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THE NEED FOR TAKINGS LAW REFORM: A VIEW FROM THE TRENCHES—A RESPONSE TO TAKING STOCK OF THE TAKINGS DEBATE

Michael M. Berger* & Gideon Kanner**

In a recent issue of this journal, United States Assistant Attorney General for the Environmental and Natural Resources Division (“ENRD”), Lois J. Schiffer, offered her thoughts on regulatory takings litigation and voiced criticism of pending federal legislation intended to rectify anomalies in judge-made takings law that in its present condition fails to provide adequate protection to owners of regulated property.¹ Unfortunately, her presentation minimized the existing problems and demonized the proposed solutions. This essay provides a response.

But first, a word of disclosure.² While Ms. Schiffer is an advocate for the federal government, these authors have largely spent their legal careers representing property owners in litigation against government agencies, most of the time in either direct or inverse condemnation actions, i.e., cases raising the very issues addressed by Ms. Schiffer—but on the other side of the counsel table. Accordingly, this article first discusses the reality of litigation between property

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1. Lois J. Schiffer, *Taking Stock of the Takings Debate*, 38 SANTA CLARA L. REV. 153 (1997). Ms. Schiffer is the attorney in charge of the Environment and Natural Resources Division of the U.S. Department of Justice, the office that defends the United States against claims by private citizens alleging that federal government actions have taken their private real property for public use without compensation as proscribed by the Takings Clause of the Fifth Amendment. U.S. CONST. amend. V.

2. See William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-30 (1965) (stating that authors with “axes to grind” should so note when they enter the scholarly lists, so their readers will know through what spectacles their advisors view the problem).

owners and the government, addresses some of the problems facing land owners confronted with stringent government regulations, and then comments on the legislative proposals being advanced to rectify these problems.

Currently pending legislative solutions range from imposition of substantive criteria of regulatory inverse condemnation liability to procedural changes that would do no more than ensure prompt availability of a neutral federal forum for litigation of federal takings issues without duplicative proceedings before administrative agencies and state courts.³ Yet, government agencies and officials oppose them all—even the latter—regardless of their shape, form, or substantive content.⁴ Though all commentators concede that judge-made substantive takings law is incoherent, and there is also widespread agreement that its ripeness aspects have become an outright intellectual mess, government functionaries bitterly resist any legislative reform. Their determined defense of the present system's inefficiencies, anomalies, and injustices offers powerful testimony that the status quo unduly favors overreaching regulators, badly needs reexamination, and is in need of legislative solution, even if overdue.

I. OVERZEALOUS REGULATORS HAVE AWAKENED LEGISLATIVE INTEREST IN TAKINGS LAW

We can start with a point of agreement. In terms of the number of properties involved, Ms. Schiffer is undoubtedly correct in saying that most private property acquisitions by the government occur either through voluntary purchase or direct condemnation—which is as it should be.⁵ At the time

3. H.R. 1534, 105th Cong. (1997).

4. See text accompanying notes 106-15.

5. No less is required by congressional enactment. Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act, 42 U.S.C. § 4651 (1994). Still, the federal government continues to take the position that its functionaries can simply seize private property when it suits them, and say to the aggrieved owner "sue me." *Stringer v. United States*, 471 F.2d 381, 384 (9th Cir. 1973); *United States v. Herrero*, 416 F.2d 945, 947 (9th Cir. 1969).

Conversely, when it suits them, federal land acquisition officials have been known to delay acquisition for years in a sometimes openly brazen effort to wear the property owners down and to acquire their land for thirty cents on the dollar as one Park Service functionary put it. *United States v. 341.45 Acres, 751' F.2d 924, 927* (8th Cir. 1984); see also *Drakes Bay Land Co. v. United States*, 459 F.2d 504 (Ct. Cl. 1972).

of her publication, Ms. Schiffer reported that 4000 direct condemnation matters were pending in her office.⁶

But the sheer volume of outright acquisition cases reveals little, and has even less to do with inverse condemnation, the topic at hand. In the acquisition cases Ms. Schiffer highlights, the takings are not and cannot be denied; those are cases in which land is being overtly acquired for new a federal building, or other public project, that would occupy the subject property. In an effort to show the magnitude of this body of work (and, presumably, demonstrate the lengths to which the government goes in order to do the right thing), Ms. Schiffer notes that the estimated compensation for these cases is \$360 million.⁷ While standing alone, this figure seems large, it comes to an average of only \$90,000 for each of the 4000 properties on the government's wish list, a rather modest amount these days when an average suburban house in metropolitan areas of California sells for over a quarter million dollars. These figures pale to insignificance when compared to the kind of cases that have made "takings" a household word. For example, after a dozen years of intense litigation, the *Whitney Benefits* case⁸ finally settled when the government paid \$200 million for taking the coal mining rights on one property in Wyoming.⁹ Moreover, the current *Pacific Lumber* litigation¹⁰ involves more than half-a-billion dollars worth of redwoods.

Apart from these cases, there are also situations that arise from local regulations in which the lives' savings of ordinary individuals can be wiped out by the stroke of a government regulatory pen. People like James Hernandez, a blind and crippled music teacher who accepted the reality that his quiet neighborhood was becoming commercialized

6. Schiffer, *supra* note 1, at 153-54.

7. *Id.* at 154.

8. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991).

9. *Id.* Only \$60 million was awarded for the value of the taken property. *Id.* at 1178. The remainder was for attorneys' fees and interest that accrued while the government fought the case long and hard. *Id.* By itself, that raises a question of governmental *bona fides*. As described by the Court, the statute made clear that the particular land owned by Whitney could not be mined—period. *Id.* at 1177. Thus, the only legitimate government activity should have been negotiating or litigating over the purchase price, not denying liability. For a full discussion, see George W. Miller, *The Odyssey of Whitney Benefits: What a Long, Strange Trip It's Been*, 1 REAL PROP. RTS. LITIG. REP. 11 (1995).

10. *Pacific Lumber Co. v. United States*, No. 96-257 L (Fed. Cl. filed 1996).

and sought a rezoning that would permit commercial development, but who, after years of municipal foot-dragging and litigation in both state and federal courts, wound up unable to develop his land.¹¹ Or, people like Paul Kollsman whose engineering prowess perfected the bombsights that helped win World War II, but who found himself stymied by the City of Los Angeles (and the courts), unable to get his case decided before he died.¹² Or people like wheel-chair-bound Bernadine Suitum, whose almost decade-long battle to build a single, one-family home on a lot near Lake Tahoe (a deathbed promise to her late husband) is still wending its way through the courts, after her recent "victory" in the U.S. Supreme Court that graciously let her start her litigation all over again at the age of eighty two.¹³ Even though these people's losses may be individually modest in comparison with the numbers involved in *Whitney Benefits* or *Pacific Lumber*, their impact on the victims is as great or greater.

Ms. Schiffer's generalized discussion of the law applicable to the ENRD's caseload also demonstrates the sort of governmental attitude that property owners routinely face. For example, she correctly notes that the Supreme Court "made clear" in 1946 that low flights by military aircraft result in a taking when they significantly interfere with underlying property owners' use of their land.¹⁴ However, the United States government continues to fight property owners who live near airports and seek the protection of the half-century old *Causby* decision.¹⁵ The property owners eventually get paid in these cases, but not without lengthy, contentious litigation over liability.¹⁶ This is often counterproductive; with accrued interest and attorneys' fees the ultimate cost to the government is higher than what it likely would have been if settled earlier. Such litigation should not be necessary.

11. *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); see RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 183-205 (1985) (detailing the controversy).

12. *Kollsman v. City of Los Angeles*, 737 F.2d 830 (9th Cir. 1984).

13. *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1639 (1997).

14. Schiffer, *supra* note 1, at 154; see *United States v. Causby*, 328 U.S. 256 (1946); see also Michael M. Berger, *Airport Noise in the 1980s: It's Time for Airport Operators to Acknowledge the Injury They Inflict on Neighbors*, INST. ON PLAN. ZONING, AND EMINENT DOMAIN §§ 10.01-.05 (1987).

15. *United States v. Causby*, 328 U.S. 256 (1946).

16. See, e.g., *Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997); *Brown v. United States*, 73 F.3d 1100 (Fed Cir. 1996).

However, the government's record of defying clear statutory policy and forcing owners to litigate¹⁷ demonstrates part of the need currently felt by many legislators to get the government to treat the rights of property owners with the seriousness they deserve.

Next we turn to the National Trails System Act¹⁸ and its "rails-to-trails" program for converting abandoned railroad rights-of-way into recreational trails. Ms. Schiffer notes that the ENRD is litigating several cases under that scheme because the government's actions in approving such a conversion "might give rise" to takings claims.¹⁹ "Might?" That's a bit of an understatement. Hornbook property law has it that discontinuation of an easement terminates the dominant estate, and restores to the owner of the servient estate full unencumbered fee title.²⁰ This means that if the government wants to impose a new hiking path easement onto the former railroad right-of-way, it must acquire the right to do so. The Supreme Court dealt with this question in the 1990 *Preseault* case,²¹ by making clear that the only thing standing between Mr. and Mrs. Preseault and recovery of compensation for a taking of their property was proof of their ownership of the underlying fee title under Vermont law.²² It is clear that the "rails to trails" program was adopted for the specific purpose of overriding state laws regarding extinguishment of railroad easements, and making former railroad rights-of-way avail-

17. *But see* 42 U.S.C. § 4651 (1994); in particular, *see* 42 U.S.C. § 4651(8) ("No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.").

18. 16 U.S.C. §§ 1241-1251 (1994).

19. Schiffer, *supra* note 1, at 157.

20. *See* ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 463-66 (1993).

21. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990).

22. *Id.* The Preseaults had challenged the validity of the statutory scheme on the ground that it took their property but paid them nothing. *Id.* at 11-13. The Supreme Court held the case to be unripe for determining the statute's validity, until the Preseaults sought compensation in the Federal Claims Court. *Id.* at 17-19. The Supreme Court did, however, note that owners of fee simple interests in land once covered by abandoned rights-of-way will have cases where "rail-to-trail conversions will amount to takings." *Id.* at 16. The concurring opinion of Justices O'Connor, Scalia and Kennedy was even more emphatic on this point. *Id.* at 23. All justices rejected the reasoning of the Court of Appeals for the Second Circuit that no rails-to-trails conversions could be takings, as a matter of law. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17-25 (1990).

able as hiking and biking trails.²³ Since abandonment of the easements for railroad usage would return full unencumbered ownership rights to the underlying fee owners under state law (a rule followed everywhere in the country), the federal scheme was intended to trump the state laws and, pursuing the fiction that the railroads might some day need to reactivate those lines for national defense, redefined the concept of “abandonment of railroad use” to not include tearing up the tracks and replacing the trains with joggers.²⁴

Preseault was one of those “rails-to-trails” cases that Ms. Schiffer reports were still being litigated in 1997—seven years after the Supreme Court provided some pretty clear guidance as to the land owners’ rights. But if you want an insight into the “rails-to-trails” litigation reality, the subsequent history of the *Preseault* litigation is an object lesson. In defending itself against Mr. and Mrs. Preseault’s claim, the government convinced a trial judge and a panel of Court of Appeals judges that the statute of limitations for the Preseaults to have filed suit ran out in 1926,²⁵ somewhat before they were born, let alone acquired title to the property, and

23. The first several attempts to compel right-of-way conversion to hiking trails met with a decided lack of success. The state courts concluded that, once the railroad abandoned its usage, it had no interest to transfer, and the unencumbered land became the property of the underlying fee owners. See, e.g., *McKinley v. Waterloo R.R. Co.*, 368 N.W.2d 131 (Iowa 1985). State statutes attempting to compel such conversion were struck down. See, e.g., *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (a case where hikers went to Congress to get federal legislation enacted to override state law).

24. 42 U.S.C. § 4651 (1994); see also *National Wildlife Federation v. Interstate Commerce Comm’n*, 850 F.2d 694 (D.C. Cir. 1988); see generally Michael M. Berger, *Rails-to-Trails Conversions: Has Congress Effected a Definitional Taking?*, INST. ON PLAN., ZONING, AND EMINENT DOMAIN §§ 8.01-.08 (1990).

25. The government prevailed in the trial court on the theory that the taking occurred in 1920 when Congress passed the Interstate Commerce Act, an event that occurred two years before Justice Holmes first articulated the regulatory takings theory in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), at a time when nothing had yet been taken from the servient owners. All that had happened in 1920 was that Congress had asserted authority to regulate interstate railroads. See Interstate Commerce Act, 49 U.S.C. §§ 20101-28101 (1994). From that lone legislative act, the government extracted an asserted perpetual immunity for anything in any way related to rail transit, since—went the argument—the taking occurred upon enactment of the Interstate Commerce Act and the statute of limitations ran out in 1926. For the superseded opinion of the court panel, see *Preseault v. United States*, Nos. 93-5067, 93-5068, 1995 WL 544703, at *1 (Fed. Cir. Sept. 14, 1995). For more extensive commentary, see Michael M. Berger, *When to Make That Claim? Let’s Go Back in Time . . .*, LOS ANGELES DAILY J., Oct. 18, 1995, at 6.

certainly before their servient estates were taken by the Rails to Trails Act. Fortunately—for the sake of jurisprudence, to say nothing of the Preseaults—the full court of appeals granted rehearing *en banc* on its own motion²⁶ and reversed with specific directions to the trial court to reject any more finely spun legalistic diversions and “to determine the just compensation to which the property owners are entitled.”²⁷

An example of the attitudes facing those who want no more than to be able to make economically productive use of their own land comes in Ms. Schiffer’s comment that “much of the takings debate focuses on federal regulation that *merely* restricts the use of property”²⁸ “Merely?” Any time a lawyer or a judge uses the words “mere” or “merely,” get ready to duck.²⁹ This word choice is a staple of government arguments that regulations stopping short of relieving property owners of *all* of their rights cannot be takings of property and, therefore, “mere” massive losses amounting to most of the affected property’s value may be inflicted on property owners with impunity and without recompense.

The following examples illustrate the “mere restrictions” property owners have been asked to accept, without compensation. In *McKenzie v. City of White Hall*,³⁰ a city demanded the donation of a portion of the owners’ land as a condition to cleaning up a *city-caused* nuisance. In *Boise Cascade Corp. v. Board of Forestry*,³¹ the state demanded that a logging company leave fifty-six acres forever unused as a condition for permission to log eight acres. In *K & K Construction, Inc. v. Department of Natural Resources*,³² the state demanded that twenty seven acres of wetlands in the middle of the property be left unused as a condition to development permission for the remaining twenty eight acres on the fringe. Because of the configuration of the land, the trial court held that the wetlands restrictions rendered the property “essentially

26. 66 F.3d 1190 (Fed. Cir. 1995) (en banc).

27. *Preseault v. U.S.*, 100 F.3d 1525 (Fed. Cir. 1996).

28. Schiffer, *supra* note 1, at 155 (emphasis added).

29. For one of the authors’ acerbic views on judicial misuse of the belittling adjective “mere,” see Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 797 n.169 (1973).

30. 112 F.3d 313 (8th Cir. 1997).

31. 935 P.2d 411 (Or. 1997).

32. 551 N.W.2d 413 (Mich. Ct. App. 1996), *leave to appeal granted*, 562 N.W.2d 788 (Mich. 1997).

worthless as commercial real estate."³³ Finally, in *Christopher Lakes Dev. Co. v. St. Louis County*³⁴ the owner of forty two acres of land was told to provide a stormwater drainage system to serve the surrounding 300 acres owned by others, before development would be permitted. "Mere" restrictions?

One of the problems is that government regulators often feel that they are simply doing what is right for the community, and therefore the property owners should accept their economic fate as "mere" restrictions. But takings litigation is not usually a challenge to the propriety of government action. Indeed, a takings claim presumes that the government is acting within the scope of its authority—i.e., that the taking is for a public use³⁵—but, in the process, its actions have taken private property without compensation.

What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands

The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large.³⁶

Thus, it is not necessary to explain that regulators are good people who are trying to do the right thing.³⁷ In fact, the "better" they are, the more necessary it may be to keep a legal eye on what they are doing.³⁸ As the Supreme Court once

33. *Id.* at 416.

34. 35 F.3d 1269 (8th Cir. 1994).

35. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (recognizing that a taking may also result from government regulations that do not advance a legitimate public purpose). Because of the courts' enormous deference to government action, such cases are extremely rare, but they do occur. *See, e.g., Richardson v. Honolulu*, 124 F.3d 1150, 1165-1166 (9th Cir. 1997).

36. *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1175 (Fed. Cir. 1994).

37. *See, e.g., Schiffer, supra* note 1, at 157-58. One is tempted to suggest, however, that some federal authorities seem to have less understanding of property owners' problems than others. *See, e.g., Bruce Babbitt, Between the Flood and the Rainbow: Our Covenant to Protect the Whole of Creation*, 2 ANIMAL L. 1 (1996) (bemoaning the fact that Congress might actually give credence to the interests of landowners when considering re-enactment of the Endangered Species Act, 16 U.S.C. § 1531 (1994)).

38. In *United States v. Certain Land in the Town of Truro*, 476 F. Supp. 1031 (D. Mass. 1979), federal functionaries, eager to save public funds successfully pressured the town selectmen to amend local zoning bylaws to allow only uneconomical, non-commercial large lots and then, decades later filed a con-

stated:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.³⁹

Still, government regulators, and their lawyers, believe that they are doing *The Lord's Work*⁴⁰ by saving wetlands, forests, and open space. They profess to be doing so not only as an act of environmentalism, but also as an expression of religious faith which they now want to drive public policy.⁴¹ Often overlooked in this rhetoric is the fact that the forests and the wetlands, as defined by government regulators⁴²—belong to somebody who is made to pay taxes on them, and then is *de facto* conscripted as an involuntary keeper of “public property.”

II. EXTREME REGULATIONS HAVE GIVEN RISE TO CUTTING EDGE ENVIRONMENTAL ISSUES

Much of the clash between property owners and the federal government has come over environmental statutes and

demnation action claiming that the land should be valued at the thus depressed values, in spite of the fact that the U.S. Supreme Court had much earlier forbidden valuation at prices that were depressed by a condemnor's pre-litigation value-lowering activities. *United States v. Virginia Elec. Co.*, 365 U.S. 624, 636 (1961).

39. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

40. This is not entirely facetious. Much of the preservationist rhetoric has of late taken the slant that saving forests and endangered species is in the nature of doing religious good works. “[R]eligious values remain at the heart of the Endangered Species Act.” Babbitt, *supra* note 37, at 8; see also TOM HAYDEN, *THE LOST GOSPEL OF THE EARTH* (1996).

41. See Gideon Kanner, *Ol' Time Religion Meets New Age*, NAT'L L.J., Dec. 30, 1996, at A23.

42. The definition of “wetlands” used by regulators is at times straight out of Orwell's fiction. See discussion *infra* notes 51-52 and accompanying text. One of these authors once represented a Florida property owner who was served by the U.S. Army Corps of Engineers with a cease and desist order, demanding that he cease “dredging and filling in waters of the United States.” *Context Dev. Co. v. Alexander*, No. 80-1708-Civ-JE (S.D. Fla. 1980). What was that earth rapin' villain doing? He was plowing dry land to plant a citrus grove. *Id.* The feds never got around to explaining how one can plow “waters of the United States.”

regulations, like the ones designed to preserve wetlands and endangered species. From the property owners' viewpoint, the chief problem with efforts to preserve the planet for us all is that regulators expect someone else to pay an inordinate part of the price for preservation, rather than spreading the cost over the entire benefited populace. In the process, the government spokespeople and their allies tend to paint protesting property owners as malcontents who are concerned only with their own economic interests; who would sacrifice the health and safety of everyone to protect these interests.

The irony is supreme because members of the environmental movement that is the moving force behind such harsh regulations, are overwhelmingly affluent upper and upper-middle class persons who "have got theirs,"⁴³ as the old expression goes, but expect would-be competing seekers of the good life to lower *their* expectations and forego the enviable amenities that the environmentalist leaders are already enjoying. As the late dean of the land-use bar, Richard Babcock, astutely observed: "it is a curious phenomenon that the titans of industry who abhor government regulation and place full-page ads in the *Wall Street Journal* extolling the virtues of the marketplace are among the most zealous devotees of zoning."⁴⁴ We should take at least a brief look at the reality of these statutory schemes before proceeding further.

1. *The Metamorphosis of "Swamps" into "Wetlands"*

We used to call 'em swamps, bogs, marshes or fens. We used to recognize that at least some of the critters that inhabited those oozing, slimy places were dangerous and the sources or carriers of devastating human illnesses. The U.S. Supreme Court at one time saw them as "the cause of malarial fevers," and opined that "the police power is never more legitimately exercised than in removing such nuisances."⁴⁵

43. See BERNARD FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979); and WILLIAM TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN AN AGE OF ENVIRONMENTALISM* (1983).

44. BABCOCK & SIEMON, *supra* note 11, at 56.

45. *Leovy v. United States*, 177 U.S. 621, 636 (1900); see JAMES V. DELONG, *PROPERTY MATTERS* 124-25 (1997). For example, much of Florida land patented by the federal government under the Swamp Land Act to private owners was conveyed on condition that they would drain swamps. See *Swamp Land Act*, ch. 84, Stat. 519 (1850) (codified as amended at 43 U.S.C. §§ 982-984 (1994)). Today, any Floridian so foolhardy as to try it would be prosecuted.

We used to drain or fill swamps, sometimes spending large amounts of government money, in order to control disease, open up waterfront land to recreational and other uses, and provide suitable expansion space for a growing population. Government entities were often at the forefront of these swampbusting activities.⁴⁶ Now “swamps” have metamorphosed into “wetlands.” Where swamps were once bad, wetlands are now good—unless there’s one on your property.

Much of the problem with this federal regulatory program is that its most hotly contested aspects were created almost entirely of the whole cloth by regulators bent on an Orwellian interpretation of a statute that does not even mention “wetlands.”⁴⁷ The problem is exacerbated by courts that meekly go along with this vast expansion of congressional language by government agencies. One result has been a widespread perception that, though legal and harshly enforced, these regulations are overreaching and illegitimate.

The public image of wetlands, assiduously fostered by environmentalists, is that of watery marshes covered with sawgrass or cattails, dotted with mangrove thickets, the home to aquatic birds, fish, and other assorted wildlife. In fact, under the government’s definition, a “wetland” can be a lifeless, smelly pond, or a muddy depression in the earth, unconnected to any other water, and good only as a breeding ground for mosquitoes. As far as the Environmental Protection Agency (“EPA”) is concerned, as long as it’s wet, and sometimes not even that, it’s a “wetland.”

Section 404 of the federal Clean Water Act⁴⁸ was originally enacted to rectify massive pollution problems, like the one that led to Ohio’s Cuyahoga River catching fire. That river was so badly polluted with industrial wastes that it actually burned. This incident galvanized Congress into action. The resulting statute, the Clean Water Act (“CWA”) of 1972, dealt with controlling the “discharge” of “pollutants” into “waters of the United States,” traditionally understood to be navigable waters.⁴⁹ Somehow without benefit of express Con-

46. Noted California examples are Marina Del Ray in Los Angeles and Mission Bay in San Diego, both of which were dredged and transformed by the respective counties, from “swamps” into modern recreational marinas, parks, hotels, restaurants and housing.

47. See *infra* note 52 and accompanying text.

48. 33 U.S.C. § 1344 (1994).

49. *Id.* Even that definition was rather expansive; navigable waters were

gressional enactment, the CWA was reinterpreted by federal regulators as the launching pad for a "wetlands" protection crusade. But somewhere along the line, the wetlands regulation crusaders lost sight of the difference between saving wetlands and worshipping them.⁵⁰

The expansion began with the government administratively defining "waters of the United States" to include "wetlands."⁵¹ Though it strained credulity that Congress intended so revolutionary a change in the law without ever mentioning it, even that usurpation would not have been as controversial as it is, if the regulations had at least been restricted to land that is perceptibly wet. But in 1987, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers, jointly charged with administration of the clean water program, redefined "wetlands" as land that may never even get wet, except when it rains. Under this definition, if there is water under the land's surface, rising to a point twelve inches below the surface for seven to seventeen consecutive days,⁵² the dry land is deemed wetlands. This definitional sleight-of-hand created "wetlands" that are invisible even on close inspection of the land. To cast the definitional net so broadly as to expand federal regulatory power over dry land, that does not implicate any legitimate environmental or federal government concerns, is not an effort to save wetlands.

Thus, if you are buying what plainly appears to be ordinary dry land, in the eyes of this newly minted law, you may nonetheless be buying unusable "wetlands." Of course, the presence on the land of even a small pond may bring the full weight of federal bureaucracy on you if you try to deal with it as your own. This is high stakes poker. Consider the case of

once defined by a wag as including any streams with enough water in them to float a United States Supreme Court opinion. *United States v. Kaiser Aetna*, 408 F. Supp. 42, 49 (D. Haw. 1976).

50. See DELONG, *supra* 45, at 149.

51. 33 C.F.R. § 328.3(b) (1993); 40 C.F.R. § 230.3(f) (1993).

52. The number of days depends on the local climate, because the rule requires subsurface wetness during five percent of the growing season. Thus, the maximum (for some parts of California and the sun belt) would be seventeen days. Further north and east, that number of days declines. The Corps takes the position that this means that the soil can be considered "saturated to the surface" even if the surface is dry. See FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1987); and Letter from Col. R.O. Buck to the Hon. Owen Pickett (Feb. 2, 1994) (on file with the authors and the *Santa Clara Law Review*).

an Illinois development called Victoria Crossings, developed by Hoffman Homes, as an example.⁵³ The owner knew that on a 43-acre parcel, there was an 0.8-acre spot that consisted of a slight depression in the land, with a clay lining that precluded normal drainage.⁵⁴ A tiny portion of the tract was undeniably wet, but it was not connected to any other waters, and was certainly not navigable; hardly a “water of the United States.” So Hoffman filled it to level out the land in preparing for construction.⁵⁵

Big trouble followed. For about a decade beginning in 1986, Hoffman Homes was either in administrative proceedings or litigation over its eight-tenths of an acre isolated pond.⁵⁶ The EPA thought the area was within its jurisdiction.⁵⁷ On what basis? Why, on the “reasonable bird” theory, of course.⁵⁸ Bear with us; this is not legal humor, this is serious—at least according to the EPA. The EPA’s argument was that this isolated wet area was within its jurisdiction under the interstate commerce clause and thus subject to federal regulation.⁵⁹ Interstate commerce? How? Well, said the EPA an aquatic bird, migrating from one state to another, might see this water spot and decide to pause for a rest, or a drink.⁶⁰ Would this mean that any migratory bird, just by taking such a momentary pause, transforms an unregulated private pond into a “water of the United States”? Of course not, said the EPA—not just any ol’ bird, only a “reasonable bird.”⁶¹ Now stop snickering, go read the court opinions and see for yourself.⁶²

53. *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310 (7th Cir. 1992), *vacated, reh'g. granted*, 975 F.2d 1554, 1555 (7th Cir. 1992), *opinion on reh'g*, 999 F.2d 256 (7th Cir. 1993).

54. *Id.* at 1311.

55. *Id.*

56. *See generally id.*

57. *Id.* at 1312.

58. *Id.* at 1320.

59. *Hoffman Homes, Inc. v. Administrator*, 961 F.2d 1310, 1319-20 (7th Cir. 1992).

60. *Id.* at 1320.

61. *Id.*

62. *Id.* at 1320-21. The court rejected the “reasonable bird” theory, no doubt to the dismay of members of the ornithological profession who were thus deprived of lucrative future opportunities to testify as expert witnesses as to whether a particular bird alighting on a farmer’s pond was in fact “reasonable” or just a loon. The EPA’s guidance letter on this subject became known as the “glancing goose” letter. *See DELONG, supra* note 45, at 131-32. We leave it to

Ms. Schiffer also takes pride in the speed with which the regulators process permits pursuant to section 404 of the Clean Water Act.⁶³ However, this is a hotly disputed proposition. Extensive studies performed by specialized private counsel, notably Virginia Albrecht of Washington, D.C., widely regarded as a renowned expert in the field, show the contrary; on average, the permit application process takes 265 days if approved, 483 days if denied with prejudice, 133 days if denied without prejudice, and 390 days if applicants, in exasperation, withdraw their application.⁶⁴

This is not the place for an examination of all the legal and administrative issues raised by wetlands protection regulations and their enforcement by the EPA and the Corps of Engineers.⁶⁵ It should suffice to note that, with regulators relying on such absurd concepts as the invisible "wetland" and the "reasonable bird" to sweep within their jurisdiction all manner of properties, conflicts between property owners and regulators will provide grist for years of litigation. The stakes are simply too high and the government's position too unreasonable for the land owners to acquiesce in such overreaching government demands. What makes the situation worse, is that in addition to stultifying the right to develop and use one's property, the potential penalties for guessing wrong about the nature or existence of a wetland are staggering. A property owner can be fined up to \$25,000 per day and given a year in prison for the unintentional, but negligent, violation of the law.⁶⁶ This is clearly an effort at *in ter-*

the readers to figure out exactly what that means.

63. Schiffer, *supra* note 1, at 155-56.

64. See Virginia S. Albrecht & Bernard N. Goode, *All Is Not Well With Section 404*, COURSE MATERIALS, ALI-ABA LAND USE INSTITUTE 377, 377-78 (Aug. 15-17, 1996). A concise description of the Albrecht-Goode study and its methodology may be found in DELONG, *supra* note 45, at 142-43. The readers will have to make up their own mind as to whether Ms. Schiffer or Ms. Albrecht and Mr. Goode present the more accurate picture. One cannot help concluding, however, that if a section 404 permit were quickly and easily obtainable, all this controversy about this facet of wetlands regulation would not exist.

65. We, cannot, however, fail to note that putting the Corps of Engineers in joint charge of this program may have been a cosmic act of humor pulled off by the United States Congress. The Corps of Engineers had for years been reviled by environmentalists for raping and pillaging the land during its halcyon years of dam building and river channelizing, and with some justification. Now it is to protect the country's natural waterways from the depredations of others.

66. 33 U.S.C. § 1319(c) (1994). The government's enforcement practices can get downright bizarre. Marinus Van Leuzen, a Dutch immigrant living in Texas, was informed that he would need permits from six agencies to build a

rorem governance that rightly runs against the grain of American social and political values.

In defense of the EPA's criminal enforcement actions, Ms. Schiffer disparages the "horror stories."⁶⁷ She points to the saga of John Pozsgai and concludes that he "is no hero."⁶⁸ He may indeed not be a "hero," but neither is he the villain the government made him out to be. Guilty or not, his plight causes legitimate concerns about governmental overreaching. Ms. Schiffer's depiction of Mr. Pozsgai's stubborn resistance to federal efforts to enforce "wetlands" laws, overlooks what he actually did. Mr. Pozsgai cleaned up a junk pile filled with discarded tires and other refuse whose illegal dumping and accumulation blocked a little stream. The illegal dumping caused the stream to spread, thus creating a "federally protected wetland," which, under the perverse reasoning of the authorities, was now sacrosanct even though its maintenance would necessarily perpetuate an illegal trash dump on Pozsgai's land—hardly an environmental triumph. Whatever the moral of this story may be we leave to the readers' judgment.⁶⁹ But in our book the EPA simply overreached, *even on its own premise*. Even if he was guilty of a *malum prohibitum*, Mr. Pozsgai's case arose from a perverse misapplication of the law absurdly requiring him to preserve a garbage-strewn eyesore. The problem—if that is what it was⁷⁰—could easily have been handled by the exercise of prosecutorial discretion not to file criminal charges. At most this was a matter for civil enforcement proceedings, using an injunction if necessary. The fact that the EPA found it appropriate to bring the full force of the criminal law to bear on this "small potatoes" case based on these bizarre and morally highly ambiguous facts, does not speak very highly of the soundness of its judgment. How many high-level executives of large com-

house next to his bait shop on a 0.4-acre admittedly wet parcel. Jonathan Tolman, *A Sign of the Times*, WALL ST. J., Sept. 20, 1994, at A15. He evidently thought this was crazy, so he built the house without a permit. For that he was ordered to erect a 10 by 20 foot billboard with an apology, pay a \$350 per month fine for 12 years (for a total of \$50,000), dig a 2-foot deep moat around his house, create a new wetland at his expense, and remove his house altogether after eight years. *Id.*; see also DE LONG, *supra* note 45, at 133.

67. Schiffer, *supra* note 1, at 162-64.

68. *Id.* at 163.

69. See *United States v. Pozsgai*, 897 F.2d 524 (3d Cir. 1990).

70. We have great difficulty in understanding how Pozsgai's elimination of an obvious nuisance could be viewed as an environmental problem of all things.

panies and how many municipal officials has the EPA put in federal prison for massive pollution of rivers? Not many we dare say.⁷¹

Fortunately, the EPA's overly enthusiastic enforcement of criminal penalties is finally being halted in some judicial quarters. The Court of Appeals for the Fourth Circuit recently issued its opinion in the *Wilson* case,⁷² another prosecution for filling wetlands. This one involved a regulation giving the federal government jurisdiction over wetland filling that merely "could affect" interstate commerce.⁷³ The court found this to be unauthorized by the Clean Water Act, and hence beyond the regulatory jurisdiction of administrative agencies to enact.⁷⁴ A million dollar fine and a twenty-one month prison sentence were set aside.⁷⁵

In the end, whatever the merits of preserving wetlands may be, the current wetlands regulations are overreaching in a way not intended by Congress. Furthermore, the government abuses these regulations by applying them to lands that are simply not "wetlands" by any non-Orwellian English-language standards. Moreover, the penalties imposed on citizens, including those acting without any criminal intent or even unintentionally, are simply draconian and offensive. This is particularly galling when they are contrasted with daily newspaper and television news that regularly reports stories of violent, *convicted* criminals who nonetheless receive the proverbial "slap on the wrist," followed by probation or a few months' incarceration—and even that often cut shorter still for "time off," or because the local jail is overcrowded, forcing early release of prisoners.

Altogether, however desirable the preservation of true

71. See Bryan Abas, *Counterpoint: Dingell's Justice Probe Is Justified*, WALL ST. J., July 22, 1993, at A15 (charging that the Justice Department goes easy on truly large-scale polluters).

It is difficult not to surmise that by bringing these high profile, extremely harsh enforcement actions against "small potatoes" transgressors like Pozsgai or Van Leuzen, the regulators are seeking to send an *in terrorem* message to the population at large, and thus discourage opposition to its illegitimate practices by those most likely to oppose them. We suggest that such draconian government policies go far beyond proper deterrence.

72. *United States v. Wilson*, No. 96-4498, 1997 U.S. App. LEXIS 35971, at *1 (4th Cir. Mar. 3, 1997).

73. 33 C.F.R. § 328.3(a)(3) (1993).

74. *Wilson*, 1997 U.S. App. LEXIS 35971, at *2, *13-*15.

75. *Id.* at *46.

wetlands may be, the regulators have overreached, and they plainly do not understand the difference between ends and means. To address this problem, relief from Congress would be appropriate.

2. *Protecting Rats and Bugs at Human Expense*

That brings us to Ms. Schiffer's spirited defense of the harsh externalities imposed on land owners by endangered species protection laws. She would do well to present the government's position face to face to farmers or loggers in support of the assertion that for the sake of the well-being of a species of bird, rat, weed, or insect,⁷⁶ they are to be stripped of their livelihood, *de facto* conscripted as involuntary keepers of public animal preserves, and compelled to leave their land fallow and unused (while also being required to continue making mortgage payments and paying property taxes on it). Indeed, there have been cases in which unfortunate landowners were also *de facto* ordered to feed the critters.⁷⁷ Absent a morally defensible explanation, we suggest that Ms. Schiffer's argument is no more than an assertion of naked government power that Congress is surely entitled to temper by enacting appropriate legislation rebalancing the competing interests of rats and humans.

The plain fact is that species have been becoming extinct

76. Though it is widely assumed by the populace and loudly asserted by politicians and environmentalists that endangered species protection centers on majestic creatures like the wolf, the grizzly bear or the bald eagle, the fact is that—as one commentator aptly put it—most protected species are insects, plants, and fungi. Of course, striving to protect the dung beetle does not make for nearly as good a public relations image as doing battle for the bald eagle (which ironically, is no longer endangered). See DELONG, *supra* note 45, at 99.

We are admonished that even the humblest weed must be saved because it may or may not prove to be the source of a healing drug, but one does not hear much about preserving the obscure species of monkey that may or may not be a carrier of the HIV virus.

77. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (fining rancher for shooting a grizzly bear that was munching on his sheep); *Moermann v. State*, 21 Cal. Rptr. 2d 329 (Ct. App. 1993) (finding no taking where state transported a protected herd of tule elk to the vicinity of Moermann's farm, and the elk proceeded to tear down his fences and eat his crops while the law forced him to stand by helplessly).

As Justice White aptly observed in his dissenting opinion on denial of certiorari in *Christy*, under the reasoning of that case, cities could solve their welfare programs simply by enacting laws allowing the poor to enter grocery stores and help themselves to free food and other goods with impunity. *Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting).

without human involvement for tens of thousands of years, not counting the dinosaurs which departed this vale of tears millions of years ago. The notion that legislation can stop this biological process by government ukase is as foolish as King Canute's command that the tide not advance on the beach. There are no doubt species whose preservation by human intervention is desirable for scientific, moral or even aesthetic reasons. But that hardly leads to the conclusion that every sport that somehow survived the evolutionary struggle to the extent of carving out a precarious little niche for itself—in the case of the Delhi Sands flower-loving fly, a speck of land of a few hundred acres⁷⁸—is entitled by law to take precedence over substantial, constitutionally enshrined human rights *without any societal recompense*. If the survival of each species is that important, then so should be the fair distribution of the true cost of its survival.

Beyond that, on a moral and policy level, and after giving due consideration to the worthiness of the preservation of species on principle, one is entitled to question whether exalting the well-being of rats⁷⁹ and bugs⁸⁰ over vital, constitutionally-protected interests of people is really such a one-sidedly slam-dunk issue as environmentalist rhetoric asserts. However important environmental legislation may be, one should be sensitive to matters of degree and observe the distinction between ends and means. We do not enforce criminal laws by disregarding the rights of people who get in the way of law enforcement, and the same holds true for people who have not done anything wrong and who only seek government permission to put their land (on which they are being taxed considering its highest and best use)⁸¹ to reasonably

78. See *infra* note 80.

79. See Gideon Kanner, *California Rat Killer Gets Off*, WALL ST. J., May 24, 1995, at A15 (commenting on the arrest and abortive prosecution [and false accusations of unrelated wrongdoing] of a Chinese farmer in Kern County, California, for the "criminal offense" of plowing his land, and in the process running over some Tipton kangaroo rats).

80. See Kim Kowsky, *Protected Status for Fly Stirs Up Hornet's Nest*, L.A. TIMES, Oct. 6, 1993, at A3, (reporting the government's demand that a hospital site be moved [at the cost of millions] to protect the habitat of the Delhi Sands flower-loving fly). See also *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

81. A chilling insight into the regulatory mentality is provided by *Bergen County Assocs. v. City of East Rutherford*, 625 A.2d 524 (N.J. Super. Ct. App. Div. 1993), in which federal regulations reduced the assessed value of the subject property from \$19,978,100 to \$976,500. The local taxing authority none-

productive uses. As Justice Brennan aptly put it: "After all, if a policeman must know the Constitution, then why not a planner?"⁸² Since planners refuse to respect constitutional values⁸³ and the courts go along with the gag, as it were, then there is nothing wrong with Congress exercising its law-making prerogatives; stepping in to restore an economic and ethical balance. That may heighten the responsibility of the government, and make its job harder, but enforcing the outermost limits of the state police power is, and should be, easy only in a police state.

3. *Forcing the NIMBY Problem*

Last but hardly least, since Ms. Schiffer's essay was tendered for debate, it cannot go without emphatic notice that a discussion of the takings problem in the limited context of environmental laws, such as wetlands or endangered species protection statutes, misses the principal point on which the takings issue has in fact centered. Of the land-use/takings cases considered by the Supreme Court in the past fifteen years, most involved neither wetlands regulation nor endangered species protection, but rather housing. In at least six cases considered by the Court between 1980 and 1997,⁸⁴ the plaintiff-landowners sought no more than government permission to devote their land to the lawful construction of housing, only to be thwarted by local regulators on grounds that in no way implicated wetlands or endangered species.

Given the strong, long standing federal policy favoring availability and affordability of housing, Ms. Schiffer's failure to note this facet of the takings problem is unfortunate. True, in her practice she does not have to face or defend the misdeeds of local zoning authorities whose land-use decisions

theless insisted on taxing the owner at the higher [unregulated] assessment level. *Id.* at 526. Though the courts eventually sided with the owner, *id.*, one is left to wonder about the mentality of government functionaries who would demand so unreasonable a right to tax, and carry their argument through two court levels.

82. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.6 (1981) (Brennan, J., dissenting).

83. *See infra* note 115.

84. *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825; *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

are at times no more than elaborate charades undertaken to curry favor with their affluent suburban constituencies striving to keep their posh communities intact. Just the same, this facet of regulatory reality needs to be faced and forthrightly discussed because here the familiar environmental slogans break down. The protection of the ambiance of tony communities whose regulations precipitate so many of these controversies is hardly the stuff of "environmental preservation." Maintaining a high level of suburban amenities and fostering an environmentally desirable community are two quite different things that are all too often antithetical to one another. Typical large-lot, upper crust suburban/exurban zoning, far from enhancing the environment is environmentally counterproductive. It promotes sprawl, consumes agricultural land, requires a more widespread infrastructure and greater energy consumption. Moreover, it lengthens commuting distances, adds to air pollution, and prevents efficient use of mass transportation.

While one can readily understand how the image of misty forests, serene wetlands, and endangered animals may provide the regulators with superior "poster children" to be displayed in public relations and litigational battles,⁸⁵ the fact is that most of the high-profile takings cases have been precipitated by more mundane NIMBY ("Not In My Back Yard") interests doing their best to keep their suburbs exclusive and exclusionary. To allude to the wisdom of the late Professor Donald G. Hagman of UCLA, we must distinguish between good planning and rent seeking by "environmental pretenders" who talk a good game, but actually strive to protect their agreeable lifestyles from competing seekers of the good life, by adamantly pursuing land-use policies that constrict housing supplies and predictably, in the face of ongoing de-

85. See Richard J. Lazarus, *Litigating Suitum v. Tahoe Reg'l Planning Agency in the United States Supreme Court*, 12 J. LAND USE & ENVTL. L. 179 (1997), for an insight into how it is done. Faced with the technical question of whether an attempt by a single family lot owner to sell her transferable development rights in a nonexistent market was a mandatory prerequisite to achieving ripeness for her taking lawsuit, Mr. Lazarus candidly explains how his efforts in defending the government's position focused on singing the praises of Lake Tahoe's purity and environmental value—worthy attributes, no doubt, but clearly intended to shift the emphasis of the controversy away from the violation of Ms. Suitum's constitutional rights, to contemplation of an environmentally attractive image. We see that as an effort to confuse ends with means.

mand, cause excessive escalation in home prices—a phenomenon all too apparent in California.⁸⁶

III. CRITICISM OF PROPOSED LEGISLATIVE SOLUTIONS LACKS CANDOR AND EQUITY

That a debate should rage over legislative takings remedies is ironic. Early suggestions for legislative solution to the “taking issue” were successfully disparaged on the grounds that inasmuch as the problem was grounded in a constitutional provision, the Takings Clause of the Fifth Amendment, the solution would properly come from the courts.⁸⁷ Alas, it is now all too clear that the courts have not been equal to the task. Their decisions have produced an incoherent, and at times contradictory, body of law that concededly lacks standards by which to determine predictably whether a taking has occurred. Unsurprisingly, efforts at a legislative solution have reemerged.

Ms. Schiffer, however, considers the current legislative proposals for reform “obviously flawed.”⁸⁸ Her position begins on a reasonable note, but quickly segues into a categorically partisan conclusion: “Of course, every citizen should be protected from unreasonable regulatory restrictions on property. But compensation bills are exactly the wrong way to go.”⁸⁹

Government functionaries *always* think that compensation is the wrong remedy for any harm inflicted by errant government activity—no matter what the activity and no matter how great or unjustified the harm to the damaged in-

86. As Judge Clark presciently observed in his dissent in *Agins v. City of Tiburon*: “The environment which Tiburon seeks to preserve will disproportionately benefit that wealthy landowner, whose home will be surrounded by open space, unobstructed view and unpolluted atmosphere.” 598 P.2d 25, 35 (Cal. 1979) (Clark, J., dissenting).

Judge Stanley Mosk, of the California Supreme Court, also observed that, “No one ever devised an ordinance to preserve an urban ghetto or crowded central city environment; it is always to protect the outer city, the suburb, the middle or upper class housing development.” Stanley Mosk, *Finding a Direction for Our Environment*, BARRISTER, Spring 1976, at 18.

87. For a concise summary of these proposals and how they fared, see Gus Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15, 53-58 (1983).

88. Schiffer, *supra* note 1, at 162.

89. *Id.* at 159. Significantly, Ms. Schiffer offers no suggestion as to how citizens should be protected from unreasonable regulatory restrictions, and says nothing about what by her lights would be the “way to go.” *Id.* at 164.

nocent citizens.⁹⁰ Before the Supreme Court decided *First English Evangelical Lutheran Church v. County of Los Angeles*⁹¹ a decade ago and concluded that the Fifth Amendment mandated compensation as the constitutional remedy for all governmental takings of private property, regardless of the means used by the government to accomplish its task, all government agencies (including the ENRD)⁹² loudly opposed compensation as a remedy.⁹³

Ms. Schiffer's argument in opposition to the currently

90. The paradigmatic instance of this phenomenon is the vicious and archaic rule that business losses are not compensable in eminent domain—a rule of defective intellectual provenance. See D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483 (1985) (demonstrating that fact, and also that in the entire twentieth century only one student note has favored this rule, and while no other commentator or textwriter has, government lawyers stubbornly continue advancing it, and most courts, alas, continue to apply it).

This problem descends to the level of a moral sewer in redevelopment cases, where indigenous (usually small) business people are bulldozed aside without compensation for their businesses, and their condemned land is then turned over at subsidized prices to favored mass merchandisers, car dealers, or owners of gambling casinos and shopping mall operators, who then go on to run lucrative private businesses on it. See *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 203-05 (Ct. App. 1977); Sonya Bekoff Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L.J. 627 (1977).

91. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 305 (1987). One of the authors was counsel for the church.

92. Intriguingly, although in *First English* the Solicitor General as amicus curiae opposed the recognition of a constitutional right to compensation, believing that the "mandate [of the Fifth Amendment] is served by an equitable remedy barring continued application of the offending regulations," Brief for the United States at 6, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (No. 85-1199), in every case in which the United States was a party, in which the issue of proper remedies for takings came up, from *Hurley v. Kincaid*, 285 U.S. 95 (1932), to *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), and *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and several cases in between, the federal government always took the position that "just compensation" is an aggrieved inverse condemnee's sole remedy and that injunctive relief is not and should not be available. This is quite consistent with general law or remedies. See *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949).

In spite of that history, in *First English*, the Solicitor General disparaged monetary relief and argued in favor of injunctive relief, stressing that Congress was always free to enact a compensatory remedy if it so chose. Brief for the United States at 6, *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (No. 85-1199). Yet now, Ms. Schiffer tells us that compensation bills "are exactly the wrong way to go." Schiffer, *supra* note 1, at 159.

93. For a collection of the worst offenders, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 739-42 (1988).

pending legislation is that if enacted, it will paralyze enforcement of federal environmental laws, and that state laws will not sufficiently protect the environment, or worker safety, "and other values that give us the high quality of life Americans have come to expect."⁹⁴ This threatened impending decline in the American standard of living due to absence of an adequate level of state regulations will come as shocking news to state and local regulators who have worked independently of federal intervention. It may even come as welcome news to occasionally beleaguered California business people and property owners who are under the impression that they are very much subject to all sorts of stringent and burdensome *state and local* environmental and safety regulations.⁹⁵

We surmise that what really irks opponents of the pending substantive legislation, is that payment of compensation is to come from funds already budgeted to the regulatory agency whose regulations or activities cause a compensable taking. The sponsors of this legislation evidently believe it appropriate to fund the bill in this way because they mean to force the regulators to come face-to-face with

94. Schiffer, *supra* note 1, at 161. Ms. Schiffer should not take it hard if we remind her that the high quality of life enjoyed by Americans derives from our free-market economy, rather than from enforcement of far-reaching government regulations, even if these can serve an important function if reasonably applied.

95. *See, e.g.*, *Friends of Mammoth v. Board of Supervisors*, 502 P.2d 1049 (Cal. 1972) (imposing much stricter environmental standards on private development activities than those prevailing under federal law). Also, California has exercised its prerogatives under the Clean Air Act, and the California Air Resources Board has accordingly established more stringent mobile source emissions standards than called for by federal law. *See generally* California Clean Air Act, CAL. HEALTH & SAF. CODE §§ 39000 to 44470 (West 1996 & Supp. 1998); Federal Clean Air Act, 42 U.S.C. §§ 7401 to 7671 (1994); LONGTIN'S CALIFORNIA LAND USE § 5.12 (2d ed., 1997 Supp.) (describing the difference between state and federal laws). The CalOSHA folks are doing right well too with regard to safety. So is the South Coast Air Quality Management District that controls stationary emission sources, and the State Water Quality Control Board that establishes water quality standards.

In short, even on her own premise, it is bureaucratic hubris for Ms. Schiffer to suppose that the condition of state environmental laws is so enfeebled that absent Uncle Sam's paternalistic intervention, a veritable environmental calamity will descend upon us and impair our quality of life. To the extent she claims that takings legislation will in any way impact "safety of . . . workers" or require "pay[ment] to manufacturers not to dump their waste into the streams that run through our neighborhoods," she simply cannot be serious. Schiffer, *supra* note 1, at 161; *compare infra* text accompanying notes 112-16.

the economic consequences of their own regulatory decisions and cause them to undertake serious cost-benefit analyses. Under the proposed legislation, projected benefits of regulations with a significant impact on regulated individuals, will need to be balanced against the true the cost of the program.⁹⁶ Regulators do not have to do that now because these costs are either not paid by the government—they are dumped instead on those regulated (the usual case)—or they come from a general judgment fund, not from the regulators' own budgets.⁹⁷

Thus, regulators and their admirers confronted with the prospect of having to eat their own *fugu*⁹⁸ are shocked. Shocked! They figure that if the EPA, for example, has to reflect on having to pay for the predictable impact of another "glancing goose letter," the zealotry of its regulations of private property will be muted with disastrous sequelae, such as—according to Ms. Schiffer—a decline in our standard of living.⁹⁹

96. This should not be a problem since such cost/benefit analysis to determine whether the regulatory game is worth the candle has been required for the past decade by Exec. Order No. 12,630, 53 C.F.R. 8859 (1988), reprinted in 5 U.S.C. § 601 (1994). One surmises that the bureaucrats' lack of enthusiasm for complying with this order is a part of the present problem.

97. H.R. 925, 104th Cong. § 6(f) (1996).

98. Japanese gourmets prize a species of blowfish called *fugu* whose gallbladder contains a lethal poison, and hence the fish must be carefully prepared by highly skilled chefs. Dennis Ray Wheaton, *Menus of the Rich and Famous*, N.Y. TIMES, Feb. 23, 1997, § 5, at 6. Accordingly, there is a Japanese custom that requires a chef preparing *fugu* for a customer to taste his own creation first.

The foremost candidate for poster child of the *fugu* principle in action is former Senator and Democratic presidential candidate George McGovern who, after growing frustrated by government regulations applied to a Connecticut inn that he owned in the 1980s, was born again and opined that "I'm not sure federal legislation is the way to go." *Lives of the Party*, NEWSWEEK, Sept. 2, 1996, at 28.

99. See *supra* notes 94-95 and accompanying text. This argument qualifies as an "oldie," but definitely not a "goodie." It was intoned in the past by judges and government functionaries repeatedly, only to wind up in the end as a peek into the clouded crystal ball, as *The New Yorker* magazine used to put it. Both authors have written on the subject. See Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CAL. W. L. REV. 199, 252-59 (1973); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 785-87 (1973); Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W. L. REV. 57, 77-79 (1969). In spite of the government foreshadowing of impending fiscal doom, many archaic non-

Thus, the same regulators who have lauded far-reaching regulations, and who have archly told property owners that they must bear substantial economic burdens for the good of society, or the good of the planet, or the good of our children, are suddenly crying "Foul!" when asked to have their agencies join those owners and share in the burdens for the sake of the goodness they prescribe for others. Why is the burden bearable when placed on individual property owners but intolerable when placed on the responsible agencies of the government? After all, apart from being the cause of the loss, the government has superior ability to spread the cost and superior resources to bear it until it can be fairly spread.

Ms. Schiffer, while not addressing these issues, asserts that the current legislative proposals would require "unfair and unjust" payments, suggesting that owners would be paid for loss of uses they never had any reasonable expectation of making, or that they would receive a net benefit from the regulations even though they could make a reasonable return on their property anyway.¹⁰⁰ If those are indeed perceived as *bona fide* problems, there is no reason they cannot be dealt with by suitable amendments to the pending legislation. Yet none are suggested. That may be so for good reasons. To the best of our knowledge, no principled and informed spokesperson for the property owners' side has demanded full compensation for every regulatory bump in the road. Moreover, no one has had the *chutzpah* to demand legislation that would confer windfalls for losses *not* suffered by regulated owners. No such legislation could ever pass.

The proposed legislation confronts the government and the populace with the true cost of federal programs. It is all well and good to report that, as an abstract proposition, a large majority of Americans favor environmental and species protection. Of course they do. What sort of person would come out against "the environment"? But how much are those same Americans willing to pay to make sure they re-

compensability rules were abrogated or modified by legislation and court decisions, without the catastrophic sequelae prophesied by condemnors' briefs throughout the 1960s.

Without revisiting these old battlefields, suffice it to say that the U.S. Supreme Court answered it all in *Owen v. City of Independence*, 495 U.S. 622, 656 (1980). See also *Watson v. Memphis*, 373 U.S. 526, 537 (1963) (holding it is no defense to say it is cheaper to deny constitutional rights than to afford them).

100. Schiffer, *supra* note 1, at 162.

ceive it? At the moment, most of the cost is being fobbed off on those who fortuitously happen to own highly regulated land, so that the cost—though quite real—is not reflected in government budgets and is thus thought of by regulation proponents as a “freebie.” But it isn’t.¹⁰¹ The positive aspect of the pending legislation is that it makes the true cost of the program a part of the decision-making process. If the public balks at spending the money necessary to pay for far-reaching environmental programs, and will only support them on the backs of comparatively few adversely affected property owners, then perhaps the number of programs, certainly their scope, needs to be reconsidered.

Above all, government functionaries should work earnestly with the regulated to mitigate the economic impact on them,¹⁰² thus lowering the economic and demoralization costs to all concerned, rather than govern by ukase. Such a change in attitude cannot address the intractable core problems of regulatory confiscation, but it might do a great deal of good at the margins. In this connection, officials tend to lose sight of nurturing the idea that governance is legitimate and essential to the proper functioning of a democratic society, even if it sometimes involves making unpleasant choices.

In her discussion of the takings legislation pending in Congress, Ms. Schiffer takes liberties when she asserts that it would somehow require payment to dreaded “corporations”¹⁰³ to “ensure the safety of their workers, pay

101. See Arvo Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modernization in California*, 16 U.C.L.A. L. REV. 491, 543-94 (1969); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1181 (1967).

102. One of the most successful preservation plans (in spite of initial controversy over it) has been the New Jersey Pinelands (also known as “Pine Barrens”), the explanation for this is as follows:

The absence of litigation is attributable to several considerations. The first is the Pinelands Commission and its staff. While the results of their efforts have not been satisfying, almost everyone agrees that they were fair and responsive. When someone had a complaint, he or she got action, and the Commission exuded an attitude of service quite distinct from the bureaucratic annoyance that generally tends to characterize resource management-efforts.”

BABCOCK & SIEMON, *supra* note 44, at 156.

103. The use of the word “corporations” as an all purpose pejorative term has unfortunately found a home in political, anti-property, and anti-business rhetoric. But one is entitled to question the propriety of its use by a lawyer in a law journal. How does the fact that people choose to do business in a corporate

manufacturers not to dump their waste into the streams that run through our neighborhoods, and so forth."¹⁰⁴ But that is not an accurate depiction of any pending takings bills.

The legislation in question has nothing to do with "water pollution," at least as that term is understood by persons untutored in the arcana of the EPA regulations.¹⁰⁵ Water pollution would remain proscribed under the Clean Water Act which, contrary to Ms. Schiffer's apprehensions, is not being repealed. Similarly, industrial safety would continue to be regulated by OSHA and a host of other federal and state safety legislation. The substantive takings relief legislation, discussed by Ms. Schiffer, makes explicitly and painstakingly clear that its provisions are *not* directed to identifiable safety hazards, nor to any private activities constituting a nuisance such as water pollution, nor those that are forbidden by local zoning laws.¹⁰⁶ One is entitled to wonder why Ms. Schiffer

form rather than individually, or as a partnership, affect the legitimacy or merits of their position? That Ms. Schiffer would use such terminology, however, is significant because it resonates the subtext of anti-property rights ideologies—a phenomenon that afflicts discourse on takings law all too often.

As noted elsewhere in this article, high-level corporate managers are often the prime exponents of stringent zoning and land-use controls because they and their posh suburbs are the principal beneficiaries of the present system. See *supra* note 44 and accompanying text. Moreover, large corporations usually adjust to regulations and pass on the increased cost to their customers, though they may *kvetch* about it a bit. Thus, the cost of environmental regulations that affect "corporations" is passed on to the public at large, but in a random and haphazard way by private entities that understandably look out for themselves in the process. Would it not be more fair to have the government spread that cost evenly? The most harshly affected land owners are often individuals from all walks of life—some of them quite sympathetic. See *supra* notes 11-13 and accompanying text. Unlike "corporations," they lack the means to pass the cost through.

104. Schiffer, *supra* note 1, at 161.

105. According to the EPA, earth turned over by the blade of a plow used in cultivating agricultural land is "pollution." See *American Mining Congress v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267 (D.D.C. 1997).

106. House Bill 9, 104th Cong. § 205(a) (1995), provides that "[n]o compensation shall be made under this Act with respect to an agency action the primary purpose of which is to prevent an identifiable (1) hazard to public health or safety; or (2) damage to specific property other than the property whose use is limited." *Id.* Section 204 of House Bill 9 also provides that "[i]f a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this division with respect to a limitation on that use." *Id.* § 204. Similarly, Senate Bill 605, 104th Cong. (1995), provides "[n]o compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated . . ." *Id.*

did not mention that fact in her essay.¹⁰⁷ Furthermore, the more recent procedural reform legislation¹⁰⁸ would only streamline the present redundant, multi-step administrative and litigational procedures and require that takings cases be decided promptly on the merits, with federal courts deciding federal issues in the first instance.

Since the present state of ripeness law can only be described as an intellectual, and ethical, mess, as attested to by an outpouring of critical commentaries,¹⁰⁹ one would have expected House Bill 1534 to sail through Congress. Instead, it was the subject of bitter opposition by, among others, the U.S. Department of Justice whose functionaries opposed it¹¹⁰ and refused to consider compromise legislative language. The opposition had it that land owners should not be permitted to sue in federal courts in the first instance, the same as everyone else, to vindicate their federal constitutional rights, and that unlike anyone else they should continue to be compelled to try their causes two or three times in state tribunals

107. Unfortunately, this technique of omitting what does not fit a polemical author's thesis is hardly new in this field. See Daniel R. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981) (distinguished law professor purported to analyze the law of remedies for regulatory takings, *without so much as mentioning any preexisting U.S. Supreme Court decisional law on remedies for uncompensated takings*); see also Norman Williams et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984) (sharply attacking Justice Brennan's view that regulatory takings should be compensable, but without discussing existing U.S. Supreme Court decisional law on remedies for uncompensated takings, that was contrary to their thesis). Cf. Michael M. Berger and Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685 (1986).

108. Private Property Rights Implementation Act, H.R. 1534, 104th Cong. (1995).

109. Currently, a property owner must first obtain a "final administrative decision" from the regulatory body, then do it again if the decision is adverse, then—if the regulators are state or local entities—sue first in state courts, and only then, upon an adverse state court decision, sue for the first time in federal court. See MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

Legal commentators have been highly critical of this inefficient, prolix procedure that *de facto* shuts the door to federal courts to all but the wealthiest and most determined property owners who under present rules must spend a decade or so in litigation, and around a million dollars in litigation expenses, before being admitted to federal court. See *infra* note 146.

110. See Letter to Sen. Patrick Leahy from Andrew Fois, Assistant Attorney General (Aug. 15, 1997) [hereinafter Letter to Sen. Leahy] (on file with authors).

before gaining access to federal trial courts.

The position of the Department of Justice on this point may be something less than ingenuous. Even as the U.S. Supreme Court was deciding *City of Chicago v. International College of Surgeons*,¹¹¹ there was no opposition from the federal government. Indeed, in sharp contrast with all prior land use/takings cases of the past fifteen years, the Solicitor General filed no *amicus curiae* brief.

In opposing House Bill 1534, the Department of Justice argues that making it easier for landowners to seek redress of constitutional law violations in federal court directly, would overburden federal courts.¹¹² Thus, one is left to wonder why similar concerns were not voiced when the shoe was on the other foot, and it was state and local regulatory agencies that wanted these cases decided directly by federal judges. Does the Department of Justice believe that overburdening of the federal judiciary hinges on which side to the controversy brings the same matter before a U.S. District Court? It would certainly so appear.

The plain provisions of the proposed takings laws exempting zoning, nuisances and safety hazards from their purview have not deterred the spread of disinformation to the effect that congressional takings legislation would require compensation to "polluters," or even, as Molly Ivins asserted in one of her syndicated columns, that it would facilitate the dumping of cyanide into drinking water supplies.¹¹³ Such

111. 118 S. Ct. 423 (1997) (holding that local government agencies may routinely remove to federal court all cases that seek review of land-use and zoning administrative decisions on constitutional grounds, when the affected land owners file them in *state courts*).

112. See Letter to Sen. Leahy, *supra* note 112.

113. Molly Ivins stated:

The Fifth Amendment rightfully and sensibly says the gummint cannot seize your property without giving you just compensation. If they want to take a hunk of your pasture to run a freeway through, they have the right to pay you fair market value for the land. But suppose you want to build a cyanide factory on your pasture and dump your waste in the creek that runs through it, and the gummint says you can't 'cause that creek flows on down to the city's drinking reservoir? The Republicans want to give you the right to sue the gummint and make all the rest of us pay for the money you say you will lose by not bein' able to poison our drinkin' water.

Molly Ivins, *Other Voices: Latest Damage from Nootsville*, ATLANTA J. AND CONST., Feb. 18, 1995, at A18.

Cyanide dumping also made its appearance in an op-ed piece by Donella H. Meadows in the *Los Angeles Times*, falsely asserting that takings legislation

falsehoods may be the deplorable fare of op-ed propagandists in today's "negative campaigning" public discourse,¹¹⁴ but they have no foundation in reality and no legal substance. That unscrupulous, partisan polemicists peddle such disinformation to alarm the public is expectable, if regrettable.¹¹⁵

The harsh reality is that the last quarter century's mushrooming property regulations, and their recent extreme manifestations¹¹⁶ have by degrees begun treating constitu-

would permit the dumping of cyanide waste into the Connecticut River. Donella H. Meadows, *Pay Me to Be Good—Or I'll Sue*, L.A. TIMES, Mar. 10, 1995, at B7.

And who can forget the Toles cartoon in *The New Republic* depicting sludge coming out of a kitchen faucet, accompanied by the line, "Now I'm free to dump waste oil in our watershed"? NEW REPUBLIC, Mar. 27, 1995, at 8.

114. See, e.g., Dan Gordon, *The Environment vs. Property Rights: Want a Toxic Dump Next Door?*, N.Y. TIMES, Mar. 15, 1995, at A25 (falsely asserting that under the proposed takings legislation taxpayers would have to pay a landowner when a zoning rule, *inter alia*, limits the value of land). As noted at *supra* note 106, the takings legislation quite explicitly exempts zoning.

For a similarly bogus depiction of the proposed takings legislation, see Robert H. Sulnick, *Constitution Faces a Triple Threat*, L.A. TIMES, Aug. 21, 1994, at M4 (stating, in addition to the standard line about factory owners polluting water with impunity and threats to local zoning, that "[t]he insurance industry and doctors could claim that lost profits related to health-care legislation are a 'taking,' and therefore warrant reimbursement by the federal government").

Though not specifically directed at takings legislation, see also Douglas T. Kendall & James E. Ryan, *The Right Can't Have It Both Ways*, L.A. TIMES, Feb. 8, 1998, at M5 (asserting that the "property campaign" asks judges to overturn "a wide variety of health, safety and environmental laws based on expansive definition of the term 'take'").

115. For a vivid example, see an unsigned document distributed by the American Planning Association, under cover of a "Dear Colleague" letter from Michael B. Barker, Executive Director, dated September 27, 1995, complete with a pre-drafted lobbying letter and a "Sample 'Takings' Op-Ed", asserted that "[u]nder this distorted view [of the takings legislation] the public, in having to compensate for 'takings,' would have to pay industry not to pollute because environmental restrictions could reduce potential profits." Michael B. Barker, *How Land Use Planning, Regulations and Zoning Protect Property Rights: Why "Takings" Measures Would Harm Property Rights* (Sept. 27, 1995) (sample op-ed letter on file with authors).

Warming to its task, the APA document goes on to assert that "[b]y preventing government from regulating where a hazardous waste facility could be located, 'takings' laws could encourage the siting of these facilities in minority and low-income neighborhoods." *Id.* at 6.

Of course, nothing in the pertinent takings legislation justifies such extravagantly untrue assertions. This legislation does not deal with pollution and it certainly does not regulate siting of hazardous waste facilities.

116. We offer as a paradigmatic example a case where the regulation in question forbade *all* improvements on the last two residential lots in the built-up beachfront community of Isle of Palms, leaving their owner, the unfortunate David Lucas, with the obligation to pay taxes, service his mortgage, and bear other burdens and liabilities of property ownership, but without any ability to

tional rights of property owners as a "poor relation."¹¹⁷ Regulators deem such rights as unworthy of protection on par with other rights, and not even deserving of being fairly balanced against a host of regulations, some of which have little to do with public health, safety, welfare or morals¹¹⁸—

put his land to any economically rational use whatever. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Such regulatory extremism was widely defended by environmentalists and government lawyers as just and proper, while Lucas was depicted as an extremist out to destroy all property regulation. See Gideon Kanner, *Lucas and the Press: How to be Politically Correct on the Taking Issue*, in *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* 102 (David L. Callies ed., 1993).

Ironically, after South Carolina acquired those two lots by settlement of Lucas' inverse condemnation action, it promptly turned around and sold them to a developer who proceeded to build the very homes that Lucas had been forbidden to build. The state regulators' environmental zeal thus lasted only as long as they thought they could stick Lucas with the cost of the proverbial free lunch. But when faced with the tab themselves, preservation of Lucas' lots suddenly ceased being environmentally important. See Robert Aalberts, *Whatever Happened to David Lucas?*, 25 *REAL EST. L. J.* (1997) (unpaginated editorial appearing before page 214); Gideon Kanner, *Not With a Bang, But a Gigggle: The Settlement of the Lucas Case*, in *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 308 (David L. Callies ed., 1996).

117. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

118. The most obvious example being the familiar NIMBY syndrome, whereby affluent suburbanites, purporting to "save the environment," use ostensibly environmental concerns to push through land-use regulations (by initiative if necessary) that raise the regulatory drawbridges to their upscale communities through building caps, "slow growth" measures and moratoria that in effect protect the privileged status and life style of those already owning homes in desirable areas. See FRIEDEN, *supra* note 43; William Tucker, *Environmentalism and the Leisure Class*, *HARPER'S*, Dec. 1977, at 49.

In fact, environmentally desirable communities look nothing like Bel Air or Hillsborough, California. Rather, they depend significantly on moderate to high density multiple-family housing and efficient public transportation—both anathema to the denizens of the likes of Tiburon or Rancho Palos Verdes, California.

The use of environmentally-minded regulations as a justification for reducing housing supplies has resulted in California suffering the highest housing costs in the nation, in spite of its plentiful supplies of land, water and other resources necessary for construction of badly needed homes, particularly of more affordable housing. WILLIAM A. FISCHER, *TAKINGS: LAW, ECONOMICS AND POLITICS* 218-52 (1995). This burden of excessive housing costs falls most heavily on those least able to afford it, and tends to reduce their standard of living. Two presidential commissions have studied the problem, and both found high levels of land-use regulation and the NIMBY syndrome to be implicated in excessively high housing costs.

Ironically, though pursued in the name of environmental values, such misuse of the environmental ethic has contributed to urban sprawl because unable to build where most people want to live, and faced with ongoing demand—after all, young people and immigrants have to live somewhere—developers move on to the urban periphery where land is cheaper, regulations are less severe and

the conceptual underpinnings of the state regulatory police power. The environmentalists' successful, if unjustified, depiction of concerned land owners as unworthy rednecks being manipulated by large business interests, was bound to produce a backlash and inspire well-founded demands for legislation balancing the harsh decrees of the regulatory state against private property interests.

Perfectly legitimate environmental considerations exist to justify legislation requiring major changes in our past ways of living and doing business, and the government may well step in to enact it. But these changes exact costs, and it is quite proper for the legislature to make the judgment that, beyond a certain level of private losses, these costs should be properly shared by society at large as a *quid pro quo* for the benefits received at the expense of a minority of private property owners. In other words, though the government has the power to govern harshly, an enlightened society bears the responsibility of seeing to it that the governance is not just effective but also wise and fair.¹¹⁹ Justice Holmes, in rephrasing the eternal verity that there is no such thing as a free lunch, once stated:

[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air in its domain. It has the last word as to whether its mountains shall be stripped of their forests and inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word, but with it remains the final power.*¹²⁰

The fact that government regulations may be of great benefit to society does not address the separate question of the means by which those benefits should be achieved.¹²¹ Were we writing on a clean slate, a host of approaches could be conjured up, some no doubt effective, even if draconian. But we are not writing on a clean slate; the Constitution as well as the political ethics that underlie it must be respected

there are no "NIMBY!" shouting neighbors.

119. This is in keeping with the observation attributed to St. Thomas More, that the office of the King's Chancellor is to tell the sovereign not what he can do, but rather what he should do.

120. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (emphasis added).

121. This basic idea has been repeatedly stressed by the Supreme Court. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

and those ethics reject confiscation as a measure of justice.¹²²

What that means in practice is that the cost of improving the public condition, as Justice Holmes put it, requires fair spreading of the resulting harsh economic burdens, and doing so without economic shortcuts.¹²³ That concept lies at the heart of the Takings Clause. Furthermore, to the extent the courts' interpretation of its minimal provisions leaves large individual losses uncompensated, there is nothing wrong with legislation that grants compensation to aggrieved property owners above the constitutional minimum¹²⁴ when their losses reach a high enough level even though that level may fall short of a total, or near-total, wipeout required to trigger compensation under today's judge-made law.¹²⁵ This approach is no different than that of current civil rights statutes that establish standards of government conduct higher than the bare minimum mandated by the Due Process or Equal Protection Clauses of the Constitution. As for another, more closely analogous example, the Uniform Relocation Assistance Act¹²⁶ provides for compensation for a number of private losses inflicted by eminent domain takings that are deemed constitutionally noncompensable by the courts.

Ms. Schiffer is within her prerogatives to question the level at which protection of property rights should be legislatively drawn. She may well quarrel with the wisdom of using this or that percentage decline in property value caused by the regulation as the compensatory trigger.¹²⁷ But surely,

122. *United States v. Cors*, 337 U.S. 325, 332 (1949).

123. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also* *Armstrong v. United States*, 364 U.S. 40 (1960) (holding that the purpose of the Just Compensation clause is to bar government from forcing some people alone to bear public burdens which, in fairness and justice, should be borne by the public at large); *Holtz v. Superior Court*, 475 P.2d 441 (Cal. 1970) (finding that the decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking).

124. *See* *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923) (stating that legislatures are free to set compensation levels above the constitutionally required minimum).

125. *See e.g.*, *Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (deeming loss of ninety-five percent of the subject property's value constitutionally noncompensable and insufficient to establish a taking).

126. 42 U.S.C. §§ 4601-4655 (1994).

127. Schiffer, *supra* note 1, at 160.

some magnitude of a decline in value must command her assent to the proposition that the regulation has gone too far and that compensation is mandated. Even the current grudging takings jurisprudence considers destruction of reasonable investment backed expectations as a criterion of taking.¹²⁸ One is thus entitled to ask what level of regulatory destruction of such expectations, or of the property's value, would be sufficiently great to warrant legislatively decreed compensation. If a 33% loss in value is too low, would 50% do the trick? How about 75%?¹²⁹ Nothing in Ms. Schiffer's essay acknowledges that anything short of a total 100% wipeout requires compensation, and even that with qualifications.¹³⁰

Hers is an advocate's legalistic position. The courts' harsh formulation has bestowed a legal advantage on her client, and so she, understandably, wants to preserve that advantage.¹³¹ But she overlooks the fact that courts are not the

128. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Supreme Court has held that the impact on such expectations can be so severe as to result in a taking by itself. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Or, in the words of two knowledgeable commentators: "[R]estrictions on use may so frustrate reasonable development expectations that compensation is required, even though beneficial uses of the property remain following enactment of the regulation." JOHN SHONKWILER & TERRY MORGAN, *LAND USE LITIGATION* 182 (1986).

129. What has gone without note by regulation hawks disparaging "mere" diminution in value, is that real property is widely and usually held by its owners subject to loans secured by mortgages or deeds of trust, so that a catastrophic decline in value typically wipes out the entire equity. The nominal owners of the land in question may then continue to hold title but in reality own nothing of utility or value. As the New York Court of Appeals once put it: under such circumstances, outright confiscation of the land would leave the owners better off because it would at least relieve them of the obligation to pay property taxes. *See Arverne Bay v. Thatcher*, 15 N.E.2d 587, 592 (N.Y. 1938).

130. Schiffer, *supra* note 1, at 160-61. Ms. Schiffer relies on *Concrete Pipe Prod. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), from whose language she seeks to derive comfort. But the Court was explicit in *Concrete Pipe* that it was rejecting "Concrete Pipe's contention that the analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property." *Id.* at 605. Applying *Concrete Pipe's* reasoning to land regulation cases would seem a dubious proposition. For more extensive discussion, see Michael M. Berger, *Yes, Virginia, There Can Be Partial Takings*, in *TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS* 148, 159-61 (David L. Callies ed., 1996).

131. Perhaps familiarity breeds disregard, but there is an inscription on a wall in the Department of Justice in Washington, D.C. which reads: "The United States wins its point whenever justice is done one of its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Government lawyers are mandated to seek justice, not necessarily victory. That is an ethical mandate as

only source of law; legislatures are the primary lawmakers. Legislatures are also responsible for the public purse, both in terms of raising and spending public funds, and thus would seem to be the appropriate institution to lay down criteria dictating when compensation is called for above the constitutional minimum.

According to the Supreme Court, the law of eminent domain is "harsh" and relief from its harshness should be sought from Congress.¹³² It was the federal government that thus persuaded the court to defer to the legislature as the source of gentling the decisional takings law's harshness. Thus, it is disingenuous for Ms. Schiffer to argue that when aggrieved Americans do exactly what the Supreme Court suggested, and turn to Congress for relief, Congress should nonetheless leave them to the tender mercies of the "harsh" law fashioned by the courts at government's behest.¹³³

Finally, Ms. Schiffer complains that the takings legislation is flawed because its "loss-in-value trigger focuses solely on the affected portion of the property."¹³⁴ She argues that "the courts have made clear that under the Constitution, fairness and justice require an examination of the regulation's impact on the parcel as a whole."¹³⁵ But even on that premise, Ms. Schiffer makes an argument that proves too much, certainly in the context of a debate whether the Congress should rectify this judicially-created anomaly.

well. Some courts have taken this mandate to mean that a condemnor acts in a quasi-judicial capacity imposing special obligations of fairness toward property owners. See, e.g., *City of Los Angeles v. Decker*, 558 P.2d 545, 551 (Cal. 1976).

132. *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945).

133. To the extent Ms. Schiffer argues that takings legislation may call for "unfair and unjust" levels of compensation that is higher than the landowners' actual losses, Schiffer, *supra* note 1, at 161-62, she ignores not only the fact that the takings legislation says no such thing, but also the principle of eminent domain valuation law holding that the condemnee (whether direct or inverse) is entitled only to compensation for net, demonstrable losses. As Justice Holmes put it in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), "the question is: 'What has the owner lost?'"

Valuation law is also quite clear that any benefits generated by the government project necessitating the taking, that are reflected in the remaining property's post-taking value, are offset against the value of the severance damages, and in federal law against the value of the part taken. *United States v. Sponenbarger*, 308 U.S. 256, 269-70 (1939). That is hornbook law. See JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 166 (1982). Of course, if the taking is total, there are no post-taking benefits to the owner, so the problem does not arise in the first place.

134. Schiffer, *supra* note 1, at 161.

135. *Id.*

"Takings jurisprudence," the Supreme Court's body of inverse condemnation law, consists largely of takings of easements and, thus, stands opposed to this proposition. In 1978, the *Penn Central* Court, without any explication of doctrine or citation of authority, asserted that "takings jurisprudence does not divide a parcel into discrete segments."¹³⁶ That may have made the Court's job easier to decide *Penn Central* in favor of the government, but it was inconsistent with the then existing "takings jurisprudence." Were this the law, the government could acquire passive or negative easements in private property¹³⁷ without compensation, simply by decreeing that the owner of the affected land refrain from improving or even using the part of it covered by such an easement for any economically rational use.

But when the court spoke in *Penn Central*, its taking jurisprudence contained no such rule. Had the court made even a cursory examination of its own prior jurisprudence this would have revealed at once that most of the successful takings cases involved takings of easements—quintessential partial takings, both qualitatively and quantitatively.¹³⁸ Indeed, the Supreme Court decided at least two cases *after Penn Central*, in which it deemed government regulations to be takings, even though both involved partial regulatory takings of easements.¹³⁹

To the extent one can argue that the preexisting cases of partial takings of easements were physical rather than regulatory, there are two responses. First, the court did not ascribe any significance to that dichotomy in *Penn Central*; it was not even mentioned. Second, it is difficult to see on what doctrinal basis it can be said that what is plainly a taking, albeit a partial one, is not a taking at all when prior case law—to say nothing of common sense—makes clear that it is.¹⁴⁰ It is indefensible to argue that the existence of a taking

136. *Penn Central*, 438 U.S. at 130.

137. Common examples would be avigation easements, scenic easements or highway sight easements that under settled law have to be condemned and paid for. See generally *Sneed v. City of Riverside*, 32 Cal. Rptr. 318 (Ct. App. 1963) (finding a compensable taking where a height limit regulation of land near municipal airport secured an avigation easement for the city).

138. The granddaddy of all regulatory takings cases involved a partial taking of mineral rights. See *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

139. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

140. *United States v. Causby*, 328 U.S. 256, 261-62 (1946); *United States v.*

vel non depends not on the confiscatory effect of the government regulatory action, but on the means the government chooses to employ to effect it. More importantly, a scant three years after *Penn Central*, Justice Brennan, the author of the majority opinion, rejected the physical versus non-physical taking distinction in no uncertain terms:

Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.¹⁴¹

But be that as it may, the Court certainly had the raw power to so decree. As a result, its doctrinally and logically unfounded assertion that takings jurisprudence does not divide a parcel into discrete segments, has given rise to anomalies that the court itself duly noted in *Lucas*.¹⁴² There is thus nothing wrong with Congress rectifying these anomalies by appropriate legislation.¹⁴³ The fact that Ms. Schiffer seems to prefer the present state of the law that heavily favors government regulators, is hardly a sound basis for resisting the legislative enactment of clearer, fairer and more doctrinally sound liability standards than the present muddle. While we do not wish to be unkind, it is entirely proper to allude again to Chief Judge Traynor's incisive observation

Grizzard, 219 U.S. 180 (1911) (holding that not only is just compensation payable for a partial taking, but also for severance damages to the remainder of the partially taken property).

141. *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (citation omitted).

For a collection of scholarly denunciations of the physical versus nonphysical distinction in determining whether a taking has occurred (in terms such as "primordial," "outmoded," "anachronistic," and "primitive"), see Michael M. Berger, *To Regulate or Not to Regulate—Is That the Question?*, 8 *LOY. L.A. L. REV.* 253, 268 (1975).

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

143. As California's late Chief Judge Roger Traynor once observed, there are notions embedded in the law "that have never been cleaned and pressed and might disintegrate if they were." Roger Traynor, *No Magic Words Could Do It Justice*, 49 *CAL. L. REV.* 615, 621 (1961). The *Penn Central* "non-segmentation" theory certainly qualifies as one such notion. See generally *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

in which he was critical of "bogus defenders of stare decisis" who try to alarm the courts and the public to forestall needed reform in the law.¹⁴⁴

Then there is the currently pending procedural legislation. Unlike the bills attacked by Ms. Schiffer, House Bill 1534 makes no substantive legal changes. This legislation, called the "Private Property Rights Implementation Act of 1997," might just as easily have been named the "Fairness in Access to the Courts Act of 1997," or the "Let the Federal Courts Decide Federal Constitutional Issues Act of 1997." In fact, either would probably have been more accurate—and may have made the bill less controversial. The bill does not deal substantively with property rights *per se*, but with the right of property owners to have access to the federal courts to determine the merits of their federal constitutional claims *against local, typically zoning, bodies*. At the same time, it properly instructs federal courts not to defer to state courts on issues of federal constitutional law.

The purpose of the bill is not to "implement" or create any specific private property rights or to impinge on or reduce any protections provided by other substantive laws to people, air, water, plants, or animals. It is neither the twin nor the step-child of the property rights bills already considered by Congress, which did attempt to draw some clear substantive lines to define when property owners would be entitled to compensation. House Bill 1534 would only permit property owners who claim that *local* government action has violated their *federal* constitutional rights (under substantive rules and precepts established by the courts, not by this legislation) to have a *federal* judge decide whether they are right or wrong. The bill is simply about fair access to federal courts.

The legislation addresses only the procedural and remedial attributes of actions challenging regulatory decisions of state and local regulators. Much of the regulatory taking litigation is fomented by local government agencies that usually have a decided preference for litigating in the comfortable confines of their local trial courts—the ones that they fund, and with whose personnel they are familiar.¹⁴⁵ In

144. Traynor, *supra* note 143, at 621.

145. Note, however, that when *local* regulators conclude that the *federal* courts in their bailiwick are hostile to property owners, and decide to do a little

states where development versus preservation conflicts are at a high level (California and Florida being obvious examples), local state courts have by and large gone along with their desires. For years, property owners' urgent need to have their federal constitutional claims heard by federal district courts, has been severely restricted by the use, or more accurately misuse, of the ripeness doctrine.¹⁴⁶ This has placed them, as a group, in the position of some sort of second class citizenship.

Space prohibits a full explication of the procedural pitfalls and conundrums facing property owners who want no more than to have federal constitutional issues decided by federal judges. The commentaries cited have already consumed enough trees expounding on that issue.¹⁴⁷ Thus, House Bill 1534 represents needed and long overdue reform.

This pending procedural legislation should not concern Ms. Schiffer and her colleagues at the Department of Justice, as it deals only with the ability of property owners to sue local state agencies in federal courts and thus has no direct impact on the work of the Department of Justice. In keeping with her statement of support from her entire department for

forum shopping by removing the owners' takings claims to federal courts, they have been permitted to do so. *City of Chicago v. International College of Surgeons*, 118 S. Ct. 423 (1997); *Tari v. Collier County*, 56 F.3d 1533 (11th Cir. 1995). In what can only be described as a morally scandalous performance, the *Tari* court proceeded to lecture the plaintiff on the impropriety of making federal courts "master zoning boards' in disputes which are best handled at the local level," ignoring the plain fact that the plaintiff had indeed filed his lawsuit *in the state courts*, but it was removed against his wishes to federal court by the defendant county. *Id.* at 1534, 1537.

146. Commentators have often been overwhelmingly scornful of its parameters and its application, as is quite apparent from the titles of their works: Michael M. Berger, *The "Ripeness" Mess in Federal Land-Use Cases: How the Supreme Court Converted Federal Judges Into Fruit Peddlers*, 1991 S.W. LEGAL FOUND. INST. ON PLANNING, ZONING, & EMINENT DOMAIN 7 (1991); Brian W. Blaesser, *Closing the Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988); Timothy J. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Bruce I. Wiener, *Obstacles and Pitfalls for Landowners Applying the Ripeness Doctrine to Section 1983 Land Use Litigation*, 7 J. LAND USE & ENVTL. L. 387 (1992).

147. See Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 1, 3 (1990) (urging that the federal courts are the proper place to decide federal questions).

procedural reform, one would hope there would be federal backing for this bill, or at least that the Department would not oppose it as it has no legitimate reason for doing so. As she put it: "The [Department of Justice] is committed to working with the courts to ensure that takings claims may be resolved quickly and efficiently"¹⁴⁸

Sadly, although perhaps predictably, that is not the case. The Department of Justice works "with the courts" all right, but in the role of a hard-nosed advocate. Even as House Bill 1534 was being passed by the House of Representatives, Department's opposition to it was unyielding; its officials would not discuss any compromise legislative language, and bluntly rebuffed suggestions that Department do so. The hard-nosed advocacy posture was all too evident.

IV. POLICY, NOT POLEMICS, NEEDS TO GUIDE OVERDUE LEGISLATIVE REFORM

Much has been said and written about the "taking issue," and it is not our intention to duplicate here the efforts of scholars, students, and practitioners—and not a few polemicists—trying to plumb the depths of the inconsistent and at times bewildering "takings jurisprudence" in an effort to make sense of it. In this debate, even apart from the unfairness that application of the "black letter" takings rules so often impose, it seems to us that insufficient attention has been paid to broader considerations. The debate as to whether Congress and state legislatures should intervene to rectify the muddled handiwork of judges needs to focus less on the environmentalists' apocalyptic visions of an unregulated world on one hand, and Ms. Schiffer's "horror stories" on the other,¹⁴⁹ though neither should be dismissed altogether.

148. Schiffer, *supra* note 1, at 159.

149. Schiffer, *supra* note 1, at 162-64. In setting out to refute these "horror stories," Ms. Schiffer discusses only two anecdotes in which she asserts that the complaining landowners had overstated their cases. *Id.* at 162. That, however, hardly touches the surface of such problems. It cannot go without notice that in the case that planted the seeds of the "ripeness mess," it took the land owners almost *thirty years* of litigation, moratoria, and crude municipal foot-dragging—to get permission from the city of Tiburon to build only *three* houses, the first of which is being completed as of this writing, and in which Ms. Agins can no longer afford to live. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); see also Charles Gallardo, *After 29 Years, Tiburon House Going Up: Home OK'd But Not For Original Family*, MARIN INDEPENDENT J., Oct. 1, 1997, at 1; Philip Hager, *Courting a Dream: 20-Year Fight to Build Tiburon Home Not Over Yet*, L.A.

We need to focus more on the long term effects of land-use regulations. In particular, the increasingly intrusive and mushrooming impact of those effects needs to be comprehended and reevaluated.¹⁵⁰ Starting with the modest proposition that incompatible land uses may properly be separated by zoning laws, lest their juxtaposition create nuisances, given to us by the U.S. Supreme Court a scant seventy-two years ago,¹⁵¹ land-use law has run amok.¹⁵² Zoning and the countless land-use regulations have at times assumed the air of a fundamentalist religion, complete with official dogma,

TIMES, Aug. 3, 1987, at A3.

150. Since such a suggestion is usually deemed by regulators to be in the nature of heresy, we note that the city of Houston, Texas, has no zoning, but looks no significantly different than other cities in the region, of similar size and age. Could it be that the fiercely complicated and costly zoning apparatus could stand reexamination when it turns out that for all its cost, time consumption, complexity, inefficiency and frequent corruption, it produces cities that look no different than Houston? See generally BERNARD SIEGAN, *LAND USE WITHOUT ZONING* (1972); Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 ENVTL. L.J. 277 (1996); Douglas Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. (1981); Jan Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); George Lefcoe, *California's Land Planning Regulations: The Case for Deregulation*, 54 SO. CAL. L. REV. 447 (1981); Mark Pulliam, *Brandeis Brief for Deregulation of Land Use: A Plea for Constitutional Reform*, 13 SW. U. L. REV. 435 (1983).

151. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). When *Euclid* was originally tried, Judge Westenhaver who presided over the trial, presciently concluded that for all its benefits in separating incompatible land uses, the true purpose of zoning was to segregate the population of a community according to income or situation in life. *Ambler Realty v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

152. Richard A. Epstein, *Property As a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 203 (1992). As of this writing, the City of Glendale, California has just cited a homeowner for putting up a 3 1/2-foot white picket fence around his lawn to keep cars from running over it, instead of the regulation 18-inch fence. John Steinman, *Couple Fights Over Bit of Americana*, L.A. TIMES (Valley ed.), Jan. 13, 1998, at B1. The latter height, says the city with what purports to be a straight face, is to protect views. *Id.*

There have even been cases where local zoning authorities have harassed little kids selling lemonade in front of their homes in the summertime. For example, in Massachusetts land-use officials shut down a lemonade stand of 10-year old Hillary Carey, who was later permitted to reopen it after payment of \$100 for a town hawker's license, \$62 for a state license, \$25 "base of operation" health department inspection, and another \$50 for the health department's inspection of her two coolers. See LANDPLANNER 12 (Fall 1996). Another example occurred in Watchung, New Jersey, where authorities forced 10-year old Max Schilling to pay a \$250 fee for a variance application to permit the operation of a lemonade stand in front of his parents' house. *Young Lemonade Maven Eases Out of Squeezes*, MIAMI HERALD, July 8, 1990.

true believers, and despised heretics. These days, there is very little that can be done with one's land without obtaining some sort of permit or license, indulgence, or entitlement from the government whether local, regional, state, federal or all of the above. Government land use regulations now cover everything from setbacks to home size, architectural styles, fencing, landscaping, lighting, plumbing and roof materials, the color one may paint one's house, and whether storekeepers must hire security guards at their expense instead of relying on the police to suppress crime.¹⁵³ In California, the law may now require builders to put "public art" into their private projects, with the artistic content subject to approval by the local municipality, not the builders who are nonetheless required to pay for whatever the city likes, never mind the builders' First Amendment rights.¹⁵⁴

Many of today's land-use regulations bear no rational relationship to public health, safety, welfare or morals—the conceptual underpinnings of the state police power said to justify all that. In some areas they are a manifestation of a new feudalism that favors persons in accordance with their status:¹⁵⁵ existing homeowners are preferred to outsiders not yet living in the community and to owners who have not yet built on their land. As Professor Fischel astutely observed, these new arrangements, though unsanctioned by any law, have *de facto* effected a massive wealth transfer from owners of vacant land to home owners.¹⁵⁶ In the regulatory regime that prevails in many places, notably California, the latter can often prevent the former from improving their land—either in an economically rational fashion or sometimes completely. All this, of course, infuses the seemingly mundane municipal land-use approval process with unwarranted and

153. This feat is accomplished by use—or more accurately misuse—of land use regulations, whereby security requirements are imposed as conditions of the storekeeper's conditional use permit under which the store operates. Gideon Kanner, *Blaming the Victims*, L.A. TIMES (Valley ed.) Apr. 3, 1994, at B17.

154. *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996); Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 231-36 (1997).

155. DENNIS COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 116, 118 (1993); see also John McClaughry, *The New Feudalism*, 5 ENVTL. L. 675, 701-02 (1975).

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

at times illegitimate power over the lives of citizens whose economic well-being and hence their civic liberties increasingly depend on the at times whimsical exercise of the municipal regulatory power.¹⁵⁷

As even staunch defenders of the current land-use regulatory system have had to acknowledge, in practice, the land use approval process is too often characterized by "one might almost say, the art, of delay, delay, equivocation and never-ending 'negotiation' These actions are ubiquitous, vicious, and devoid of any resemblance of procedural due process Moreover, many local governments seem to relish prolonged administrative turmoil before reaching a decision from which judicial relief may be sought."¹⁵⁸

These are matters of no concern to Ms. Schiffer, who, as a federal government lawyer, is not required to deal with them. Yet, they are of enormous and widespread importance,

157. A perfect example and an object lesson is provided by recent events in Burbank, California. There is a controversy in that community as to whether the Hollywood-Burbank Airport should be expanded, and the local Chamber of Commerce took a position favoring expansion which is opposed by most Burbank officials. Jill Leovy, *Burbank Studios Repudiate Vote on Airport Expansion*, L.A. TIMES (Valley ed.), May 14, 1997, at A1. Within days, three Chamber members repudiated the Chamber's position and wrote groveling letters of apology to the City Council, promising not to do it again. *Id.* Who were these meek "little" entities, so easily intimidated by the very prospect of a conflict with City Hall? They were NBC, Warner Brothers, and Disney Studios—collectively, probably the most powerful force in American media and communications. *Id.* Why did these mighty enterprises so abase themselves? All three of them have major construction projects and expansion plans in Burbank, and they evidently thought it prudent to subordinate their views on a matter of community interest, to currying favor with officials with the power to pass on their land-use entitlements. *Id.* Ironically, the Chamber of Commerce was on the right side of this issue; as of this writing the Los Angeles County Superior Court ruled that the airport may be expanded by the joint powers authority operating it without Burbank's consent. Andrew Blenkstein, *Burbank Can't Block Airport Plan, Judge Says*, L.A. TIMES (Valley ed.), Feb. 19, 1998, at A1.

Though their caving in to City Hall was chilling, unfortunately, NBC, Warner Brothers, and Disney probably acted prudently. The nearby City of Los Angeles recently denied approval for construction of a new golf course (that had been approved by the planning commission) in order to exact revenge against the developer's financing company that became involved in a dispute with a municipally well-connected labor union. Hugo Martin, *City Council Votes Down Big Tujunga Golf Course*, L.A. TIMES (Valley ed.), July 23, 1997, at A1. Predictably, the developer has sued the city, and the city council "staring down the barrel of a \$215 million lawsuit" is reconsidering the development application. Editorial, *The Tujunga Washout*, L.A. TIMES (Valley ed.), Feb. 15, 1998, at B16.

158. Norman Williams et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 242-43 (1984).

and they can and do implicate takings problems, particularly when the ostensible regulations work to deprive the affected land owners of all or most of their property. While the pending federal takings legislation does not address these local problems (except to the extent that House Bill 1534 restores aggrieved land owners' reasonable access to federal courts), its adoption would nonetheless send a wholesome message to the entire country that property rights are to be treated with the seriousness their importance and constitutionally protected status requires.

We are unable to improve on the astute observation of Justice Potter Stewart that personal liberties and property rights are interdependent and neither can have meaning without the other.¹⁵⁹ That he was right is attested to by the fact that there are no societies in which a high degree of personal and political liberties does not correlate strongly with a similarly high degree of economic freedom. A powerful lesson flows from that fact that needs to be heeded. Particularly since the current harsh regulations are often justified on the grounds that they tend to enhance the environment, another lesson that needs to be learned is that it is government-managed societies whose citizens lack liberty—personal, political and economic—that wound up with the worst environmental degradation, while democratic, free market oriented societies enjoy both a higher level of environmental amenities and greater liberties for their citizens.

However arguably worthy the sweep of the countless land-use regulations may be, many of them are arbitrary and some simply do not work efficiently, fairly, or sometimes at all. Though laws and regulations that control land-use in a given community are voluminous, it turns out all too often that this mass of "official" verbiage provides little reliable guidance to persons seeking to develop land or even build a house. Instead of a rule of law embodied in all that paper, land-use is actually governed by what even elementary texts call a "dealmaking process."¹⁶⁰ When it comes to land-use, the vaunted "rule of law" that enjoys such currency in after-luncheon speeches, turns out all too often to operate more like a bazaar. Nothing is what it seems; everything is up for

159. *Lynch v. Household Fin. Co.*, 405 U.S. 538, 543-48 (1972).

160. ROBERT C. ELLICKSON & A. JAMES TARLOCK, *LAND-USE CONTROLS* 234-80 (1981).

grabs. Seemingly clear laws prove to have the substantiality of cotton candy when vocal NIMBY-shouting homeowners decide that they simply don't want anyone else on or even near "their" turf.¹⁶¹ In short, as practiced today in many communities land-use "law" is often anything but law, with predictably corrosive effects on public perception of the integrity of the legal process.

As far as the courts are concerned, they traditionally do not pass on the wisdom of governmental arrangements, and so it is understandable, though not commendable, that at times they have improvidently gone along with absurd government actions and land-use regulations.¹⁶² But there are limits to everything. When regulations reach the level of the confiscatory, it is essential that a society that means to remain free draw a line. In the takings area, the courts have acted with callous insensitivity to vital economic interests and constitutional rights of faultless citizens subjected to predatory government practices, and have failed in the task of delimiting government power, even though, as Justice Holmes put it, the great body of the law consists of drawing lines.¹⁶³ The courts have not performed that function effectively or even competently. Instead, even the U.S. Supreme Court—in theory a court of precedent, not of error—has given us a mode of constitutional decision-making that it itself has characterized as *ad hoc*, factual adjudication on a case-by-case basis.¹⁶⁴ Excuse us for asking, but is that what the Justices believe to be a "rule of law"? If they sincerely do, then it would appear that they have lost the ability to differentiate

161. For a detailed description of what started out as a perfectly proper plan to build a mid-rise office building complex in full compliance with applicable zoning, but after objection by local NIMBY homeowners ended eight years later as a protracted, slow-motion litigational nightmare that ended in insolvency after wasting between \$40 and \$50 million to no purpose whatever, see Robert I. McMurry & Gideon Kanner, *Shootout at Warner Ridge*, LOS ANGELES LAW., Jan. 1995, at 24; see also James F. Peltz, *Bumps on the Road to Warner Ridge*, L.A. TIMES (Valley ed.), Mar. 2, 1993, at 3.

162. There are many worthy candidates for recognition in this regard, but the authors' favorite is *McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (Cal. 1953), where the California Supreme Court upheld an ordinance forbidding all construction on a beachfront lot on the fatuous ground that construction of a home on pilings would encourage immoral behavior underneath the structure.

163. *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

164. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

between the function of a common-law judge and that of a Kadi sitting under a tree, dispensing subjective justice by the seat of his pantaloons.¹⁶⁵ The proverbial bottom line is that the Supreme Court has created an illusion of relief by its decisions whose all too apparent subtext has been obviously read by many lower courts as a license to deny enforcement of constitutional rights of American landowners in a majority of cases.

In part, this regrettable state of affairs is due to the unfortunate structural problem in American takings law, whereby absent an intermediate legislatively-established level of relief, judge-made law requires a choice between finding a taking, or providing no remedy at all.¹⁶⁶ It does not have to be that way, but unfortunately it is since the courts have largely gone out of the business of enforcing substantive property rights under the Due Process Clause.¹⁶⁷ Throw into the litigational picture *Penn Central's* doctrinally deficient "non-segmentation" rule, and takings cases become all-or-nothing propositions in more ways than one. Prevailing in a regulatory taking case these days, even on egregious facts, can be in the nature of the scriptural feat of leading a camel through the eye of a needle, particularly in jurisdictions like California whose courts are notorious for being openly hostile to private property rights.¹⁶⁸ A middle ground is needed and the proposed congressional legislation provides it, both as a solution to the substantive constitutional problem created by the Supreme Court, and in the case of House Bill 1534 as an efficient means of providing aggrieved property owners with

165. *Terminiello v. Chicago*, 337 U.S. 1, 8 (1949) (Frankfurter, J., dissenting).

166. During the nineteenth century, a number of states amended their constitutions to provide for compensation when private property is taken or damaged for public use. California is one of them. CAL. CONST. art. I, § 19. But apart from physical damaging, the "or damaged" clause has turned out to be a toothless tiger, as far as confiscatory regulations are concerned. *HFH, Ltd. v. Superior Court*, 542 P.2d 237, 243-45 (Cal. 1975).

167. *Armendariz v. Penman*, 75 F.3d 1311, 1321-26 (9th Cir. 1994) (en banc).

168. In his noted treatise, Norman Williams (a strongly pro-regulation textwriter) opined that "[t]he striking feature of California law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state." NORMAN WILLIAMS, 1 AMERICAN PLANNING LAW 184 (1974). A national survey of land-use experts of all substantive orientations revealed that California was a nearly unanimous choice as the state least likely to protect the rights of land owners. DENNIS COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 11 (1995).

a neutral federal forum, precisely as envisioned by the constitutional framers.¹⁶⁹ This legislation may also serve as an inspiration to the states.

After years of quite deliberate judicial obfuscation of takings law in ways that have heavily favored the government, there is no solution in sight capable of satisfying the regulators who at the moment enjoy enormous litigational advantages over individual property owners, and fiercely resist any prospects of losing them. But regulators' extreme litigational advantages aside, a complex society must get on with its daily business. One essential facet of that business is that there must be a discernible level of security and stability in property rights, and a modicum of predictability in litigation.¹⁷⁰ When people cannot ascertain what they can and cannot do with their own property in an economically rational manner, without first spending years or even decades of ruinous but utterly uncertain, deliberately obfuscatory and usually unsuccessful litigation,¹⁷¹ that is but another way of saying that they cannot tell what they own, and hence that they may actually own nothing of value. After all, the U.S. Supreme Court told us that "property" is only that economic advantage that the law will protect.¹⁷² But when the courts

169. "[A] review of the constitution of the courts in the many states will satisfy us that they cannot be trusted with the execution of Federal laws." *Greenwood v. Peacock*, 384 U.S. 808, 836 (1966) (quoting James Madison).

170. *Hughes v. Washington*, 389 U.S. 290, 296-99 (1967) (Stewart, J., concurring); *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570-71 (1905); *Chicago B. & Q. v. City of Chicago*, 166 U.S. 226, 241 (1897).

171. We offer as a bloodcurdling example the saga of Thomas and Doris Dodd, who in 1983 bought a 40-acre parcel of forest land, intending to build their retirement home on it, only to be told by the Hood River County, Oregon, land-use regulators that no construction would be permitted because the proposed house would not be "an accessory" use to forest uses—this plainly confiscatory ruling resulted in the following reported decision, *Dodd v. Hood River County*, 855 P.2d 608 (Or. 1993); see also 836 P.2d 1373 (Or. 1992) (same case), 59 F.3d 852 (9th Cir. 1995) (same case), and No. 97-35124, 1998 U.S. App. LEXIS 2011, at *1 (9th Cir. filed Feb. 13, 1998) (same case).

Another, even more grotesque saga is found in the decisions of *Corn v. Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996), 997 F.2d 1369 (11th Cir. 1993), 904 F.2d 585 (11th Cir. 1990), 816 F.2d 1514 (11th Cir. 1987), 794 F. Supp. 364 (S.D. Fla. 1992), and 771 F. Supp. 1557 (S.D. Fla. 1991). And these were just the federal cases. See also *City of Lauderdale Lakes v. Corn*, 427 So. 2d 239 (Fla. Dist. Ct. App. 1983), 415 So. 2d 1270 (Fla. 1982); and 371 So. 2d 1111 (Fla. Dist. Ct. App. 1978). In the end, Herman Corn was told that even though he had vested rights under Florida law, they would not be enforced.

172. *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945). The clear implication of *Willow River* is that without a dependable rule of law

will not reliably protect property rights, it is up to the legislature to enact laws that will do so. Unless this is done, the result is certain to produce injustice, inefficiency, eventually violence,¹⁷³ and in the end justified erosion of public respect for the law and for the courts.

The takings legislation presently pending before Congress may not be a finely tuned precision tool, but it is designed to draw a badly needed bright line of some sort in the now chaotic law. If government regulators think otherwise, then it is civically and morally incumbent upon them as responsible public officials, to tell the country how the pending legislation should be amended or redrafted in a constructive, balanced manner. But to the extent they remain silent on that point and fault all earnest attempts at a badly needed rectification of the prevailing intellectual mess, their arguments are not entitled to serious consideration in a society that values fair treatment of its citizens, and subscribes to precepts enshrined in the Fifth Amendment and the Eighth Commandment, respectively.¹⁷⁴

there are no property rights. Which is exactly what some regulators and their ideological allies are about when they advance a legal regime in which *de facto* there are no private property rights, except to the extent the government chooses to create them ad hoc by the issuance of a permit or license, and even that further subject to the vagaries of the vested rights doctrine.

173. Though thus far that has not been the case, an embryonic protest movement is rising in the western United States, particularly in rural areas, that openly views the American government as the enemy of the people. Perceived disregard of the people's property rights is a major factor driving this movement. See WAYNE HAGE, *STORM OVER RANGELANDS* (1990). As one of the local leaders put it to a *Los Angeles Times* reporter: "In the West, we don't have \$400,000 in a retirement fund or savings account, but we do have 40 acres of land. The problem is that environmentalists, in their zeal to gain control, forgot about our constitutional rights and that, before they take private property away from us for public use, people deserve compensation." Frank Clifford, *Cow County Tells U.S. to Back Off*, L.A. TIMES, Apr. 4, 1994, at A3; Louis Sahagun, *A Wave of Distrust in the West*, L.A. TIMES, Feb. 3, 1995, at A1; Timothy Egan, *Angry Westerners Target Federal Employees*, DAILY NEWS (Los Angeles), Apr. 30, 1995, at 1; Philip Brasher, *Farmers Rebel Over Wetlands Regulation*, L.A. TIMES, Apr. 23, 1995, at A9; Barry Seigel, *A Lone Ranger: U.S. Forest Service Ranger Guy Pence Is a Persistent and Passionate Defender of Public Lands. Is That Why Someone Bombed His Office and His Home?*, L.A. TIMES, Nov. 26, 1995, (Magazine), at 20.

174. "Thou shalt not steal." *Exodus* 20:2-17 (King James).