMB) concluded that the costs of S. 605 would be "several times the \$28 billion [over seven years] of the House-passed legislation."²⁰²

The Senate Judiciary Committee majority report on S. 605 erroneously claimed that the Congressional Budget Office (CBO) "concluded that the cost of compensation to the Federal Government under S. 605 would be no more than \$30 to \$40 million a year, a tiny fraction of the OMB figure."²⁰³ In fact, however, CBO estimated only the costs of *administering* the bills, stating that:

CBO has no basis for estimating the additional amount of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court. . . . CBO expects that the majority of the new suits would involve relatively large claims against agencies that regulate the use of land or water, particularly the U.S. Army Corps of Engineers and the Department of the Interior (DOI).²⁰⁴

201. See *Hearing: Property Rights, supra* note 58, at 26-32. "In brief, I believe that it would be difficult to denounce H.R. 9 with sufficient vehemence. It is profoundly stupid and deeply cynical." *Id.* at 26. See generally Byrne, *Ten Arguments, supra* note 25.

202. S. Hrg. 104-299, *supra* note 32, at 142 (June 7, 1995 letter from Alice M. Rivlin, Director, Office of Management and Budget to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate), *accord id.* at 134-46, 181-83 (testimony and written statement of Alice M. Rivlin).

203. S. REP. NO. 104-239, at 26.

204. See S. REP. NO. 104-239, at 40, 43 (Congressional Budget Office Cost Estimate, enclosure to March 8, 1996 letter from June E. O'Neill, Director, CBO, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate). See also U.S. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE FOR S. 605, OMNIBUS PROPERTY RIGHTS ACT OF 1995 2 (Oct. 17, 1995), *discussed in* S. REP. NO. 104-239, at 65 (minority views); and Kriz, *supra* note 71, at 1203 ("the CBO ducked the question of how much compensation the federal government would wind up pay-

Taxpayers for Common Sense, a budget watchdog group, issued a May, 1996 report stating that the cost of S. 605 could be \$100 billion over seven years, or, more likely, a virtual blank check.²⁰⁵ Former Senator Paul Tsongas, a strong advocate of a balanced budget, presented very powerful testimony on this issue before the Senate Environment & Public Works Committee.²⁰⁶ The Senate Judiciary Committee minority report on S. 605 cited a study by the University of Washington Institute for Public Policy Management which revealed that Washington State's defeated takings legislation (Referendum 48) could have cost local governments up to \$1 billion annually for takings studies alone and exposed them to payments of as much as \$11 billion.²⁰⁷ As the author stated at the time, "The only limit to how much this bill would cost taxpayers is any limitation on corporate greed and ingenuity."²⁰⁸

Payment bills would thus block enforcement of environmental and conservation laws as well as a wide variety of public health, safety, financial,²⁰⁹ and civil rights laws.²¹⁰ These bills would create a new entitlement requiring blank check payments to corporate and individual property owners. As a result, these bills would compel avoidance of these costs through repeal or non enforce-

ing to aggrieved property owners.").

205. See Kriz, *supra* note 71, at 1203 ("Opponents of the Senate bill assert that the full price could rise to \$100 billion over seven years — an estimate developed by Taxpayers for Common Sense, a Washington-based public-interest group.").

206. See S. Hrg. 104-299, *supra* note 32, at 146-51. The Senate Judiciary Committee minority report noted that

Responding to the fiscal concerns voiced by former Senator Tsongas, Senator Robert Dole last spring was quoted as saying, 'I think he has raised some legitimate questions. Maybe there is another way to do it. We are not trying to run up the tab. We know one thing we can't do is spend a lot of money.' (*Boston Globe*, Apr. 29, 1995, at 13)

SEN. REP. NO. 104-239, at 65 n.13.

207. See S. REP. NO. 104-239, at 70 n.17 (citing INSTITUTE FOR PUB. POL'Y MGMT., U. WASH., REFERENDUM 48 — ECONOMIC IMPACT STUDY OF THE PROPERTY RIGHTS INITIATIVE (1995)).

208. Glenn Sugameli, National Wildlife Federation, *quoted in* Kriz, *supra* note 71, at 1202.

209. S. REP. NO. 104-239, at 211 n.9.

210. *Id.* at 124.

ment of needed protections for people, neighboring property, and public resources. The cost of takings studies mandated by assessment bills would have a like effect.

If any such bills were to pass, the vast majority of payments would be to large corporations and developers who are the subject of most of the regulations and who have the lawyers, appraisers and experts necessary to demonstrate a right to payment under the vague standards of these bills.²¹¹ This fact was dramatically illustrated in May 1996, when an Exxon subsidiary filed a lawsuit claiming that the \$125 million Exxon Valdez tanker had been taken.²¹² The claim challenged a provision of the Oil Pollution Act of 1990, which was passed after the Exxon Valdez had spilled 10.6 million gallons of crude oil, that allowed the ship to operate anywhere in the world except Prince William Sound, where the spill had occurred.²¹³ Maritrans, Inc. subsequently filed a takings claim for more than \$200 million to cover the loss of 37 single-hull tank barges that would be forced from service in 2003 by the double-hull requirements of the same Act.²¹⁴

Payments regarding land would also reflect the highly concentrated nature of land ownership:

211. In analyzing the results of S. 605, Senator Robert Dole's 1995 takings bill, the Congressional Budget Office concluded that "CBO expects that the majority of the new suits would involve relatively large claims against agencies that regulate the use of land or water, particularly the U.S. Army Corps of Engineers and the Department of the Interior (DOI)." S. REP. NO. 104-239, at 43 (Congressional Budget Office Cost Estimate, enclosure to March 8, 1996 letter from June E. O'Neill, Director, CBO, to Sen. Orrin G. Hatch, Chairman, Committee on the Judiciary, U.S. Senate).

212. See James Gerstenzang, *Tanker Seeks Return to Alaskan Waters*, L.A. TIMES, May 4, 1996, at A16; David Whitney, *Exxon Wants Notorious Tanker Back on Duty in Alaska Waters*, *Anchorage Daily News*, Apr. 5, 1996, at A-1. See also Joan Claybrook (President of Public Citizen), "Takings" *Legislation Would Reward Polluters*, S.F. EXAMINER, May 29, 1996, at A-17 (citing Exxon Valdez takings claim); Kriz, *supra* note 71, at 1202 ("for the environmental lobbyists fighting the Republican property-rights legislation, the lawsuit might just as well have come wrapped in pretty paper and tied with a big bow.").

213. See 33 U.S.C. § 2701 (1994).

214. See *Maritrans to Sue Over Spill Law Losses*, J. COM., Aug. 26, 1996, at 1B.

[I]f one combines the land holdings of the large farm operators and timber operators, 2.1 million land owners own 1,035 million acres of land. That means that 2.65 percent of all private land owners own 78 percent of all private land. Their size also implies a likely sophistication in dealing with government programs.²¹⁵

In contrast, the roughly sixty million owners of residential property own three percent of all private land.²¹⁶ Takings bills would benefit the former, large landowner group to the general detriment of homeowners who depend upon clean air, safe drinking water, zoning and other laws. In fact most home property values benefit from land use regulations.²¹⁷

B. *Takings Assessment Bills Would Needlessly Multiply Red Tape*

From both legal and practical perspectives, there are numerous fundamental flaws in takings impact assessments. Many takings bills track President Reagan's Executive Order 12,630, which the Congressional Research Service and others have demonstrated severely misrepresents Supreme Court takings law precedent.²¹⁸

In addition, many takings impact assessments are based on an impossible premise — they purportedly would require a takings determination — and typically a dollar assessment — at the time any regulation is proposed.²¹⁹ Such a requirement would conflict

215. S. Hrg. 104-299, *supra* note 32, at 205 (statement of C. Ford Runge, Professor, Dept. of Agricultural and Applied Economics, Univ. of Minn.).

216. *See id.*

217. *See id.* at 207-08.

218. *See supra* notes 29-30 and accompanying text.

219.

[A]ny determination that a regulation on its face (without its application to a particular piece of property) causes a taking is *always* impossible (with one exception — the legitimacy review. . . . Only one level of analysis is possible to do by assessment, that is the consideration of whether the regulation on its face substantially advances a legitimate governmental interest, the legitimacy review. . . . An assessment could not make an intelligent conclusion for the following components of the takings analysis. It could not (1) determine whether permanent physical occupation is occasioned; (2) determine

with the Supreme Court's consistent takings policy and experience. The Court has repeatedly emphasized that there cannot be an inflexible test for takings because fairness requires case-by-case judicial determinations.²²⁰ With the rare (and usually unsuccessful) exception of facial takings challenges,²²¹ takings can only be decided after a particular regulation has been applied to a specific piece of property.²²² This allows for consideration of the individual and cumulative impacts of proposed uses on neighboring and downstream property and on the public.

In describing the takings assessment requirements of Executive Order 12,630, Professor Carol M. Rose has stressed that:

A moment's reflection suggests how much these questions will resist an *ex ante* investigation, and what special difficulties they present for regulations with broad but mild impacts — the very regulations that are often thought fairer than those that single out particular owners. In such assessment requirements, the detailed factual inquiries of takings jurisprudence simply are shifted without being avoided, and indeed they are shifted

whether property would be partially or totally affected; (3) conduct an economic impact analysis; (4) conduct the 'rough proportionality' test; (5) investigate investment-backed expectations; or (6) strike a balance between public need and the harm occasioned to specific property owners.

Robert H. Freilich & RoxAnne Doyle, *Takings Legislation: Misguided and Dangerous*, LAND USE L., Oct. 1994, at 3, 4-6.

220. It is "a question of degree — and therefore cannot be disposed of by general propositions." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). The process relies on a ["factual inquiry into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986); *accord Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993). *See also* S. REP. NO. 104-239, at 56 (minority views) ("Formulas, calculators and financial appraisals cannot alone measure fairness, the Court has recognized. Required, as well, is a look at all the relevant factors — such as the owner's reasonable expectations in the property, the economic impact of the government action on the property, and the importance of the public interest being protected. *See Penn Central Trans. v. New York [City]*, 438 U.S. 104, 124-25 (1978).").

221. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

222. *See id.*; *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).

to a time frame in which they are less likely to yield reliable answers. At best, such overblown procedural requirements are simply wasteful and redundant, and at worst they are a kind of harassment of regulators.²²³

Similarly, thirty-three State Attorneys General wrote Congress that:

Takings Assessment proposals would require agencies to speculate about the precise amount by which the value of all affected private property might be diminished, then speculate about how much diminution in value would be caused by various alternative courses of action, and then speculate about what the courts might decide in any potential lawsuit challenging the regulation. Since agency attorneys already review new proposals for potential takings problems . . . this new paper-shuffling requirement would do nothing to reduce the likelihood of unconstitutional takings.²²⁴

These State Attorneys General recognized that assessment bills simply "creat[e] costly new bureaucratic paperwork requirements with no corresponding benefits."²²⁵ For example, under a 1992 Delaware takings impact assessment law,²²⁶ the State Attorney General's Office conducted a "canned" regulatory review. This review routinely noted that virtually all regulations involving real property *might* result in a taking and that a more meaningful analysis can only be done on a property-specific basis.²²⁷ The then Deputy Attorney General of Maryland, Ralph S. Tyler, concluded that the Delaware example underscores the "central conceptual flaw" of a similar Maryland bill, that "it is impossible to conduct a meaningful 'takings' analysis in the abstract . . ."²²⁸

Even Roger Marzulla, who authored President Reagan's Executive Order on Takings which is the source of the concept of tak-

223. Rose, *A Dozen Propositions*, *supra* note 30, at 288.

224. Letter from 33 Attorneys General to Members of Congress, Sept. 26, 1994, *quoted in* S. REP. NO. 104-239, at 75 (minority views).

225. *See id.*

226. DEL. CODE ANN. tit. 29, § 605 (Supp. 1996).

227. *See* Letter from Ralph S. Tyler, Deputy Attorney General of Maryland, to Delegate Donald B. Elliot, Maryland House of Delegates 1 (Mar. 26, 1993). *See* Byrne, *Ten Arguments*, *supra* note 25, at 137 ("Thus, in states that have adopted such prophylactic bills, the issuing agency merely issues a circumlocution concluding that whether a taking will occur depends on the facts.").

228. *Id.*

ings assessment or "liability planning" bills,²²⁹ admits that these bills do not yield meaningful information about potential liability. He and his wife, Nancie G. Marzulla, President and Chief Legal Officer of Defenders of Property Rights, have recognized that:

Planning bills do have a serious weakness, however. As Maryland [deputy] Attorney General Ralph S. Tyler points out, "no meaningful analysis can be done" of the liability at stake in a taking when so much depends not just "upon the particular circumstances" of the case, but on the philosophy of the particular judge hearing the case. . . . When judges take this *ad hoc* approach to takings law, liability planning becomes a shot in the dark.²³⁰

While such efforts cannot yield any useful estimates of potential government liability or the number or cost of takings of private property, they are not harmless. These efforts can incur high costs in time, effort and expense and can function, intentionally or not, to delay or block implementation of laws that protect people, property and communities.²³¹ For example, as discussed above, a study by the University of Washington Institute for Public Policy Management revealed that Washington State's defeated Referendum 48 could have cost local governments up to \$1 billion annually for takings studies alone.²³²

Takings bills are back-door attacks on protections for property and people that are too popular to modify or repeal on the merits. The real purpose and effect of these bills is not to assess or plan for takings liability but to increase profits by delaying or blocking needed protections.

229. Roger Marzulla was Assistant Attorney General, Land and Natural Resources Division from 1987-1989, and is now Chairman of Defenders of Property Rights. See *supra* note 31 and accompanying text.

230. Nancie G. Marzulla & Roger J. Marzulla, *Legislative Solutions to the Property Rights Problem*, in PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKINGS AND ENVIRONMENTAL REGULATION 174 (1997); see also Nancie G. Marzulla, *State Rights*, *supra* note 18, at 107.

231. "Because the takings analysis could not be completed, assessment type takings laws could not accomplish anything more than creating a huge expense and chilling the efforts of state agencies and local governments charged to protect the health, safety, and welfare of our communities." Freilich & Doyle, *supra* note 218, at 6.

232. See *supra* note 206 and accompanying text.

C. *Takings Bills Would Harm Private and Public Resources Alike*

Takings compensation bills would force Americans to choose between allowing destruction of homes and Native American burial, archaeological and historic sites or paying companies not to desecrate these sensitive areas. For example, S. 605 and S. 1954 could mandate taxpayer payments to mining companies and corporate developers in the following cases. In each case, the court found that federal or state limitations on the use of property to protect homes and burial, historical, and archaeological sites did not result in a "taking" of private property.

A company claimed a taking after two percent of a farm was designated unsuitable for strip mining under the Indiana version of SMCRA. The site is eligible for the National Register of Historic Places and is rich in historically and scientifically important archaeological artifacts from four distinct cultural periods. The Supreme Court of Indiana found that no taking had occurred because "the overall effect on the value of the land is minute" and only three percent of the coal was affected.²³³ The company had bought the land with no expectation of coal mining and the designation did not interfere with the original and present use of the land for farming.

•The M & J Coal Company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. When the federal Interior Department required M & J Coal to reduce the amount of coal it was mining to protect property and public safety, the company sued. The court rejected M & J Coal's claim that, despite the company's 34.5 % annual profit, mining regulations had "taken"

233. Department of Nat. Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1004 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990). The federal bills covered state administered federal programs, authorizing suit against the supervising federal agency. See S. 1954, 104th Cong. § 204(b) (1996); S. 605, 104th Cong. § 204(b) (1995). A similar state bill could effectively reverse *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994) (no taking from denial of mining that would violate Iowa statute authorizing protection of human remains of national or state significance), *cert. denied*, 514 U.S. 1003 (1995).

its property.²³⁴

S. 605, and S. 1954, could have reversed the results of these cases. They would have ignored issues regarding the reasonable expectations and profit from the overall properties. Payments would have been required if there was a thirty-three percent (or fifty percent under S. 1954) impact on the potential value of the tiny "affected portion" of the Indiana property or of the coal that had to be left under the West Virginia homes.

Takings bills can also harm public resources, especially when there are claims of private interests.²³⁵ Private parties have unsuccessfully claimed property rights in public lands under leases and permits for extraction and grazing uses.²³⁶ As Professor Richard J. Lazarus testified:

[T]he property rights bills ignore the significant rights that the public has to many natural resources, such as air, oceans, and wildlife, that have long been considered not susceptible to private ownership. . . . government must be able to protect the public's rights to its natural resources. The government need not allow individual property owners unilaterally to convert public rights into private property."²³⁷

D. *Health, Safety and Morality Consequences*

Apart from strictly environmental concerns, takings bills such as S. 605 could have required unlimited payments to importers of assault rifles, effectively reversing the results of federal appellate decisions that found that restrictions on such imports did not result in compensable takings.²³⁸ Indeed, this issue was raised

234. *M & J Coal Co. v. United States*, 30 Fed. Cl. 360 (1994), *aff'd*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 116 S. Ct. 53 (1995).

235. *See National Ass'n of Homebuilders v. Babbitt*, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (value of endangered plants and animals as sources of medicine and genes); EPA OFF. OF WATER, LIQUID ASSETS: A SUMMERTIME PERSPECTIVE ON THE IMPORTANCE OF CLEAN WATER TO THE NATION'S ECONOMY 800-R-96-002 (May 1996).

236. *E.g.*, *United States v. Locke*, 471 U.S. 84 (1985); *Freese v. United States*, 639 F.2d 754 (Ct. Cl.), *cert. denied*, 454 U.S. 827 (1981).

237. S. Hrg. 104-299, *supra* note 32, at 218. *See Rose, A Dozen Propositions, supra* note 30.

238. *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993) (ban on importation of assault rifles did not take suspended import permits; investment-backed reliance on government-issued permits was not a compensable vested "property" interest: "as against reasona-

during hearings on S. 605, when Associate Attorney General John R. Schmidt referred in general terms to such cases in response to an inquiry from Senator Dianne Feinstein (D-Cal.), who mentioned that she was "intrigued by the fact that the National Rifle Association is in support of this bill, and I would be curious as to how this bill would affect weapons."²³⁹

The Judiciary Committee majority report tried to distinguish the assault rifle case with a major non sequitur that focused on how property rights under the Fifth Amendment (as opposed to under S. 605) are "defined by the constitutionally allowable legal constraints that exist at the time of acquisition of possession of the property, even if the regulatory policy reduces the property values of a general class of property holders."²⁴⁰ Apparently recognizing how this language would result in a broad exemption, the Report continued: "wetlands and endangered species land use limitations in most cases do not fall in the preexisting law category since takings arise in these circumstances from denial of a permit after the property was purchased."²⁴¹ Unfortunately for the authors of the majority report, this attempted distinction fails — for example, in the assault rifle case, the alleged taking also arose "from denial of a permit after the property was purchased."

ble state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public."); *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989) (temporary suspension on importation of firearms was not a taking because government acted solely in its regulatory capacity); *Fesjian v. Jefferson*, 399 A.2d 861, 865 (D.C. 1979) (no taking from requirement that the owner of a firearm not satisfying the statute's registration criteria "(1) 'peaceably surrender' the firearm to the chief of police, (2) 'lawfully remove' the firearm from the District for as long as he retains an interest in the firearm, or (3) 'lawfully dispose' of his interest in the firearm." (Citing D.C. CODE § 6-1820(c) (Supp. 1978)); *see also* *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1183-84 (N.D. Ill. 1981) (declining to find a taking when "gun owners who wish to may sell or otherwise dispose of their handguns outside" the town's lawful boundaries), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

239. S. Hrg. 104-535, *supra* note 1, at 28 (citing *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993)).

240. S. Rep. No. 104-139, at 27.

241. *Id.*

Other, no doubt unintended, consequences of S. 605 could have included, in effect, reversal of a decision that rejected a takings claim by a provider of "dial-a-porn" services, who challenged federal regulations designed to protect children from obscene speech.²⁴² For state and local governments, enactment of takings laws would have a host of disastrous consequences on local efforts to protect people, property and communities.²⁴³ These bills would require Americans either to pay for basic protections of public safety and moral welfare or to allow a wide range of activities that harm neighbors and communities. Thus, takings bills would mandate a prohibitively expensive, taxpayer-funded entitlement for corporations and others that have not lost any property rights.

Proposed state bills could reverse the results of cases where courts have rejected takings claims brought by businesses faced with limitations on their ability to exact every dollar of profit at the expense of neighboring property and community values. For example, these bills could require payments to unsuccessful takings claimants, including:

a tavern claiming that sobriety checkpoints to control drunk driving reduced their business;²⁴⁴

"to-go beer windows" challenging restrictions on drinking in public;²⁴⁵

242. See S. REP. NO. 104-239 (minority report), at 61 (citing *Carlin Communications, Inc. v. F.C.C.*, 837 F.2d 546 (2d Cir. 1988) (the Federal Communications Commission's provisions involving access codes, scrambling, and credit card payment did not "take" private property)).

243.

Under this measure, a factory could be built beside a retirement village, a massage parlor next to a church, or a night club on a quiet residential street. One irresponsible developer could spoil a neighborhood and ruin property values of its residents without fear of governmental interference. This, apparently, is some legislators' idea of property rights.

Editorial, *Legislature Should Quickly Kill Measure to Scrap Land-Use Controls*, TAMPA TRIB., Mar. 9, 1993, at 6.

244. *Get Away Club, Inc. v. Coleman*, 969 F.2d 664 (8th Cir. 1992) (reducing drinking on premises furthers public goal of protecting against drunk drivers).

245. *Glasheen v. City of Austin*, 840 F. Supp. 62 (W.D. Tex. 1993)

those denied a license to operate and all-night dance hall;²⁴⁶ and proprietors facing restrictions on topless and exotic dancing.²⁴⁷

Donald E. Wildmon, President of the conservative American Family Association, issued a press release condemning a Mississippi takings bill as the "Porn Owners Relief Measure," citing concerns that it would require payments if a law banned nude dancing or made an "adult" business less valuable.²⁴⁸ (The bill would have required payments for state or local regulations that cause a 40% reduction in property value).

The cases rejecting takings claims cited in this article are the tip of the iceberg that would surface if takings bills such as S. 605 were passed. Already, litigants have demonstrated a willingness to pursue through trial and appeals highly creative takings challenges to a wide variety of local, state and federal protections for people and property where established precedent is clear that no taking has occurred. If a bill were enacted jettisoning this established precedent in favor of a test tailor-made so claims

(restriction on consumption of alcohol "in or on" public streets and sidewalks in designated areas of city does not constitute taking because law was properly related to goal).

246. *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3d Cir. 1991) (denial of license for all-night dance hall supports public interest).

247. See, e.g., *Centerfold Club, Inc. v. City of St. Petersburg*, 969 F. Supp. 1289, 1307-08 (M.D. Fla. 1997) (rejecting contention "that even though beneficial use of the real property exists, a taking has nonetheless occurred because the landowner's chosen use of the property, i.e. the adult establishment, may no longer be operated on the property"); *J&B Social Club #1 v. City of Mobile*, 966 F. Supp. 1131, 1140 (S.D. Ala. 1996) (no taking because there was "no evidence whatsoever to indicate that their property is no longer economically viable" as a result of ordinance banning topless dancing in bars); *Sammy's of Mobile, Ltd. v. City of Mobile*, 928 F. Supp. 1116 (S.D. Ala. 1996) (ordinance banning topless dancing in bars was not taking); *Specialty Malls of Tampa, Inc. v. City of Tampa, Florida*, 916 F. Supp. 1222 (M.D. Fla. 1996) (zoning changes alone are not automatic basis for successful takings claim by an exotic dance establishment).

248. See American Family Association Release, *Wildmon Blasts Property Bill as "Porn Welfare" Scheme* (Jan. 13, 1994) (on file with the *Fordham Envtl. L.J.*).

would succeed, the amount and nature of resulting claims would only be virtually unrestricted.

Alternatively, enactment of takings bills can lead to a massive chilling effect on promulgation and enforcement of any protective measures that may come within the scope of required payments. For example, there is already evidence that Florida's takings law, which requires payments for certain new restrictions that "inordinately burden" land use, has had a chilling effect.²⁴⁹

249. See Editorial, *Flawed Use of a Bad Act: Application of the Property Rights Act Reveals Severe Problems*, SARASOTA HERALD-TRIB. MANATEE/AM, Dec. 15, 1996, at 2F; Jerry Jackson, *Property-Rights Law 1st Step for Farmers*, ORLANDO SENTINEL, Nov. 13, 1995, at 17; Editorial, *Mangroves vs. Property Rights*, ST. PETERSBURG TIMES, Dec. 8, 1996, at 2D; Editorial, *The Property Appeasers*, ST. PETERSBURG TIMES, July 9, 1995, at 2D; Elizabeth Willson, *For a Better Environment: Nibbling at Growth Controls*, ST. PETERSBURG TIMES, Mar. 3, 1996 at 1D ("It is causing cities and counties, large and small, to give in to development demands of landowners."). House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Subcommittee Hearing on State Approaches to Protecting Private Property Rights, Sept. 23, 1997 (Testimony of Jane Cameron Hayman, Deputy General Counsel, Florida League of Cities) (visited Mar. 9, 1998) <<http://www.house.gov/judiciary/22350.htm>>.

[In] Florida, the existence of private property laws has had a chilling effect on the development of law, rules and regulations. This effect means that existing laws, rules and regulations move towards being frozen in place, because the administrative structure is uncertain about the impact of the private property rights laws, and finds it easier to do nothing than to do something and find itself subject to the new law's provisions. The impact of this is that the administrative structure may find itself unable to respond flexibly to new situations, conditions and technology and thus will become literally stuck.

Id. (Testimony of Harvey Jacobs, Dean, Department of Urban and Regional Planning, University of Wisconsin-Madison, based upon "a research project on the impact of state-based private property rights legislation.") See also Nancy E. Stroud & Thomas G. Wright, *Florida's Private Property Rights Act: What Will It Mean for Florida's Future?*, 20 NOVA L. REV. 683, 685-86 (1996).

[I]ts impact on local government is likely to be quite severe. The severity of the impact, however, will not be measured by case law as much as by the unmeasurable, but real chilling effect the Act will have on governmental regulation of land

Provisions in some takings bills that mandate that payments will come out of the budget of the agency responsible for enforcing the restriction can only magnify this effect. These provisions provide a powerful incentive for agencies to grant permits that will harm the health, safety and property of neighbors rather than risk any conceivable chance that they will lose their jobs or have to shut down to pay a judgment.²⁵⁰ In effect, "takings statutes would give administrative agencies the power to nullify or repeal regulatory statutes. The chilling effect of having a taking award deducted from an agency's budget might prove a particularly formidable disincentive to even the most dedicated public administrator."²⁵¹

The Fifth Amendment provides a delicate balance between competing individual rights and between individuals and the welfare of communities. Radical redefinitions of "takings" such as the ones proposed in Congress last year disrupt this balance by allowing uses of property that harm others.

E. *Antidiscrimination Laws*

The public accommodation provisions of the Civil Rights Act of 1964²⁵² and the Americans With Disabilities Act (ADA)²⁵³ were

use. In addition, the broad scope of the Act, the discretion left to the courts under vaguely defined concepts, and the prospects of significant monetary consequences, create a strong incentive for government to compromise its regulatory authority for case by case settlements with complaining property owners.

Id. (footnotes omitted).

250. See *Dole, Clinton at Odds Over Devalued Land Issue*, WASH. POST, July 27, 1996, at E9.

'It would surely chill government regulators in their exercise of regulatory authority,' [Jerold Kayden, associate professor of urban planning at Harvard University] said. Those regulators would be worried not just about government funds, but also about their own jobs, said Kayden, because the funds for payments would come out of the enforcing agency's appropriations.

Id.

251. Martinez, *supra* note 173, at 342.

252. §§ 201-07; 42 U.S.C. §§ 2000a - 2000a-6 (1994).

needed precisely because discrimination was not a nuisance. Perhaps most egregiously, therefore, takings bills such as S. 605 would create a right to discriminate.

In other words, S. 605 required that corporate and other property owners be paid not to discriminate. This taxpayer obligation would have arisen whenever a property owner could show that complying with civil rights and ADA requirements partially reduced the value of a portion of their property.²⁵⁴

Essentially, S. 605 would have reversed the results of cases which found that no "taking" of private property occurred from Civil Rights Act and ADA prohibitions against discrimination by hotels, restaurants and other public accommodations on the basis of race or disability. For example, a restaurant franchisee argued unsuccessfully that the requirement of the ADA that restrooms be made accessible to people in wheelchairs was a taking, because it would require spending money and removing restaurant seating.²⁵⁵ Under S. 605, the lost seating (and/or the restroom) could be viewed as the "affected portion" of property whose value had been reduced by more than one-third.²⁵⁶

During the hearings on S. 605, Associate Attorney General John R. Schmidt referenced this case in testifying about potentially severe impacts of the bill on the ADA.²⁵⁷ In response, Judiciary Committee Chairman Orrin Hatch (R-Utah) stressed his continuing support for the ADA and discounted these concerns.²⁵⁸ Eventually, when Senator Hatch introduced S. 1954, his

253. Pub. L. No. 101-336, 104 Stat. 328, 42 U.S.C. § 12101 et seq. (1988).

254. S. REP. NO. 104-239, 104th Cong. 60 (1996).

255. *Pinnock v. International House of Pancakes Franchisee*, 844 F. Supp. 574 (S.D. Cal. 1993).

256. In discussing this case, the *Wall St. Journal* reported that: "many lawyers say [the franchisee] probably would have prevailed under some of the new takings theories being pushed in Congress." Charles McCoy, *The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 5, 1995, at A1.

257. See S. Hrg. 104-535, *supra* note 1, at 10-13, 15.

258. See S. Hrg. 104-535, *supra* note 1, at 13, 15-16.

Having been one of the authors of the Americans With Disabilities Act and having managed the bill on the floor, I personally don't believe that this is going to cause any takings

revised version of S. 605, he kept the original bill's heavy reliance on the nuisance exception, but added one significant additional exclusion — for civil rights laws, including the ADA.²⁵⁹

At least some prominent proponents of takings bills, however, have made clear their hostility to civil rights and ADA laws. Roger Pilon of the Cato Institute was one of only six witnesses called to testify in favor of H.R. 925 at the only House hearing on the bill.²⁶⁰ Previously, he had written that anti-discrimination restrictions on the sale or rental of private property

are illegitimate as a matter of right and hence should be abolished. . . . We have no rights to preserve particular neighborhood styles, for example, not unless we create those rights through private covenants. Likewise with rent controls or antidiscrimination measures: private individuals have a perfect right to offer their properties for sale or rent to whomever they choose at whatever prices they wish.²⁶¹

problems at all to the Federal Government I don't think the courts are going to interpret this law in that fashion to do away with the ADA that is why we wrote the [one-]third or more principle in this.

Id.

259. See 142 Cong. Rec. S7888 (July 16, 1996) (statement of Sen. Orrin G. Hatch).

260. See *Hearing: Property Rights*, *supra* note 58, at 42-48.

261. Roger Pilon, *Property Rights, Takings and A Free Society*, 6 HARV. J.L. & PUB. POL'Y 165, 188 (1983). Pilon's discussion of "rights to preserve particular neighborhood styles . . . through private covenants" in the context of his argument that antidiscrimination housing laws are illegitimate is especially jarring. Racially restrictive private covenants were widely used to exclude persons of designated races from particular neighborhoods until the Supreme Court ruled that judicial enforcement of restrictive covenants that were based upon race or color violated the equal protection clause of the Fourteenth Amendment. See *Shelley v. Kraemer*, 334 U.S. 1 (1948); see also *Hearing: Property Rights*, *supra* note 58, at 41-42 (statement of Rev. Joan Campbell, general secretary to National Council of Churches of Christ in the USA, describing the churches' earlier opposition to use of takings provisions that attempted "to block racial inclusiveness. Allowing persons of color to live next door, it was argued, would reduce the value of their white neighbor's property and amount to 'taking' something away. Overlooked was what racism 'took away' from its victims . . ."), *quoted in* H.R. REP. NO. 104-46, 104th Cong. 14 (dissenting views).

In his testimony in favor of H.R. 925, Roger Pilon argued that Congress should either repeal the ADA or pay affected businesses what he estimated would cost billions of dollars to comply with it.²⁶²

Chicago Law Professor Richard A. Epstein declared, in his 1985 book *Takings*, that his "position invalidates much of the twentieth century legislation" including: civil rights legislation, the National Labor Relations Act, "The New Deal," Social Security, minimum wages, and "virtually all public transfer and welfare programs."²⁶³ More recently, he has written that "I believe that the billionth dollar spent on the recruitment and training of police, prosecutors, and judges yields a far higher social payoff than the first dollar spent in the enforcement of the antidiscrimination laws."²⁶⁴

F. *Litigation Explosion*

S. 605 would have authorized challenges to a broad range of federal actions or inactions on any property, including contract

262. *Hearing: Property Rights, supra* note 58, at 51-52.

263. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 281, 324 (1985). Professor J. Peter Byrne states that while Epstein is "both the ablest and most influential proponent of constitutional property rights . . . [a] basic premise of Epstein's approach is a wide-ranging contempt for the political process," and notes that "Epstein's book *Takings*, received an unusually thorough drubbing from academic critics." Byrne, *Ten Arguments, supra* note 25, at 123 & n.217 (citing Thomas A. Merrill, *Rent Seeking and the Compensation Principle; Essay on Takings: Private Property and the Power of Eminent Domain*, 80 NW. U.L. REV. 1561, 1564-69 (1986); Thomas Grey, *The Malthusian Constitution*, 47 U. MIAMI L. REV. 21 (1986); Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986); Thomas Ross, *Taking Takings Seriously*, 80 NW. U.L. REV. 1591 (1986); Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986)). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 230 (1990) ("My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause."); BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 98-136 (1990).

264. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 186-87 (1995); see also RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

rights and other intangibles.²⁶⁵ The result would have been a flood of costly litigation.²⁶⁶ As Associate Attorney General John R. Schmidt testified regarding S. 605:

[W]e can rest assured that plaintiffs' lawyers will seek the broadest possible application: compensation for businesses that must comply with access requirements under the Americans With Disabilities Act; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that might affect the complex water rights controversies in the West; compensation for agricultural interests that must comply with changing phytosanitary restrictions; compensation where food safety rules or product labeling requirements diminish the value of factories producing unsafe products; and so forth. The examples are virtually endless.²⁶⁷

Looking at only the "affected portion" would magnify this effect. It would trigger claims whenever erosion or flooding concerns affect one acre out of a 10,000 acre development which is a streamside buffer or floodplain zone,²⁶⁸ or whenever worker

265. See, e.g., *Allen v. Wood*, 970 F. Supp. 824, 831 (E.D. Wash. 1997) (rejection of inmate's mail under prison rules banning receipt of contraband was not a taking, because "[p]laintiff fails to show that property he was authorized to receive was taken for public use"). Cigarette vending manufacturers have claimed that an FDA regulation restricting cigarette vending machines to adult-only establishments constituted a taking of their machines, placement agreements and commissions. See Plaintiff's First Amended Complaint at 5-6, *A-1 Cigarette Vending Inc. v. United States* (Fed. Cl., Order to Show Cause Feb. 12, 1997) (No. 97-848 C).

266. See S. REP. NO. 104-239, at 67-68 (minority views).

267. S. Hrg. 104-535, *supra* note 2, at 44 (statement of John R. Schmidt, Associate Attorney General, U.S. Department of Justice), quoted in Sax, *Takings Legislation*, 23 *ECOLOGY L.Q.* at 517-18. See also Martinez, *supra* note 173, at 339 ("By enlarging the scope of private property, takings statutes are thus an attempt to *indirectly amend* every legislative enactment which may affect private property — and it is hard to imagine a statute which does not.").

268. Under S. 605's 33% of the affected portion standard, "Where the affected portion . . . may be just a one-acre segment of a 100-acre tract (and that is an example that was given during hearings on [H.R. 925] a similar bill in the House of Representatives), the portion on

safety concerns affect one machine out of a thousand in a factory.

Enactment of such a bill would also distort the economy and investment. As Professor Richard J. Lazarus testified before the Senate Environment and Public Works Committee:

Perverse incentives will abound. Property owners will propose activities not because of any real interest in their undertaking, but rather simply so that the holder of the property right can be denied permission and thus be entitled to compensation. The law would create an economic incentive for land owners to engage in the most environmentally destructive activities possible, short of a classic common law nuisance, in order to force the land owner not to do so.²⁶⁹

Similarly, EPA Deputy General Counsel Gary S. Guzy repeatedly testified that S. 605 "will create perverse incentives that discourage cooperation between property owners and regulators to find ways of allowing development while protecting the environment. . . . Even more perversely, the bill rewards proposals that are not realistic or feasible."²⁷⁰

Thus, for example, developers would apply for permits to fill in especially sensitive lakes or other wetlands in order to collect payments when the permits are denied. Logically, these applications would even be filed where the alleged development plan would not make economic sense, as in cases where the overall profit from the tract would be enhanced by retaining a lake and marketing luxury upland lakefront acreage.

The Honorable James L. Oakes, a Second Circuit judge who was appointed by President Nixon, has forcefully described the litigation explosion that would have resulted from enactment of the original version of H.R. 925 (Title IX of H.R. 9):

[T]he proposed legislation is so broad that the covered agency action includes *denial* or *conditioning* of a permit and issuance of a cease-and-desist order, as well as a statement under ESA Section 7(b)(3) and commencement of a civil proceeding arising out of failure to secure a permit.

CERCLA lawyers who might be put out of business if Superfund is repealed need not worry. They need only hope

question is $\frac{1}{3}$ of 1% of the whole." S. Hrg. 104-535, *supra* note 2, at 176 (statement of Joseph L. Sax, Counselor to the Secretary, U.S. Department of the Interior).

269. S. Hrg. 104-299, *supra* note 32, at 220.

270. *Id.* at 200; *see also* S. Hrg. 104-535, *supra* note 1, at 374.

for passage of Title IX. . . . The possibilities are endless, mind-blowing. Not only the national environmental movement but much of local and regional land use planning is at risk with proposed Title IX.²⁷¹

During the Senate Judiciary Committee hearings on S. 605, Joseph L. Sax, Counselor to Interior Secretary, testified pithily that:

[A]nybody who thinks when you pass a law that says you can be compensated by the Federal taxpayers when your property is reduced, any affected portion of your property, is reduced by 33 percent, thinks that isn't going to create a great burgeoning of lawsuits must be smoking something pretty strong.²⁷²

CONCLUSION

Takings bills conflict in numerous respects with the Constitutional principles that govern whether or not private property has been taken. Ironically, some of these bills focus heavily on the ESA and other federal and state species protection laws that are extremely unlikely to result in a taking.

The property rights and values of American citizens are protected by environmental, conservation and other laws that prevent harms to their private property, health, and natural resources. Under the guise of protecting property rights, proposed federal and state "takings" bills would radically redefine property rights in a way that threatens these fundamental protections. By establishing a takings standard that directly conflicts with Supreme Court holdings they would create a massive, unnecessary new entitlement when, in fact, no property rights have been taken. As a result, basic protections would neither be enforced nor subsequently repealed.

The intended and unintended consequences of takings bills pose a severe threat to conservation and protection of private property, people, and the quality of the environment. The National Wildlife Federation and others who support conservation and the Constitution's balanced approach to takings oppose tak-

271. Hon. James L. Oakes, *Developments in Environmental Law: What to Watch*, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,308, 10,310 (1995) (speech to American Law Institute-American Bar Association, Feb. 15, 1995).

272. S. Hrg. 104-535, *supra* note 1, at 226.

ings bills are the genuine private property protection movement, not the self-styled "property rights" advocates.

