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Florida Rock Industries, Inc. v. United States: Tipping the Scales in Favor of Private Property Rights at the Public's Expense

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FLORIDA ROCK INDUSTRIES, INC. v.
UNITED STATES: TIPPING THE SCALES
IN FAVOR OF PRIVATE PROPERTY
RIGHTS AT THE PUBLIC'S EXPENSE

I. INTRODUCTION	502
II. BACKGROUND: SUPREME COURT TAKINGS JURISPRUDENCE	503
III. THE SUBJECT CASE: FACTUAL AND PROCEDURAL BACKGROUND OF <i>FLORIDA ROCK</i>	510
IV. DISCUSSION	516
A. <i>The Florida Rock IV Decision</i>	516
B. <i>Current Takings Legislation</i>	519
C. <i>Recommendations for Takings Legislation</i>	527
V. CONCLUSION	530

FLORIDA ROCK INDUSTRIES, INC. v. UNITED STATES: TIPPING THE SCALES IN FAVOR OF PRIVATE PROPERTY RIGHTS AT THE PUBLIC'S EXPENSE

I. INTRODUCTION

In *Florida Rock Industries, Inc. v. United States*¹ the Court of Appeals for the Federal Circuit held that the denial of a federal wetlands permit under section 1344 of the Clean Water Act² may constitute a compensable taking of private property under the Fifth Amendment to the United States Constitution.³ The court remanded the case to the Federal Court of Claims to determine the value of the property remaining after the permit denial, while warning the trial court that the existing record did not support a finding of the loss of all economically viable use of the property.⁴ The Federal Circuit declared that the parcel's retention of economic value would not foreclose the finding of a compensable "partial taking."⁵ Yet the court did not set a "bright line" standard to guide the lower court in determining whether the percentage of remaining value would be sufficient to rebut the takings challenge. Instead, the court ordered "a classic exercise of judicial balancing of competing values."⁶

While the finding of a "partial taking" would be new to takings jurisprudence, the utilization of a balancing test is not new.⁷ The Supreme Court attempts to apply a categorical "all-or-nothing" rule in regulatory takings cases.⁸ For cases not falling within this rule, the Court purports to use a balancing test to determine whether

1. 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

2. 33 U.S.C. § 1344 (1988). See *infra* note 59 and accompanying text.

3. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1568. The Fifth Amendment to the United States Constitution states in pertinent part that private property shall not "be taken for public use without just compensation." U.S. CONST. amend. V. This part of the Fifth Amendment is commonly known as the "Takings Clause." In *Chicago, Burlington & Quincy Railway v. Chicago*, 166 U.S. 226 (1887), the Supreme Court made the Takings Clause applicable to the states by incorporating the Fifth Amendment into the Due Process Clause of the Fourteenth Amendment. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW* § 5A.03, at 138 n.23 (1988).

4. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1572-73.

5. *Id.* at 1570 (citing *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)) ("Nothing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this court so held.").

6. *Id.*

7. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Agins v. Tiburon*, 447 U.S. 255 (1980).

8. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (holding that a categorical, compensable taking occurs where governmental regula-

compensation is due. The Court, however, has yet to apply the balancing test to a specific situation and find a compensable partial taking. The Court's reluctance to address directly the partial takings issue has caused property rights activists to lobby Congress and state legislatures for serious, albeit extreme, takings legislation. Likewise it has caused lower courts such as the Federal Circuit in *Florida Rock* to reformulate and expand takings doctrine.⁹

This Note discusses why the Federal Circuit embraced the concept of a partial taking. It contends that the Circuit's action was a reaction not only to the fervor created by conservative politicians, businesses, and property rights groups who advocate radical takings reform but also to the Supreme Court's approach to regulatory takings cases. This Note maintains that the Court's limited use of the balancing test has denied compensation to deserving property owners and has caused lower courts and legislatures to overreact to the perceived unfairness. This Note also suggests that Congress and state legislatures should enter the takings arena and clarify regulatory takings law. A legislatively-mandated approach would provide guidance to the judiciary and would prevent questionable decisions such as that in *Florida Rock*. Yet in reformulating takings law, legislative bodies must consider why the Supreme Court has followed the careful approach that it has in deciding regulatory takings cases. If legislatures enact statutes tipping the scales too far in favor of property owners, decades of environmental and land use statutes and regulations will be jeopardized as will the health, safety, and public welfare goals those regulations were passed to protect.

II. BACKGROUND: SUPREME COURT TAKINGS JURISPRUDENCE

United States Supreme Court takings jurisprudence has been criticized as "a vast sea of uncertainty,"¹⁰ "almost totally out of touch,"¹¹ "confusing,"¹² and "vague."¹³ Norman Williams, a leading commentator in land use law, attributes this to the Court's inexperi-

tion denies a property owner *all* economically beneficial or productive use of his land).

9. See, e.g., *Corrigan v. City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in part, vacated in part on other grounds, and remanded on other grounds*, 720 P.2d 513 (Ariz. 1986). In *Corrigan* an intermediate appellate state court held that a compensable taking occurred where a zoning ordinance precluded development of 80% of the owner's land, 3836 of 4800 acres. *Id.* at 532, 540. Rather than asking whether the local ordinance forbid all economically viable use of the entire 4800-acre parcel, as is customary in regulatory takings cases, the court inquired whether the regulation prevented all economically viable use of the 3836 acres affected by the regulation. *Id.* at 538-39. The court answered in the affirmative and ordered the City to compensate the landowner. *Id.* at 539-40.

10. WILLIAMS, *supra* note 3, § 5A.01, at 132.

11. *Id.* at 168.

12. *Id.*

13. *Id.*

ence with takings issues and its refusal to consider a vast number of potentially enlightening state court decisions.¹⁴ The Supreme Court first addressed the interplay between land use regulation and the Takings Clause in the 1920s when it upheld the constitutionality of zoning as a valid exercise of governmental authority¹⁵ notwithstanding the adverse effect of the regulation on the value of the restricted property.¹⁶ The Court decided several other land use cases in the 1920s and then left the field for over forty years.¹⁷ By the time it reentered, state courts had developed a varied, but fairly predictable, approach to takings challenges.¹⁸ The Court, however, ignored existing lower court case law and formulated two categorical rules¹⁹ and an ambiguous balancing test²⁰ that favor governmental regulation over private property rights.

There are two kinds of takings under the Fifth Amendment: physical invasion and regulatory. In physical invasion cases the government appropriates or occupies private property. In regulatory cases the government implements regulations that restrict the use and affect the value of land. Physical invasion cases have created fewer stumbling blocks for the Court than have regulatory cases. According to Williams, "It has always been clear that, if a governmental agency physically invades and takes over a tract of land (in whole or in part), . . . compensation must be paid to the property owner."²¹ The Court follows this categorical rule when the govern-

14. *Id.* at 169. The Court's desire to decide takings cases without the benefit of state court precedent seems to have ended with *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). In *Dolan* the Court examined the approaches taken by several states in determining the necessary relationship between the potential impacts of a proposed development and the conditions imposed to address those impacts. *Id.* at 2318-19.

15. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926). Although the property owner in *Euclid* requested injunctive relief under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the case is often cited as standing for the proposition that government can restrict the use of land without paying compensation, a remedy required by the Takings Clause of the Fifth Amendment. WILLIAMS, *supra* note 3, § 5A.01, at 126.

16. The landowner in *Euclid* argued that the ordinance reduced the value of its property by 75%. *Euclid v. Ambler Realty Co.*, 272 U.S. at 384.

17. WILLIAMS, *supra* note 3, § 5A.01, at 127.

18. *Id.* at 127-28.

19. See *supra* note 8 and *infra* note 22 and accompanying text.

20. See *infra* text accompanying notes 26-30.

21. WILLIAMS, *supra* note 3, § 5A.03, at 138. The history of physical invasion cases began in 1871 with *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871). *Id.* at 138 n.23. In *Pumpelly* the State of Wisconsin flooded 640 acres of private property while erecting a dam. The Court held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectually destroy or impair its usefulness, it is a taking . . ." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. at 181.

ment physically appropriates private property.²² Thus landowners are compensated even if the physical invasion is *de minimis*.²³ Fifth Amendment challenges to regulatory actions, on the other hand, are, with one exception,²⁴ not decided by a categorical rule but by an *ad hoc*, fact-specific inquiry²⁵ that attempts to balance competing interests.

In 1922 the Court stated the basic guiding principle for regulatory takings cases: “[W]hile property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.”²⁶ Although this oft-cited statement has great rhetorical value, it offers little guidance to landowners, regulatory bodies, or courts. Since the 1960s the Court has enunciated at least three variations of a balancing test to help it determine when a regulation goes “too far.”²⁷ First, a regulatory taking occurs if an ordinance “does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land”²⁸ Second, while there is no “set formula” for determining whether a regulation effects a taking, there are “several factors that have particular significance. . . . [These factors include] [t]he economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action.”²⁹ Finally,

where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the

22. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government”).

23. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that New York law requiring landlord to permit installation of cable on rental property constitutes compensable taking).

24. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992) (holding that a categorical, compensable taking occurs where governmental regulation denies a property owner *all* economically beneficial or productive use of his land).

25. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124 (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated [I]t depends largely ‘upon the particular circumstances [in that] case.’”) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

26. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (emphasis added).

27. 7 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 52A.04[1][b], at 52A-53 (1994).

28. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted).

29. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124 (citation omitted).

regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.³⁰

Although the enunciation of a test is offered to provide clarity in judicial decision-making, the factors included in the balancing test are often ambiguous and difficult to define. For example, the Court has clarified only partially the notion that an owner cannot be denied "economically viable use of his land." In *Lucas v. South Carolina Coastal Council*³¹ the Supreme Court held that a categorical, compensable taking occurs where governmental regulation denies a property owner "all economically beneficial or productive use of his land."³² Thus if the "economically viable use" factor is seen as a spectrum from zero to one hundred percent diminution in value, the Court in *Lucas* focused on one extreme end of that spectrum; it announced an unambiguous rule that applies where regulation diminishes the value of private property by one hundred percent.

The Court however has not addressed sufficiently the remainder of the spectrum: must government deny a landowner *all* economically viable use of his land before it is required to compensate the owner for his loss? The Supreme Court has stated repeatedly that "mere diminution in value" is not sufficient to constitute a taking.³³ Yet is there a point between complete deprivation of all economically viable use and mere diminution in value that justifies compensation? The Court has not answered this question in a holding, although the majority in *Lucas* responded in dicta affirmatively.³⁴ The majority criticized dissenting Justice Stevens, who described the categorical *Lucas* rule as "wholly arbitrary [in that a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."³⁵ Justice Scalia, writing for the majority, responded that the analysis of Justice Stevens

30. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992).

31. 112 S. Ct. 2886 (1992).

32. *Id.* at 2893 (emphasis added). The plaintiff in *Lucas* purchased two lots on a barrier island in South Carolina with the intention of erecting single-family residences on the parcels, as the owners of adjacent property had already done. *Id.* at 2889. Several years later the state legislature passed the Beachfront Management Act, which prohibited construction of habitable improvements in an area encompassing Lucas's two lots. *Id.* Lucas filed suit and the state trial court found that the Act "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless." *Id.* at 2890 (quoting App. to Pet. for Cert. 37). The trial court awarded \$1,232,387.50 in "just compensation" under the Fifth Amendment. *Id.* The Supreme Court of South Carolina reversed, holding that no taking had occurred because the regulation was enacted "to prevent serious public harm." *Id.*

33. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 131.

34. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. at 2895 n.8.

35. *Id.* at 2919 (Stevens, J., dissenting).

errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.³⁶

The majority dicta in *Lucas* did not draw a "bright line" indicating the percentage of devaluation, less than one hundred percent, that is sufficient to constitute a taking. It did, however, acknowledge that in some circumstances a landowner may recover under the Fifth Amendment even if governmental action has not destroyed completely all economic viability of the property. The Court thus has left the door open to legislatures and lower courts regarding the remainder of the takings spectrum.³⁷ It is this part of the spectrum, the partial takings issue, that the Court of Appeals attempts to address in *Florida Rock*.

In confronting the question of partial takings, the court in *Florida Rock* must examine another ambiguous concept in the balancing equation: "investment-backed expectations."³⁸ Exactly what this phrase means is unclear. There is no consensus in state law on this issue, and the area is one of "almost pure gut jurisprudence."³⁹ Williams focuses on reliance in explaining investment-backed expectations; one must examine the extent to which a developer has acted in deciding whether a regulation infringes upon the developer's expectations.⁴⁰ Other commentators note that the Court has introduced "profit" into the investment-backed expectations inquiry, an

36. *Id.* at 2895 n.8.

37. See Charles R. Wise & Kirk Emerson, *Regulatory Takings: The Emerging Doctrine and Its Implications for Public Administration*, Nov., 1994, available in LEXIS, News Library, Current News File ("The Supreme Court has declared itself only with respect to total economic viability. Continued silence on the issue of impact on economic viability that is less than total is unlikely to prove satisfactory to regulators, property owners, or the lower courts as a guide to action.").

38. The Court first began to include investment-backed expectations as part of its balancing test in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Pennsylvania Coal* "is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978). In *Pennsylvania Coal* the defendant sold the surface rights of its property to the plaintiff while retaining the right to remove all coal beneath the surface. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 412. The state then enacted the Kohler Act, which forbid the mining of "coal in such a way as to cause subsidence of . . . any structure used as a human habitation . . ." *Id.* at 412-13. The Court held that the Kohler Act, as applied to the defendant, constituted a taking under the Fifth Amendment. *Id.* at 414-15.

39. Williams, *supra* note 3, § 5A.15, at 166.

40. *Id.*

action that only "add[s] confusion to the issue."⁴¹ There is general consensus that a property owner is not entitled to the most profitable use, otherwise known as the "highest and best" use, of his land.⁴² There is also general consensus that a landowner has a constitutional right to receive a "reasonable return"⁴³ from his property.⁴⁴ Yet judicial precedent is not clear as to what constitutes a reasonable return, and this ambiguity adds confusion to the role that investment-backed expectations play in regulatory takings cases.

In deciding whether a regulation effects a taking, the Court also considers the segmentation of property interests or rights and the segmentation of parcels. The Court has instructed that one must examine the impact of the regulation on the complete "bundle of sticks" and not the impact of the regulation on one particular "stick." In addition, one should not divide the parcel and focus only on the portion affected by the regulation, but rather one must consider the regulatory impact on the entire parcel. In 1978 the Court stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole⁴⁵

41. Wise & Emerson, *supra* note 37. The Court demonstrated the relevance of profit to investment-backed expectations in *Pennsylvania Coal*. In holding that legislation precluding the mining of coal constituted a compensable taking of the defendant's property, the Court explained that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 414-15.

42. Wise & Emerson, *supra* note 37.

43. WILLIAMS, *supra* note 3, § 5A.12, at 156.

44. *Id.*

45. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978). In *Penn Central* the New York City Landmarks Preservation Commission rejected the property owner's alternative proposals to construct a fifty-five or a fifty-three story office building over Grand Central Station. *Id.* at 117. The property owner argued that it had established a taking "by showing that [it had] been denied the ability to exploit a property interest that [it] heretofore had believed was available for development . . ." *Id.* at 130. The Court denied that the property interest in question, the right to develop the air rights above Grand Central Station, was "so bound up with the investment-backed expectations of [the property owner] that governmental deprivation of these rights invariably—*i.e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking.'" *Id.* at 130 n.27.

Yet in 1992 the Court in dicta hesitated to reinforce this long-standing rule⁴⁶ and consequently added ambiguity to a once clearly defined factor in the balancing test.

As part of the balancing test the Court also considers whether there is an "average reciprocity of benefits."⁴⁷ "Under this notion a land use restriction is valid only when (and because) each person restricted derives some benefit from the fact that others in the vicinity are similarly restricted."⁴⁸ According to Williams, this test was rejected in *Penn Central Transportation Company v. New York City*⁴⁹ "since recognizing a landmark really doesn't help everyone else much."⁵⁰ Whether the test was rejected in *Penn Central* or not, the difficulty in defining a "benefit" certainly was recognized in *Lucas*.⁵¹ Thus "[w]here all this stands now is anybody's guess."⁵²

The variations of the balancing test have been described as "hollow rhetoric"⁵³ because "[t]here is . . . enough ambiguity in the case law so that members of the Court [are] able to choose appropriate language to support either side in almost any case"⁵⁴ This ambiguity, however, can also be regarded as affording great flexibility to courts in deciding regulatory takings cases. Flexibility allows courts to implement what may be termed a "fairness" principle: "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."⁵⁵

46. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7.(1992). The court observed:

Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id.

47. WILLIAMS, *supra* note 3, § 5A.10, at 152.

48. *Id.*

49. 438 U.S. 104 (1978).

50. WILLIAMS, *supra* note 3, § 5A.10, at 153.

51. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992) ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.").

52. WILLIAMS, *supra* note 3, § 5A.10, at 153.

53. ROHAN, *supra* note 27, § 52A.04[1], at 52A-56.

54. WILLIAMS, *supra* note 3, § 5A.17, at 169.

55. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

III. THE SUBJECT CASE: FACTUAL AND PROCEDURAL BACKGROUND OF *FLORIDA ROCK*

In 1972 Florida Rock Industries, Inc., a company that mines, processes, and sells crushed stone, purchased 1560 acres of wetlands in Dade County, Florida, for \$2,964,000, or approximately \$1900 per acre.⁵⁶ Florida Rock purchased the property intending to mine the limestone that lay beneath the surface.⁵⁷ Shortly thereafter the federal government enacted the Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the Clean Water Act.⁵⁸ Five years later the United States Army Corps of Engineers (Corps) implemented regulations pursuant to section 1344 of the Clean Water Act, requiring property owners to obtain permits before discharging dredged or fill material into "navigable waters," including wetlands.⁵⁹ Unaware of the need to obtain a permit, Florida Rock began mining without acquiring the requisite approval. The Corps issued a cease and desist order, forcing Florida Rock to stop its mining operations. Florida Rock then sought a permit for the entire 1560-acre parcel. The Corps responded that it would consider issuing a permit for only ninety-eight acres, a parcel of sufficient size to enable three years of excavation. It later denied the permit because the mining would cause "irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity."⁶⁰ Florida Rock responded by filing suit in the United States Court of Federal Claims,⁶¹ alleging that the denial of the permit constituted an uncompensated taking under the Fifth Amendment.

56. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1562 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

57. *Id.*

58. 33 U.S.C. § 1251-1387 (1988).

59. Section 1344 of the Clean Water Act states that the Secretary of the United States Army may issue permits through the Army Corps of Engineers "for the discharge of dredged or fill material into navigable waters at specified disposal sites." 33 U.S.C. § 1344.

60. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1563.

61. Under the Administrative Procedure Act, Florida Rock could have challenged: 1) the refusal of the Corps to consider the permit application for the 1560-acre parcel and 2) the denial of the permit application for the 98-acre parcel. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1563 n.5 (citing 5 U.S.C. § 706 (1988)). Instead, pursuant to the Tucker Act, Florida Rock filed a complaint in the Court of Federal Claims, which handles all takings claims against the United States. 28 U.S.C. § 1491 (Supp. V 1993). By not pursuing a remedy under the Administrative Procedure Act, Florida Rock implicitly conceded that the Corps had authority to act with respect to the parcel. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). It therefore was estopped from arguing this issue in later Tucker Act proceedings. *Id.*

In *Florida Rock I*⁶² the Court of Federal Claims held that the permit denial constituted a regulatory taking⁶³ and awarded Florida Rock \$1,029,000 plus attorney fees and simple interest.⁶⁴ The court found that mining was the only viable economic use for the parcel.⁶⁵ In prohibiting such activity the Corps effectively had reduced the value of the property from \$10,500 per acre⁶⁶ to a negligible amount, thus requiring compensation under United States Supreme Court precedent.⁶⁷

The Government appealed the decision to the Court of Appeals for the Federal Circuit.⁶⁸ In *Florida Rock II*⁶⁹ the Federal Circuit held that the trial court should not have focused on the immediate use of the property in determining the value of the parcel after the denial of the wetlands permit.⁷⁰ Instead the court should have established the "fair market value" of the property after the denial so that it could compare that figure to the fair market value of the property prior to the restriction.⁷¹ The court vacated in part the trial court's judgment and remanded for further proceedings.⁷²

62. *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. 160 (1985), *aff'd in part, vacated in part, and remanded*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

63. *Id.* at 179.

64. Brief for Appellant at 7-8, *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (No. 91-5156).

65. *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. at 164.

66. Brief for Appellant at 15, (No. 91-5156).

67. Although the case was decided seven years prior to *Lucas*, the court found support for its holding in other Supreme Court decisions. The Court of Claims observed, "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . .'" *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. at 165 ((quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981)) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

68. Decisions of the Court of Federal Claims are appealed to the Court of Appeals for the Federal Circuit under the Tucker Act. 28 U.S.C. § 1491 (Supp. V 1993).

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

70. *Id.* at 902, 905.

71. *Id.* at 903, 905. The fair market value of a parcel is determined by examining offers that have been made for the property as well as offers that have been made for similarly situated property in the vicinity of the particular parcel. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 169 (1990), *vacated and remanded*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

72. *Florida Rock Indus., Inc. v. United States*, 791 F.2d at 906. The Federal Circuit instructed the Court of Claims that when determining the post-regulation fair market value of the parcel on remand, it may consider "a relevant market made up of investors who are real but are speculating in whole or major part." *Id.* at 903. In passing, the appellate court noted that "the 'willing buyer' of the [fair] market value formula has got to be one who is *correctly informed* about the physical character of the land, as well as legal restrictions on its use." *Id.* at 902 (emphasis added).

In *Florida Rock III*⁷³ the Court of Claims once again held that the action of the Corps constituted a regulatory taking.⁷⁴ The court awarded Florida Rock \$1,029,000, or \$10,500 per acre, the fair market value of the property at the time of the taking.⁷⁵ To determine the damage award, the court heard evidence offered by both parties regarding the fair market value of the parcel after the permit denial. The Government's expert assessed the post-taking value at \$4000 per acre,⁷⁶ \$2100 more than Florida Rock had originally paid for the land.⁷⁷ He contended that the highest and best use of the property was investment and that there was a market for the property among knowledgeable investors.⁷⁸ Florida Rock's assessor argued that the highest and best use of the property was as a recreation site and that there was no market for the parcel among knowledgeable investors.⁷⁹ He assessed the post-taking value of the property at \$500 per acre.⁸⁰

The court accepted the opinion of Florida Rock's expert, noting that the decline in fair market value from \$10,500 to \$500 per acre constituted a "substantial reduction in value."⁸¹ Yet the court also

73. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. at 161.

74. *Id.* at 176.

75. *Id.* (citing *Yuba Natural Resources v. United States*, 904 F.2d 1577, 1580 (Fed. Cir. 1990)). Rather than awarding the difference between the fair market value of the property prior to or at the time of the taking, \$10,500 per acre, and the fair market value after the taking, \$500 per acre, the court simply awarded \$10,500 per acre. *Id.* The court explained, "Although the property retains a residual value of \$500 per acre, payment of the full fair market value at the time of taking effectuates the purpose of an action in inverse condemnation, which is to produce a result comparable to the one that would have been reached had the government directly condemned the property." *Id.* The court also awarded \$808,785 to Florida Rock in attorney fees and costs as well as compound interest on the \$1,029,000 damage award. *Florida Rock Indus., Inc. v. United States*, No. 266-82L, at 5, 6 (Cl. Ct. July 31, 1991) (order awarding attorney fees, costs, and compound interest).

76. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. at 172.

77. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1562 (Fed. Cir. 1994) *cert. denied*, 115 S. Ct. 898 (1995).

78. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. at 172. In making this determination the Government's expert used the standard comparable sales valuation method, a method that assesses the value of a parcel based upon the amounts paid by other property owners for land in the vicinity of the parcel in question. *Id.* at 169.

79. *Id.* at 172. As proof Florida Rock offered a survey indicating that landowners who had purchased property near Florida Rock's parcel were not sufficiently knowledgeable of the federal regulations restricting the development of those parcels. Florida Rock argued that these property owners would not have paid an average of \$6100 per acre for the restricted land if they had known about the federal regulations. The post-taking fair market value of Florida Rock's parcel therefore could not be determined using a comparable sales formula because no comparable sales existed. *Id.*

80. *Id.*

81. *Id.* at 175. The court rejected the opinion of the Government's expert because it was "convinced that the legal requirement that any investment market be

observed that this ninety-five percent reduction "in and of itself is not a sufficient basis for concluding that a taking has occurred."⁸² The court then stated it also must inquire into "[t]he owner's opportunity to recoup its investment"⁸³ to determine whether compensation was required.⁸⁴ It observed that Florida Rock had purchased the property for mining purposes and that the property owner could recoup its investment only by engaging in this activity.⁸⁵ The regulation thus resulted in a substantial impact on Florida Rock's investment.⁸⁶ The court concluded that a taking had occurred,⁸⁷ and the Government appealed for a second time to the Court of Appeals for the Federal Circuit.

On appeal the Government argued that the denial of the permit did not create a sufficiently detrimental impact on the value of Florida Rock's property to require compensation under the Fifth Amendment.⁸⁸ It contended that the Court of Claims, in determining the fair market value of the parcel after the permit denial, improperly disregarded the actual market in which properties similar to that of Florida Rock had been purchased and sold for substantial values.⁸⁹ The Government also argued that the court erred in concluding that comparable land sales in the vicinity were irrelevant because the purchasers lacked knowledge of applicable governmental restrictions.⁹⁰ It asserted that the concept of "knowledgeable buyers and sellers" is used in fair market value analysis because it is presumed to indicate actual market conditions⁹¹ and that the actual

among investors with knowledge of the restrictions on the land ha[d] not been met." *Id.*

82. *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978)).

83. *Id.* at 176. In stating that it should consider "[t]he owner's opportunity to recoup its investment," the court acknowledged the relevance of "investment-backed expectations" to its regulatory takings analysis. *Id.*

84. *Id.* The Supreme Court decided *Lucas* in 1992, two years after the Court of Claims decided *Florida Rock III*. If *Lucas* had preceded *Florida Rock III*, the court could have held that the 95% reduction in value constituted a compensable taking in and of itself because the permit denial essentially forced Florida Rock "to sacrifice all economically beneficial uses" of its property. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992). The categorical *Lucas* rule would have eliminated the need for further inquiry into Florida Rock's opportunity to recoup its investment.

85. *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. at 176 ("[T]here is no dispute that [Florida Rock] purchased the property for the sole purpose of limestone mining; there is virtually no other business by which [Florida Rock] could 'recoup its investment or better, subject to the regulation.'").

86. *Id.*

87. *Id.*

88. Brief for Appellant at 29, *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (No. 91-5156).

89. *Id.* at 37-38.

90. *Id.*

91. *Id.* at 34 n.13.

market should not be disregarded simply because it consists of "unknowledgeable" buyers and sellers.⁹² "As long as there is an actual market for land . . . in which properties are being bought and sold at substantial prices, lands located within that market area have substantial economic values."⁹³ The Government further contended that the court "was not entitled to substitute its own concepts of economic wisdom and prudent investment for those of the actual marketplace."⁹⁴ Notwithstanding the permit denial, Florida Rock's parcel retained economic value because it could be sold on the actual market at a substantial price.⁹⁵ Thus the action of the Corps did not constitute a compensable taking.⁹⁶

Florida Rock responded that the Federal Circuit in *Florida Rock II* had instructed the Court of Claims on remand to determine whether an actual market existed among purchasers with knowledge of the governmental restrictions affecting the land.⁹⁷ After hearing expert testimony from both sides, the Court of Claims in *Florida Rock III* rejected the Government's assessment of the post-taking fair market value because it was not based upon the actions of informed buyers.⁹⁸ Florida Rock argued that the trial court's finding was made pursuant to the instructions of the Federal Circuit and that the Government's contention that unknowledgeable buyers may be considered in determining post-taking value was contrary to the appellate court's instructions.⁹⁹

In *Florida Rock IV*¹⁰⁰ the appellate court rejected the trial court's fair market value analysis that led to its finding that the Government's regulatory action denied Florida Rock essentially all eco-

92. *Id.* at 35.

93. *Id.* The conclusion that Florida Rock's property retained economic value is derived not only from the fact that similarly restricted parcels in its vicinity had been bought and sold for substantial values but also from the fact that Florida Rock actually received an offer to purchase the property, despite the permit denial. In *Florida Rock III* the company's President testified at trial that he had received a \$3.5 million offer for the parcel in June of 1981. *Id.* at 12 n.5. He further testified that he believed the land to be worth in excess of \$10,000 per acre at that time. *Id.*

94. *Id.* at 37. Just as the court is not entitled to substitute its own economic wisdom for that of the actual marketplace, neither is Florida Rock. "While Florida Rock might have been reluctant to sell wetlands to willing, but 'unknowledgeable,' purchasers in order to protect those prospective buyers from their own supposed folly, the cost of such rectitude is not billable to the United States under the Fifth Amendment." *Id.* at 36.

95. *Id.* at 35. See *supra* note 93.

96. *Id.* at 29.

97. Brief for Appellee at 14, *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) (No. 91-5156).

98. *Id.* at 15.

99. *Id.*

100. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

nomically viable use of its property.¹⁰¹ Although the Federal Circuit in *Florida Rock II* had instructed the Court of Claims on remand to examine comparable sales made by “correctly informed” buyers,¹⁰² it did not intend the detailed examination into the “motivation and sophistication” of such buyers that Florida Rock had pursued.¹⁰³ The trial court erred by disregarding the property value assessment offered by the Government¹⁰⁴ and accepting the testimony of Florida Rock’s expert, which “rejected *all* of the comparable sales values on the principle that none of the purchasers were sufficiently sophisticated and knowledgeable.”¹⁰⁵ Thus the trial court’s conclusion that the action of the Corps reduced the value of the property by ninety-five percent was based upon the incorrect premise that the property had a post-regulation value of \$500 per acre.

While expressing its support of the Government’s assessment,¹⁰⁶ the Federal Circuit at the same time refused to hold that the assessment was correct. It remanded the case again for a recalculation of the fair market value and a determination of whether the diminution in value was sufficient to constitute a taking.¹⁰⁷ The court also refused to instruct the trial court that Florida Rock would not be entitled to compensation if the post-regulation value of the property is \$4000 per acre. The Federal Circuit told the Court of Claims that once the trial court determines the post-regulation fair market value of the property, it then must decide the takings issue. The Court of Claims should resolve this issue by examining the change in fair market value caused by the regulation and the landowner’s opportunity to recoup its investment.¹⁰⁸ The appellate court instructed the trial court that, should the property be found to have retained some

101. *Id.* at 1565-66.

102. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 902 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987). *See also supra* note 72.

103. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1567.

104. The Federal Circuit emphasized that the trial court in *Florida Rock III* had disregarded the appellate court’s approval of the assessment offered by the Government’s expert, an approval expressed in *Florida Rock II*. In *Florida Rock II* the Federal Circuit had stated, “We are of the opinion that [the Government expert’s] testimony, if considered and believed, established the existence of a market in which Florida Rock could have disposed of the property and mitigated the severity of the regulatory action here involved, and the [trial] court should have considered such a possibility.” *Florida Rock Indus., Inc. v. United States*, 791 F.2d at 903.

105. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1566. The Federal Circuit emphatically rejected the analysis of Florida Rock’s expert and the trial court’s reliance thereon, and held: “That was error—contrary to our instruction in *Florida Rock II*, contrary to generally accepted understandings of market valuation, and finally, contrary to the working assumption of a free market.” *Id.*

106. *See supra* note 104.

107. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1567.

108. *Id.* This is the same instruction that the Federal Circuit gave to the Court of Claims in *Florida Rock II*. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

value, the court must ask two questions: first, "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur,"¹⁰⁹ and second, "what that proportion is."¹¹⁰ The Federal Circuit answered its first question by announcing that "[n]othing in the Fifth Amendment limits its protection to only 'categorical' regulatory takings, nor has the Supreme Court or this court so held."¹¹¹ The appellate court did not, however, answer the second question and determine for the trial court what residual fair market value would be sufficient to overcome Florida Rock's takings challenge. Thus the trial court must determine on remand whether a sixty percent diminution in value is sufficient to constitute a taking.

The Federal Circuit observed that there is "little direct case law guidance"¹¹² on "when a partial loss of economic use of the property has crossed the line from a noncompensable 'mere diminution' to a compensable 'partial taking.'"¹¹³ The appellate court proposed that the trial court balance competing values.¹¹⁴ It explained that the balancing analysis should consider whether the Government acted fairly and reasonably in regulating the property, whether direct benefits accrue to the property or are shared widely while costs are focused on only a few, and whether economically realistic, alternative activities are allowed on the property.¹¹⁵ As this Note goes to print the Court of Claims has not resolved whether the post-taking fair market value of Florida Rock's property is \$4000 per acre. It also has not resolved whether the denial of the wetlands permit constitutes a compensable taking under the Fifth Amendment.

IV. DISCUSSION

A. *The Florida Rock IV Decision*

The Court of Appeals for the Federal Circuit could have instructed the Court of Claims in *Florida Rock IV*¹¹⁶ that if the denial of the federal wetlands permit diminished Florida Rock's property by sixty percent, from \$10,500 to \$4000, then Florida Rock is not entitled to compensation under the Fifth Amendment. The court could have explained such a holding by noting that, despite the sixty percent decline, Florida Rock would still receive a return of over

109. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1568.

110. *Id.*

111. *Id.* at 1570.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1571.

116. *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

one hundred percent on its investment.¹¹⁷ Instead the appellate court observed that if the fair market value of the parcel after the permit denial is \$4000 per acre, "the correct outcome [regarding the takings issue] is no longer clear."¹¹⁸ The Federal Circuit thus opened the door to a possible finding of the Court of Claims that a diminution of sixty percent constitutes a compensable partial taking. The appellate court justified its action by declaring that there is little difference between a taking by physical invasion and one by governmental regulation and that both require compensation.¹¹⁹ This declaration encourages the Court of Claims on remand to greatly expand current regulatory takings law by finding a violation of the Takings Clause.

Although the Federal Circuit instructed the Court of Claims to use the proper test (the flexible balancing approach mandated by the Supreme Court), the Federal Circuit, in implicitly supporting the finding of a compensable partial taking, ignores the potential negative consequences of such a result.¹²⁰ In addition, the appellate court encourages expansion of Supreme Court precedent in a manner that the Supreme Court has refused to clearly support. Despite the fact that the Court has remarked in dicta that it is possible for a landowner "whose deprivation is one step short of complete"¹²¹ to recover depending upon the weighing of balancing test factors,¹²² it has not granted certiorari in a case with a factual situation requiring it to decide the partial takings question.¹²³ Given that the Supreme Court opened the door in *Lucas* dicta to the finding of a partial taking, the Federal Circuit is justified in addressing the issue. As the court observed, "Nothing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property."¹²⁴ Yet the Federal Circuit is not correct in encouraging the Court of Claims to find a partial taking where a property owner has been deprived of only sixty percent of the fair market value of its property and where the landowner will receive a reasonable return on its investment. If the Court of

117. See *supra* text accompanying notes 76 and 77.

118. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1567.

119. See *infra* note 125 and accompanying text.

120. See *infra* part IV.B.

121. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 n.8 (1992).

122. *Id.*

123. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Because the regulation in *Lucas* deprived the landowner of all economically viable use of his property, it was not necessary for the Court to apply the balancing test and determine the percentage of diminution in value that requires compensation. *Id.* at 2896 n.9. The Court merely applied an "all-or-nothing" categorical rule. *Id.* at 2893. See also *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995) (denying certiorari where the record indicates a 60% diminution in value).

124. *Florida Rock Indus., Inc. v. United States*, 18 F.3d at 1568.

Claims finds that the permit denial has effected a taking and the Federal Circuit affirms this decision, as it hints that it will do, the Federal Circuit will have set a dangerous precedent that may result in further unrestrained, and potentially imprudent, judicial decision-making.

In explaining its decision to compensate property owners for partial regulatory takings, the Federal Circuit rationalized that there is no difference between a taking by physical invasion, which is compensable regardless of its dimension, and a regulatory taking.

Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes.¹²⁵

While Supreme Court Justices have disagreed as to whether regulatory takings cases should be distinguished from physical invasion cases,¹²⁶ the Court has not *held* that the two governmental actions require equal treatment. Physical invasion of private property by the government infringes upon rights of the landowner that are not affected by regulatory restrictions. "To the extent that the government permanently occupies physical property, it effectively destroys"¹²⁷ the rights of the owner to possess, use, and dispose of the property. More important, physical occupation denies the owner the right to exclude, "one of the most treasured strands in an owner's bundle of property rights."¹²⁸ The failure of the Federal Circuit in *Florida Rock IV* to distinguish between physical invasion and regulatory cases allows the court to justify its novel partial takings doctrine and send Fifth Amendment jurisprudence plunging down an unguided path. The court's decision may significantly impair, or even destroy, environmental laws and land use regulations

125. *Id.* at 1569. Although the court explicitly states that physical invasion and regulatory cases should be treated alike, its decision indicates a different view. If both types of cases were treated equally, then *Florida Rock* would be entitled to compensation as long as the permit denial diminished the value of the property by even the slightest extent, as is true in physical invasion cases. Yet in refusing to hold that *Florida Rock* has suffered a taking, the court is actually acknowledging that not all diminutions caused by regulatory action are entitled to compensation. The court questions whether a 60 percent diminution is sufficient to constitute a taking and instructs that this question be answered based upon other factors in the balancing equation. Thus the court is actually stating that physical invasion cases, which utilize a categorical rule, and regulatory cases, which use a balancing test in most situations, should *not* be treated alike.

126. See WILLIAMS, *supra* note 3, § 5A.20, at 173-74.

127. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

128. *Id.*

that have been implemented to protect the public health, safety, and general welfare.

The United States Supreme Court has crafted takings precedent carefully so as to balance competing interests. Although this balancing has succeeded in allowing regulatory measures to be enacted that achieve legitimate governmental purposes, the balance is flawed. When courts use categorical and inflexible rules to hold noncompensable regulatory actions that seriously affect the value of private property, they create a sense in the public of fundamental unfairness and a distrust of all regulatory measures. This causes courts like that in *Florida Rock IV* to attempt to legislate a remedy judicially. These reactionary, short-sighted attempts alleviate the problem at hand but create problems of an even greater magnitude. They drastically tip the scales in favor of private property rights to the detriment of the public good.

Flaws in the judicial balancing approach to regulatory takings should be confronted by Congress. Informed, well-drafted legislation based on competent research will provide guidance to courts and thereby increase uniformity and predictability in judicial decision-making. It will provide notice to property owners and to drafters of future regulatory safeguards. Inequitable regulatory takings decisions can be addressed by adopting partial takings legislation that respects both the rights of individual private property owners and the goals of environmental and land use laws and regulations.

B. Current Takings Legislation

No current federal statute deals with regulatory takings. Takings law is crafted judicially. It has been argued that judge-made takings law leads to unpredictable and conflicting results.¹²⁹ It also has been argued that the results are in fact predictable but unfair. Under current law the federal government through regulatory action may diminish the economic value of private property by as much as ninety-nine percent and not be obligated to compensate the owner.¹³⁰ In an effort to address this problem and bypass decades of court rulings,¹³¹ the United States House of Representatives passed the Private Property Protection Act of 1995¹³² on March 3,

129. Bill Vail, *Proposed State Bill Addresses Property Rights, Just Compensation*, NEW ENG. AGRIC., Mar.-Apr. 1995, at 7.

130. *Id.* Most courts do not require compensation unless government action "render[s] the property virtually worthless." *Property Rights: Bill Amended in House; Costs Debated*, Greenwire, Mar. 3, 1995, available in LEXIS, Environmental Law Library, Current News File (quoting Brigid Schulte, PHILA. INQUIRER).

131. Scott Allen, "Contract" Reframes Issue of Environment's Worth, BOSTON GLOBE, Feb. 6, 1995, (Science & Technology), at 25.

132. H.R. 925, 104th Cong., 1st Sess. (1995). The House passed a version of H.R. 925 and then incorporated it into H.R. 9, 104th Cong. 1st Sess (1995). See *infra* text accompanying note 136.

1995. Among other things, the Act is an attempt to implement the Republican "Contract with America"¹³³ by creating a statutory interpretation of the Takings Clause of the Fifth Amendment.¹³⁴

The House passed the Private Property Protection Act by a vote of 277 to 148.¹³⁵ The legislation then was incorporated as Title IX into the Job Creation and Wage Enhancement Act of 1995, which the House passed 277 to 141.¹³⁶ Title IX greatly expands the judicial definition of "regulatory taking."¹³⁷ It allows property owners to seek compensation from the federal government where agency action taken pursuant to specified federal laws and regulations reduces property values by twenty percent or more.¹³⁸ If property values are reduced by fifty percent or greater, landowners may require the federal government to purchase the property.¹³⁹ Although an earlier version of the bill encompassed all federal agency action, Republican leaders narrowed the scope to placate moderate members of the party who feared the potential costs of the broader draft.¹⁴⁰ The legislation as passed applies only to federal farm bills, select Western water rights regulations, the Endangered Species Act, and the wetlands provisions of the Clean Water Act.¹⁴¹ Endangered species and wetlands regulations were targeted because the House Judiciary Committee believed these measures to be the most problematic,¹⁴² "prompt[ing] the most angry complaints from property

133. The "Contract with America" is a legislative agenda designed by the new Republican majority for the congressional session beginning in January 1995. The objective of the plan is "to make the regulatory burden [of governmental agencies] a matter of conscious choice rather than of accident." John H. Cushman Jr., *Republicans Plan Sweeping Barriers to New U.S. Rules*, N.Y. TIMES, Dec. 25, 1994, § 1, at 1 (quoting Random House/Times Books tract on the "Contract with America").

134. *Property Rights: Bill Amended in House; Costs Debated*, *supra* note 130.

135. *Regulation: "Takings" Bill Passes; Reactions Pour In*, Greenwire, Mar. 6, 1995, available in LEXIS, Environmental Law Library, Current News File.

136. H.R. 9, 104th Cong., 1st Sess. (1995). Two hundred nineteen Republicans voted for the Act, eight voted against. Fifty-eight Democrats supported the Act, 132 opposed. The Act was sponsored by 131 Republicans and four Democrats. *Id.*

137. Tom Kenworthy, *House Republicans Push Property-Owner Compensation Bill Toward Vote*, WASH. POST, Mar. 3, 1995, at A7.

138. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135. Originally the Republicans supported a 10% threshold. This was abandoned as politically unfeasible and impractical. H. Jane Lehman, *Property Rights Fight Heats Up on Hill; Environmental Concerns, Reimbursement Costs at Center of Debates*, WASH. POST, Feb. 18, 1995, at F1.

139. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135 (citing Tom Kenworthy of WASH. POST).

140. Kenworthy, *supra* note 137, at A7.

141. Melissa Healy, *House Approves Bill to Give Landowners Relief; Regulations: People Would be Paid if Environmental Laws Hurt Property Values. Plan Faces Uncertainty in Senate*, L.A. TIMES, Mar. 4, 1995, at A1.

142. *Property Proposal Revised*, WASH. POST, Feb. 16, 1995, at A8.

owners."¹⁴³ Republicans rejected a Democratic amendment that would have limited the legislation to new regulations.¹⁴⁴ Rebuffing Supreme Court precedent,¹⁴⁵ the House bill allows property owners to seek compensation where only a portion of the property is affected by the regulation.¹⁴⁶ The bill has been called "one of the most divisive elements of the GOP 'Contract with America' "¹⁴⁷ and likely will face opposition¹⁴⁸ and revision¹⁴⁹ in the Senate.¹⁵⁰ The Clinton Administration, a strong supporter of private property rights, has voiced its opposition to the takings legislation.¹⁵¹

Supporters of the House bill argue that existing federal regulatory measures are excessive, severely hampering business growth¹⁵² and infringing upon private property rights.¹⁵³ House Majority Whip Thomas DeLay, a Republican from Texas, explained, "We want to make sure that American small business and the American taxpayer don't become the next endangered species."¹⁵⁴ Supporters urge that legislation is needed to diminish the role of government¹⁵⁵ and in-

143. *Property Rights: House Panel OKs Bill; Trouble on Floor?*, Greenwire, Feb. 17, 1995, available in LEXIS, Environmental Law Library, Current News File.

144. *Id.*

145. See *supra* text accompanying note 45.

146. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135.

147. Ken Miller, "Takings" Bills Called Liberation from Regulations, Gannett News Service, Feb. 15, 1995, available in LEXIS, Environmental Law Library, Current News File.

148. Healy, *supra* note 141, at A1.

149. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135.

150. The takings legislation benefitted from Democratic support in the House yet Senate Democrats may not be as cooperative. Healy, *supra* note 141, at A1. Senator John H. Chafee, a Republican from Rhode Island and chairman of the Senate Environment and Public Works Committee, described the House bill as "a prescription for gridlock and a regulatory straitjacket," predicting that the Senate's version would not be as drastic as that of the House. *Id.*

151. Lehman, *supra* note 138, at F1.

152. Supporters stress the urgency of reform by arguing that businesses will be forced to close if the federal government does not start compensating property owners for regulatory takings. *Property Rights: Bill Amended in House; Costs Debated*, *supra* note 130.

153. Harold Gilliam, *Does Anybody Care About the Environment Anymore?*, S.F. CHRONICLE, Mar. 5, 1995, at Z1. See also *Former Senators Blast House Regulatory Bill*, Reuters North American Wire, Feb. 21, 1995, available in LEXIS, Environmental Law Library, Current News File (takings bill is needed "to curb federal regulatory excesses, which . . . stymie business growth and infringe on private property rights"); Miller, *supra* note 147 ("Farmers, ranchers and . . . water-users, live with the constant fear that a single stroke of the bureaucratic pen could devastate the use and value of their property . . .") (quoting Republican Representative Wayne Allard of Colorado).

154. Allen, *supra* note 131, (Science & Technology) at 25.

155. Carolyn Pesce, *Private Property vs. Public Rights*, USA TODAY, Feb. 6, 1995, at 3A.

crease regulatory accountability.¹⁵⁶ Noted one House Republican, it is time to "restore the power of the people . . ." ¹⁵⁷ Advocates of the bill downplay its novelty by asserting that the Constitution has long protected private property rights by requiring compensation for governmental takings.¹⁵⁸ They stress that the convenience afforded by avoiding the compensation requirement is not a sufficient reason to justify uncompensated taking of land¹⁵⁹ and that the costs of the bill will not be as great as opponents say because the legislation will deter future regulatory action that restricts the use of private property.¹⁶⁰ Supporters also assert a "fairness" argument. They emphasize that individuals should not be forced to bear the burden of regulatory actions that benefit society as a whole.¹⁶¹

Republicans have encouraged support for the takings legislation by asserting that it is the result of a strong "grassroots" movement¹⁶² and a "response to the growing frustration of small and large property owners with land use restrictions stemming from con-

156. National Association of Home Builders President Jim Irvine notes that "[f]or the first time in decades, government bureaucrats will now be held accountable when they deny an individual the use of his property." *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135.

157. Scott Allen, *Gore Blasts GOP on Environmental Issues; House Bills on Regulation are Derided*, BOSTON GLOBE, Mar. 6, 1995, (National/Foreign), at 5 (quoting Representative Richard Pombo from California).

158. *Property Rights: How's It Playing?; Opinion Writers Split*, Greenwire, Mar. 7, 1995, available in LEXIS, Environmental Law Library, Current News File ("Property rights are protected by the US Constitution.") (quoting BOSTON HERALD). See also *Property Rights: How's It Playing? 4 of 5 Oppose Bill*, Greenwire, Mar. 2, 1995, available in LEXIS, Environmental Law Library, Current News File ("There's nothing novel about the concept of takings compensation. The Bill of Rights, specifically the Fifth Amendment, requires it.") (quoting WASH. TIMES).

159. *Property Rights: How's It Playing?; Opinion Writers Split*, *supra* note 158 ("Constitutional rights may not be disregarded for convenience.") (quoting BOSTON HERALD).

160. *Property Rights: Bill Amended in House; Costs Debated*, *supra* note 130. See also Miller, *supra* note 147 (Takings legislation "won't cost the government one dime" as long as it stops attacking the rights of property owners.) (quoting Representative W. J. "Billy" Tauzin, a Democrat from Louisiana).

161. The American Legislative Exchange Council argues that "[e]nvironmental protection benefits society; therefore, society should bear the costs" and that "[i]t is inequitable for government to shift the cost of environmental protection to a small number of private property owners who are coerced into 'donating' their assets . . . to the public without just compensation." Jennifer Mears, *Road to Property Rights is Often Full of Bumps; Timber: No State Has Approved a Broad Formula for Compensating Landowners for Seized Land. In Mississippi a Landowner Must be Compensated if Acreage is Devalued by 40% or More by Forestry Regulations*, L.A. TIMES, Jan. 15, 1995, at B3. See also Allen, *supra* note 131, (Science & Technology) at 25 ("If the public believes it is a valuable resource, then the public should be willing to step up and make a contribution.") (quoting Margaret Ann Reigle, chairwoman of the Fairness to Land Owners Committee).

162. *Curbs on Environment Rules Gain*, CHI. TRIB., Mar. 3, 1995, (News), at 6.

servation laws that seek to protect wetlands and wildlife."¹⁶³ According to one observer, the increasing number of environmental regulations is the impetus for the current property rights movement, which began in the mid-1980s¹⁶⁴ and now consists of as many as 600 property rights groups nationwide.¹⁶⁵ Yet Republican supporters of the bill have been criticized for misrepresenting the actual supporters and beneficiaries of takings legislation. Many groups in the powerful property rights movement are supported not by small landowners but by agricultural and industrial trade associations, lobbyists for large energy, mining, and timber companies, and conservative public interest law firms.¹⁶⁶ Opponents of the bill argue that business and special interest groups are the actual beneficiaries of takings legislation¹⁶⁷ and that "the intellectual fodder of this movement, a host of anecdotes featuring 'the poor American in pursuit of the American Dream who now finds that a heartless bureaucrat has appropriated his hard-earned property to save the habitat of the tawny grubcatcher,' is completely manufactured."¹⁶⁸ Not only have special interest groups affected federal takings legislation, but they also have had a significant impact on takings reform in state legislatures.¹⁶⁹

163. Kenworthy, *supra* note 137, at A7.

164. Mears, *supra* note 161, at B3.

165. *Property Rights: N.Y. Times Profiles the Movement*, Greenwire, Jan. 9, 1995, available in LEXIS, Environmental Law Library, Current News File (citing Keith Schneider of N.Y. TIMES).

166. *Id.* See also Andre Carothers, *Don't Beat the Retreat; Environmentalism*, Information Access Co., Feb. 1995, available in LEXIS, Environmental Law Library, Current News File ("An anti-environmental backlash has indeed appeared, but it is orchestrated not by the common folk but by corporations, conservative think-tanks and their well-heeled allies in Congress.").

167. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135 ("The Republican Party is still very closely tied to business, and in these measures . . . business is getting its payoff.") (quoting Alan Murray of WALL ST. J.); ("The Congress has passed anti-environmental bills before, but never before has it been so clear that a House of Congress is completely controlled by the special interests that pollute America.") (quoting Carl Pope, Executive Director of the Sierra Club).

168. Carothers, *supra* note 166.

169. *Id.* ("[A]lmost all of the 'takings' bills that have been proposed in state legislatures around the country are written by a little right-wing think tank, the American Legislative Exchange Council, funded by the usual long-lived cast of conservative businesses and private foundations.").

State legislators are currently introducing or debating property rights legislation in Alabama, Arizona, California, Colorado, Delaware, Florida, Maine, Maryland, Mississippi, Montana, New Mexico, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, and Wyoming. *Property Rights II: Many States Considering Takings Bills*, Greenwire, Jan. 26, 1995, available in LEXIS, Environmental Law Library, Current News File (citing National Audubon Society release, Jan. 12, 1995).

As many as seven takings reform bills will be introduced in the Maine Legislature during the 1995 session. Andrew K. Weegar, *Take This Law and Dismantle It*, ME. TIMES, Feb. 17, 1995, at 14. One bill, introduced by State Senator Dana Hanley, a Republican from Oxford, requires compensation where state or local governmental

Opponents of the House bill criticize the measure as an "extreme,"¹⁷⁰ back-handed,¹⁷¹ and "transparent"¹⁷² attempt to destroy environmental standards under the guise of protecting private property rights.¹⁷³ They stress that the new Republican majority promised to enact its legislative agenda within the first one hundred days of the 1995 congressional session and that "[t]here is little evidence that in its 100-day rush to the deadline, Congress has pondered deeply the implications of its decrees."¹⁷⁴ Critics charge that the legislation will undermine public health and safety by forcing the federal government to stop enforcing environmental laws and regulations encompassed by the bill¹⁷⁵ and by deterring the passage of new environmental measures.¹⁷⁶ Edmund Muskie, a former chairman of the Senate Environmental Pollution subcommittee, remarked that the bill "would halt 25 years of accomplishment and turn the clock back to the days when the special interests made the rules and the people absorbed the risks."¹⁷⁷ Critics of the bill stress that the failure to enforce environmental laws and regulations will result in uncontrolled development that will harm neighboring landowners¹⁷⁸ and have a potentially massive financial impact.¹⁷⁹

To avoid the consequences of uncontrolled development, the government could continue to implement and enforce environmental regulations. Yet the costs of enforcement could be as staggering as

regulation decreases the fair market value of private property by more than 50% of its preregulatory fair market value. L.D. 170, § 843 (117th Legis. 1995). Opponents have criticized the bill and other takings legislation as "a solution in search of a problem . . ." Weegar, *supra*, at 14.

170. Allen, *supra* note 157, (National/Foreign), at 5 (takings bill and other bills aimed at deregulation "are extreme measures that would make the problems they purport to address even worse") (quoting Vice President Al Gore).

171. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135 (EPA Administrator Carol Browner described the Republican bill as a "back-door effort to dismantle public health protection.")

172. *Id.* (An Environmental Defense Fund attorney criticized the bill as "a transparent effort to gut environmental standards at great cost to taxpayers.")

173. Pesce, *supra* note 155, at 3A (Supporters of takings legislation are "using the property rights issue to gut environmental laws . . .") (quoting a member of the environmental group Clean Water Action).

174. Gilliam, *supra* note 153, at Z1.

175. Healy, *supra* note 141, at A1 ("Environmental groups warn[] that the takings bill . . . [will] cost taxpayers tens of billions of dollars a year or [will] force the federal government to effectively stop enforcing key environmental laws.")

176. *Id.* ("The effect of the new legislation [will] be to halt many regulations at their inception . . .") (quoting Representative Christopher Cox, chairman of the House Republican Policy Committee).

177. *Former Senators Blast House Regulatory Bill*, *supra* note 153.

178. Lehman, *supra* note 138, at F1.

179. *Property Rights: How's It Playing?; Opinion Writers Split*, *supra* note 158 ("(The takings bill) would drain billions of dollars from the Treasury, chill efforts to protect endangered species and hurt pollution control, while ignoring the huge public costs of uncontrolled development.") (quoting MILWAUKEE J.).

the costs of uncontrolled development.¹⁸⁰ In 1994 the Congressional Budget Office estimated it would cost the federal government \$10 billion to \$45 billion per year to compensate landowners whose property value was affected by the wetlands protection program.¹⁸¹ Interior Secretary Bruce Babbitt estimated that the bill could cost the Interior Department over \$7.6 billion dollars, its current annual budget.¹⁸² One of the major problems with the takings bill is that no one knows what the new entitlement program will cost, although the Clinton administration gave a preliminary estimate of several billions of dollars.¹⁸³

Opponents not only have focused on the environmental and economic impact of the legislation but also on other adverse consequences. They argue that it will be a "bonanza for trial lawyers,"¹⁸⁴ encouraging endless litigation seeking compensation.¹⁸⁵ It also will encourage speculative land purchasing.¹⁸⁶ The beneficiaries of the bill will not be small property owners but "wealthy corporate developers,"¹⁸⁷ thus assisting the few at the expense of the many.¹⁸⁸ Opponents argue that the property rights movement has lost sight of the fact that environmental regulations benefit the public as a whole¹⁸⁹ and often increase the value of individuals' property.¹⁹⁰ Senator John H. Chafee, a Republican from Rhode Island and

180. Critics of the bill contend that it will not deter implementation of future regulation. *See id.* ("If there were some reason to believe that bureaucrats would be deterred by the potential cost of their meddling, that would be a point in favor of the GOP bill. But what deterrent is there when taxpayers have to pick up the tab for unnecessary regulation?") (quoting GREENSBORO (N.C.) NEWS & RECORD).

181. Healy, *supra* note 141, at A1.

182. *Property Rights: Bill Amended in House; Costs Debated*, *supra* note 130.

183. Kenworthy, *supra* note 137, at A7.

184. Miller, *supra* note 147 (quoting Richard Codd of the American Planning Ass'n).

185. *Regulation: "Takings" Bill Passes; Reactions Pour In*, *supra* note 135 ("At a minimum, this will bring on endless litigation seeking compensation.") (quoting Hal Candee, an attorney for the Natural Resources Defense Council).

186. Georgetown University law professor J. Peter Byrne called the bill "profoundly stupid." David G. Savage, *Administration Blasts Plan to Compensate Landowners; Regulation: House GOP Proposal to Pay for Devalued Property is Called "Stupid." Advocates Say It's Needed to Ease Heavy-Handed Federal Rules*, L.A. TIMES, Feb. 11, 1995, at A13. "If the bill becomes law, tongue in cheek, Byrne said he will 'buy a wetland on Virginia's eastern shore, request a permit to fill it, get potentially massive compensation under H.R. 9 . . . , pay off my mortgage and have enough left to build a house on dry land.'" *Id.*

187. Allen, *supra* note 157, (National/Foreign), at 5 (quoting Vice President Al Gore).

188. Pesce, *supra* note 155, at 3A (citing Lisa Guide, spokeswoman at the U.S. Interior Department).

189. Mears, *supra* note 161, at B3.

190. Representative Sam Farr, a Democrat from California and owner of coastal property, observed that property values have risen as result of governmental restrictions. Miller, *supra* note 147.

chairman of the Environment and Public Works Committee, urged that “[t]he most important thing to keep in mind is that a major purpose behind much of our environmental law is to protect private property rights These laws protect our health, life and property from the adverse consequences of somebody else’s pollution and other nuisances imposed on us by our neighbors as they pursue their own interests.”¹⁹¹ Criticism of the Republican proposal also condemns its lack of common sense, for the bill ultimately “compensate[s] property owners for obeying the laws on public health and safety.”¹⁹² The legislation also encourages an egoistic and short-sighted attitude: “If I can’t do exactly what I want with my property, no matter who I hurt, the taxpayers have to pay me.”¹⁹³ Richard Epstein, a “guru of the property rights movement,”¹⁹⁴ observes that “[t]he danger is ‘a tendency (for the public) to get so upset about the government that you think private ownership means unlimited use of land.’”¹⁹⁵ Lastly, opponents emphasize that the takings measure will “sweep away years of constitutional law”¹⁹⁶ by “replac[ing] the constitutional standards of fairness and justice with a rigid, one-size-fits-all approach that focuses on the extent to which regulations affect property value.”¹⁹⁷

The balancing test of the Supreme Court rejects a “one-size-fits-all” approach. This does not mean that a bright line, legislatively-mandated method of determining when a regulatory taking occurs is necessarily detrimental to environmental and land use safeguards. Bright line legislation must be tailored to allow courts to consider the varying circumstances in particular cases. It must also address the actual problem without creating additional adverse repercussions. Thus, in drafting regulatory takings legislation, one must first determine the extent of the current law’s negative consequences. Private property owners, small and large, have suffered from federal regulatory measures that substantially diminish the economic value of their property yet fail to meet the “all-or-nothing” *Lucas* test. This fact must be acknowledged by opponents of takings reform if a satisfactory solution is to be found. On the other hand, supporters

191. Ken Miller, *Senate Environmental Chairman Cool to Gutting Protective Laws*, Gannett News Service, Jan. 31, 1995, available in LEXIS, Environmental Law Library, Current News File.

192. Gilliam, *supra* note 153, at Z1 (quoting Sierra Club President Robert Cox). See also Kenworthy, *supra* note 137, at A7 (The legislation will force taxpayers “to pay landowners not to pollute or degrade public resources.”) (quoting Representative Elizabeth Furse, a Democrat from Oregon).

193. Healy, *supra* note 141, at A1 (quoting Pam Goddard of the Sierra Club).

194. Pesce, *supra* note 155, at 3A.

195. *Id.*

196. *Regulation: “Takings” Bill Passes; Reactions Pour In*, *supra* note 135 (quoting EPA Administrator Carol Browner).

197. Lehman, *supra* note 138, at F1 (quoting Associate Attorney General John R. Schmidt).

must recognize that the number of individual landowners suffering under federal regulations is not as vast as property rights groups maintain. More than ninety-eight percent of the permits requested to fill in or move wetlands are granted under the Clean Water Act, and the Fish and Wildlife Service prohibits development proposals in only a tenth of one percent of its 10,000 annual reviews under the Endangered Species Act.¹⁹⁸ The *Lucas* test should be expanded to aid property owners who experience extreme diminution in value because of federal regulation. This does not mean that every landowner who is affected financially by an environmental law or land use ordinance should be compensated. Supporters of takings legislation have a legitimate complaint where individuals are harmed substantially, yet a solution requiring compensation where property values are decreased by twenty percent or more is "dramatic overkill."¹⁹⁹ The Supreme Court has adopted an approach that strives to balance the public interest and individual property rights. Congress should respect the wisdom of this approach in formulating legislation that will help those who deserve protection but have failed to meet the Court's standards. Congress must recognize that private property rights, although protected by the Fifth Amendment,

have always been understood to exist in a balance with the rights of neighbors and the community at large—the "common good." That balance limits what one can do with private property to ensure that it does not harm broader public rights to health, safety and public resources such as clean air and water.²⁰⁰

The takings bill passed by the House of Representatives abolishes this balance.

C. Recommendations for Takings Legislation

A modified, bright line legislative approach to the regulatory takings issue can balance competing interests while simultaneously solving the problem when a property owner, who in fairness should be compensated, is not because of current judicially-crafted takings law. The House bill requires compensation at twenty percent or greater diminution in value. This is determined by examining the portion of the property affected by the regulation and not by examining the entire parcel as the present status of the law requires.²⁰¹ The Republican proposal should be replaced with legislation creating a rebuttable presumption that compensation is due where a

198. Carothers, *supra* note 166.

199. Allen, *supra* note 131, (Science & Technology) at 25 (quoting EPA Administrator Carol Browner).

200. *The GOP Contract on the Environment*, S.F. CHRON., Jan. 3, 1995, at A16.

201. See *supra* text accompanying note 45.

specified federal regulation decreases the fair market value of an *entire* parcel by more than eighty percent or a similarly significant percentage. Once a property owner shows that the value of his property has been reduced by the requisite amount, he will have met his *prima facie* burden. The burden then shifts to the government to rebut the presumption that the regulation effects a taking. To meet its burden the government must prove that the applicability of one or more legislatively-outlined factors justifies a denial of the takings challenge. In determining which factors to include in a takings reform bill and how to set priorities for those factors, Congress should consider and clarify the elements used by the Supreme Court in its balancing test.

Reasonable investment-backed expectations and the necessity of the regulatory control are two factors that should be of utmost importance in determining whether the government has met its burden. To rebut the presumption of a taking, the government should be required to show that the post-regulation value of the property represents a "reasonable" return in comparison to the purchase price of the parcel, thus satisfying the property owner's investment-backed expectations.²⁰² Legislation should require courts in examining such expectations to consider whether the property in question is part of a multi-stage development and if so, whether the property owner has received a reasonable return in earlier stages. A takings act also should mandate that courts determine whether the regulation involves a transferrable development rights program and if so, whether the program provides, or helps to provide, a reasonable return to the property owner.

A second factor that should be included in takings legislation is consideration of the purpose and necessity of the regulatory control. Where the objective of the regulation is purely aesthetic, the government should have more difficulty rebutting the presumption of a taking than where the goal of the restriction is public health or safety. Congress should enumerate and assign priorities to broad

202. For example, if a landowner purchases property for \$1000 per acre, the pre-regulation fair market value of the parcel is \$3500 per acre, and the post-regulation fair market value is \$500 per acre, the landowner meets his *prima facie* burden because the reduction in value from pre-regulation to post-regulation is greater than 80%. The government, however, does not meet its burden regarding the investment-backed expectations factor because the landowner, who purchased property for \$1000 per acre and is left with property worth \$500 per acre, does not receive a "reasonable" return on his investment. The government *would* meet its burden where the property owner purchases a parcel for \$100 per acre and the pre-regulation and post-regulation fair market values are \$3500 and \$500 per acre, respectively. Again, the landowner meets his *prima facie* burden because the regulation reduces the fair market value of the property by more than 80%. Yet in this situation the government also meets its burden because the landowner purchased the property for \$100 per acre but is able to sell the land for \$500 per acre, thus receiving a very "reasonable" return of 400%.

legislative objectives to provide guidance to courts examining the necessity of the governmental control. A legislative enactment also should include an exception where the regulation as implemented precludes a land use that is prohibited by a state's law of property or nuisance.²⁰³ If the use is precluded by state law, compensation should not be required, regardless of the diminution in value caused by the regulation.²⁰⁴ Both the necessity of the regulatory control and the reasonable investment-backed expectations of the property owner are important factors that should be addressed in takings reform legislation to define whether the government has gone "too far."

By raising the requisite diminution in value percentage and by incorporating a rebuttable presumption into legislation, Congress will clarify current regulatory takings law without destroying environmental laws and land use regulations. Such legislation also will address the concern that deserving landowners presently are not being compensated under the Supreme Court's balancing test. By developing and mandating the use of factors that allow the government to rebut the presumption of a taking, Congress will maintain the fact-specific inquiry currently followed by the courts²⁰⁵ while encouraging consistency in judicial decision making. Fact-specific analyses allow the judiciary to examine and respond to the unique circumstances of each case, thereby increasing the likelihood of decisions perceived to be fair. A comparison between the bright line, twenty percent legislation passed by the House of Representatives and the modified, eighty percent legislation demonstrates that the latter approach will achieve a more equitable result. Under the House bill Florida Rock is entitled to compensation from a government already burdened with a budget deficit. The legislation requires that the effect of the Clean Water Act on the value of Florida Rock's property be viewed as a taking, notwithstanding the fact that Florida Rock will receive more than a reasonable return on its investment. Under the recommended legislation Florida Rock is not entitled to compensation, but the most deserving property owners

203. The Supreme Court in *Lucas* established a "nuisance exception" to its categorical rule, requiring compensation where governmental action deprives a landowner of all economically viable use of his land. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992).

[R]egulations that prohibit all economically beneficial use of land . . . must . . . do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id.

204. The takings reform bill passed by the United States House of Representatives includes a similar, although overly restrictive, exception. H.R. 9, 104th Cong., 1st Sess. (1995).

205. See *supra* text accompanying notes 24-25.

would be afforded reasonable relief pursuant to the Fifth Amendment.

V. CONCLUSION

The decision of the Court of Appeals for the Federal Circuit in *Florida Rock IV*²⁰⁶ and the takings legislation recently passed by the House of Representatives of the United States Congress²⁰⁷ balance the interests of private property owners with those of society and drastically tip the scales in favor of individual landholders at the community's expense. The Supreme Court and lower federal and state courts repeatedly have expounded that an individual private property owner should not be forced to bear a burden that should be borne by all.²⁰⁸ Yet this does not mean that an individual has a right to use his property in any manner he pleases.²⁰⁹ Government cannot protect the health, safety, and general welfare of its citizens without affecting the value of private property and landowners' rights in general.²¹⁰

The court in *Florida Rock IV* recognized that under existing judicially-created takings law, some property owners are denied compensation who should, "in all fairness,"²¹¹ recover their financial losses. The Federal Circuit encouraged the Court of Claims to find on remand that a regulatory taking had occurred where enforcement of the wetlands provisions of the Clean Water Act diminished the value of Florida Rock's property by approximately sixty percent. Such a finding would represent a drastic expansion of Supreme Court precedent and demonstrate a short-sighted reaction that could lead to endless litigation at great cost to the federal government and the taxpayers. Before other courts follow the lead of the Federal Circuit, Congress should act to mandate legislatively compensation in extreme situations that do not currently meet the "all-or-nothing" *Lucas* approach of the Supreme Court. Such legislation must be crafted carefully to balance the interests of landowners with those of the public good without creating a massive entitlement program that jeopardizes decades of environmental and land use safe-

206. 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S. Ct. 898 (1995).

207. H.R. 9, 104th Cong., 1st Sess. (1995).

208. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-36 n.4 (1987) ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

209. See *supra* note 42 and accompanying text.

210. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")

211. *Nollan v. California Coastal Comm'n*, 483 U.S. at 836 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

guards that have benefitted, and should continue to benefit, society and its individual members.

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