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A Congressional Call to Arms: The Time Has Come for Congress to Enforce the Fifth Amendment's Takings Clause

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A CONGRESSIONAL CALL TO ARMS: THE TIME HAS COME FOR CONGRESS TO ENFORCE THE FIFTH AMENDMENT'S TAKINGS CLAUSE

MARK W. SMITH*

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

— William Blackstone¹

I can certainly conceive of rational people who, if pressed to a choice, would be willing to give up the right to wear a jacket with obscene words on it in order to retain the right to construct a building or run a railroad.

— The Honorable Alex Kozinski²

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1. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

2. Alex Kozinski, *Foreword* to ECONOMIC LIBERTIES AND THE JUDICIARY xi, xvii (James A. Dom & Henry G. Manne eds., 1987).

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Introduction

The government, as a sovereign, has an absolute right to appropriate private property under certain circumstances. However, the Fifth Amendment to the United States Constitution prohibits government from taking private property for public use without paying just compensation.³ The Fifth Amendment's Takings Clause contains two specific limitations on the government's authority to take private property: (1) private property must be taken for "public use"⁴ and (2) the government must pay "just compensation" to the citizen whose property has been taken.⁵ This article focuses on the Takings Clause's second limitation — the just compensation requirement — and explores its application to situations where governmental actions have substantially reduced the value of regulated property.⁶

3. U.S. CONST. amend. V. The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 234 (1897).

4. U.S. CONST. amend. V. Recent Supreme Court decisions have severely undermined this protection by greatly expanding the concept of public use. Gideon Kanner, *The Right to Take, in EMINENT DOMAIN AND LAND VALUATION LITIGATION* 193, 195 (1994); see *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (finding state statute authorizing the condemnation of an owner's land for the purpose of transferring land to other private parties to constitute a "public use" for Takings Clause purposes).

5. U.S. CONST. amend. V.

6. While this article will focus on the Federal Takings Clause, it should be noted that every state constitution includes a just compensation clause. Keith W. Brickleyer & David Smolker, *Inverse Condemnation*, in *CURRENT CONDEMNATION LAW* 54, 54 (Alan T. Ackerman ed., 1994).

The Takings Clause memorializes the belief that though the government may take private property for the public's benefit, it may not force a private citizen alone to subsidize the government's objectives.⁷ If the public as a whole benefits, then the public as a whole should pay for the benefit.⁸ To reach a contrary conclusion is to advance the unconscionable notion that a majority of the public may receive a free ride on the backs of a few unlucky individuals.

Under the Takings Clause, property owners are entitled to receive compensation when the government formally appropriates the title to their property for public use through a legal process called condemnation. When the government does not formally appropriate title to private property, owners may still be entitled to receive compensation. In the absence of a formal condemnation action, property owners are entitled to receive compensation if a government action (1) caused the physical invasion of their property;⁹ (2) reduced their property's value to zero, for reasons other than preventing a public nuisance;¹⁰ or (3) attached unreasonable or disproportionate permit conditions on their property's use.¹¹ To obtain payment, the injured property owner must file a lawsuit against the government — a suit called an inverse condemnation action — and prove that the effect of the government action falls into one of the above categories requiring compensation.

Despite the available avenues for obtaining just compensation, the Supreme Court's application of the Takings Clause to government regulations has created a jurisprudential landscape where no compensation is required in the vast majority of situations where a government regulation causes a substantial reduction to the value of an owner's property. Government regulations result in lost property values in areas as diverse as "housing and rent regulation, savings and loan regulation, user fees, wetlands protection, mining and minerals, hazardous substances, and recreational trails."¹² Regardless of the area of regulation, as federal, state, and local regulations increase in number and widen in scope, more and more property owners are finding themselves unable to use their property for legitimate purposes and unable to recover for the resulting losses.¹³

In this article, I argue that because the Supreme Court has failed to adequately protect property rights in the regulatory takings area, Congress should exercise its legislative prerogative and extend greater protections to property owners — protections which will require just compensation in cases where government regulations have

7. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

8. *Id.*

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

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

11. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan*, 114 S. Ct. at 2320-21.

12. James E. Brookshire, "Taking" the Time to Look Backward, 42 CATH. U. L. REV. 901, 901-02 (1993) (citations omitted).

13. Roger Pilon, Director, Center for Constitutional Studies, Cato Institute, Statement Before the Subcomm. on the Constitution of the House Comm. on the Judiciary (Feb. 10, 1995) [hereinafter Pilon, Constitution Subcomm. Statement], available in 1995 WL 6621620.

substantially reduced the value of private property but do not fall within one of the Supreme Court's categories of cases mandating compensation.

Part I demonstrates how the protection of property rights is essential to a just and flourishing society, a fact recognized by our constitutional text and philosophical heritage. Part II identifies the gap between constitutionally mandated property protections and the inconsistent, insufficient protection found in today's takings jurisprudence. Part III shows that the Fourteenth Amendment grants Congress the constitutional authority to enact a comprehensive Takings Statute. Part IV outlines a model Takings Statute that Congress could pass to extend greater protection to property owners against local, state, and federal laws and regulations that limit legitimate property uses; and Part V explains the benefits of such a statute. Finally, Part VI responds to anticipated public policy concerns regarding the proposed Takings Statute, with an emphasis on its implications for environmental protection.

*I. The Constitution, the Framers, and the Needs of Society
Mandate That Property Rights Be Fully Protected*

A. The Framers Designed the Constitution to Protect Individual Property Rights

The Framers¹⁴ understood the danger to individual liberties posed by concentrating too much power in government. To counteract this threat, they drafted and the states ratified the Constitution and the Bill of Rights. Special protections for private property owners were included in both documents.

The Framers intended the rights of people in their property to be fully protected against government intrusion,¹⁵ for they considered an individual's right to acquire, own, and enjoy property to be among the most fundamental of rights.¹⁶ In fact, the Framers regarded property rights as natural liberties that preexisted government and were independent of the Constitution.¹⁷ John Adams wrote that "property is [as] surely a right of mankind as liberty."¹⁸

The texts of the Constitution and Bill of Rights reflect the Framers' intention to guarantee the utmost protection to private property. "More than twenty provisions of

14. For the purposes of this article, the "Framers" refers to those individuals who drafted, debated, and ratified the Constitution and Bill of Rights.

15. See MARK POLLOT, *GRAND THEFT AND PETIT LARCENY* 11 (1993). See generally DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

16. Michael S. Greve, *Property Rights at the Bicentennial: Course Correction or Constitutional Revolution*, 25 BEVERLY HILLS B. ASS'N J. 114, 115 (1991); see Loren A. Smith, *Foreword*, 42 CATH. U. L. REV. 717, 717-18 (1993); Charles W. McCurdy, *A Jurisprudence of Conceptions*, 11 GEO. MASON L. REV. 77 (1988); see also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT* 10-59 (1992) (explaining in detail why the Framers and the American colonists considered the individual right to private property inalienable).

17. Page Carroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 248 (1994). James Madison wrote the "rights of property originate" from the "diversity in the faculties of men" rather than from a positive grant from government. *THE FEDERALIST* NO. 10, at 130-31 (James Madison) (Benjamin Fletcher Wright ed., 1961).

18. John Adams, *Defence of the Constitutions of Government*, in 6 *THE WORKS OF JOHN ADAMS* 3, 8-9 (1851).

the Constitution directly or indirectly concern themselves with the protection of property and economic rights."¹⁹ Of those twenty, the Fifth Amendment's Takings Clause is the "Constitution's primary guarantee for ownership."²⁰

The Framers went to great lengths to protect the right to property because of their experiences living under British rule²¹ and, later, under the Articles of Confederation. It was, after all, the failure of the Articles of Confederation to fulfill its property-protection purpose that led to the convening of the Constitutional Convention and the adoption of the Constitution.²² Under the Articles of Confederation, the fledgling nation witnessed states "enacting laws for special individuals, setting aside Court judgments, repealing vested rights, altering corporate charters, staying the bringing or prosecution of suits, preventing foreclosure of mortgages, altering the terms of contracts, and allowing tender in payment of debts of something other than that contracted for."²³

The Framers feared that continued state government interference with private property and contract rights would result in the ruin of creditors, the destruction of confidence in ordinary business transactions, and a weakening of general commerce.²⁴ Some even feared the disregard of some states for property rights would lead to civil war. Alexander Hamilton wrote: "Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility"²⁵

To ameliorate these concerns, the Framers drafted the Constitution and Bill of Rights containing over twenty property-protecting provisions.²⁶ This historical fact demonstrates that in the Framers' eyes, "property occupied the central position among all individual rights."²⁷

B. Property Rights Are Necessary for a Just and Flourishing Society

Affording property ownership the fullest possible protection is essential to a just and flourishing society.²⁸ So long as their goal is the promotion of material wealth,

19. POLLOT, *supra* note 15, at 11 (listing the constitutional provisions protecting property and economic rights).

20. Bernard Siegan, *Foreword* to MARK POLLOT, *GRAND THEFT AND PETIT LARCENY* at i (1993).

21. ELY, *supra* note 16, at 10-25.

22. POLLOT, *supra* note 15, at 15.

23. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 552-53 (1928); *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 454-65 (1934) (detailing the history of the Contracts Clause).

24. POLLOT, *supra* note 15, at 100.

25. THE FEDERALIST No. 7, at 118-19 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); *see* Adams, *supra* note 18, at 9 ("The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.").

26. POLLOT, *supra* note 15, at 11.

27. Greve, *supra* note 16, at 115; ELY, *supra* note 16, at 25 ("'Liberty and Property' became the motto of the [American] revolutionary movement.").

28. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (explaining the interdependence between the personal right to liberty and the personal right to property); Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) (stating that the "notion of exclusive ownership as a property right is fundamental to our theory of social organization," and that property rights are essential to economic

individual freedom, and the general welfare, modern economic systems require a political system respecting and protecting private property rights.²⁹ Private property is a prerequisite for economic,³⁰ environmental,³¹ and social³² prosperity. Furthermore, "recognition of economic rights serves the cause of individual liberty."³³

In sum, our society must approach issues involving private property rights with a strong presumption of protection. This is what the Framers intended, the constitutional texts dictate, and our quality of life demands.

II. Where Government Regulations Result in the Deprivation of Some, But Not All, of an Individual's Property Value, the Judiciary Has Provided Insufficient Property Rights Protection

The Framers intended to protect individual property rights against direct and indirect government encroachments.³⁴ The Framers, however, did not foresee the judiciary abdicating its responsibility to fully protect property rights.³⁵ In interpreting the Takings Clause, the United States Supreme Court has been left to its own devices to

development and the avoidance of wasting natural resources) (citations omitted).

29. Jerry Ellig, *The Economics of Regulatory Takings*, in REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 69, 78-80 (Roger Clegg ed., 1994).

30. See Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187 (1992) (explaining that property rights are fundamental because they allow resources to be used most efficiently); Michael McMenamin, *Keep It Simple, Solons*, REASON, Nov. 1995, at 58 (quoting Richard Epstein who explains private property is necessary for "private innovation and public progress"); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 32 (1960); Bernard H. Siegan, *Hayek and the United States Constitution*, 23 SW. U. L. REV. 469, 470 (1994) (private ownership of property provides incentives to maximize individual initiative and creativity); TERRY L. ANDERSON & PETER J. HILL, BIRTH OF A TRANSFER SOCIETY 6 (1989).

31. See Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, in REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 87, 111 (Roger Clegg ed., 1994) (stating that societies which protect private property rights maintain healthier environments than common property systems, as demonstrated by the "unprecedented environmental catastrophe produced in Eastern Europe"); Ellig, *supra* note 29, at 80 ("[W]hen private property rights are well-defined and enforced, externality problems disappear."). See also *infra* Part VI.

32. See CHARLES E. WHITTAKER, RETURN TO LAW, OR FACE ANARCHY 11 (1966) ("Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.") (quoting former President and Supreme Court Justice William H. Taft).

33. ELY, *supra* note 16; JAMES M. BUCHANAN, PROPERTY AS GUARANTOR OF LIBERTY 59 (1993); see also *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("A fundamental interdependence exists between the personal right to liberty and the personal right in property."); WHITTAKER, *supra* note 32, at 12 (defending property rights as a human right); William W. Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66, 66-82 (1980); Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 609 n.21 (1993).

34. Roger Clegg, *Reclaiming the Text of the Takings Clause*, in REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS, 7, 15 (Roger Clegg ed., 1994) (quoting James Madison explaining a just government must hold property inviolate against direct and indirect governmental encroachments).

35. See POLLIT, *supra* note 15, at 52 (explaining that the debates during constitutional founding and ratification period demonstrate the federal judiciary was designed to protect property rights).

determine if and when the results of a government action require the payment of just compensation. Unfortunately, the Court's jurisprudence has failed to require that government agencies pay for the partial reduction in the economic value of private property caused by its regulations' effects.

As currently interpreted, the Takings Clause mandates compensation for property owners when government (1) forces the transfer of their title;³⁶ (2) physically invades their property;³⁷ (3) reduces, through regulation, the value of their property to zero for reasons besides preventing a public nuisance;³⁸ and (4) attaches unreasonable or disproportionate permit conditions on property use.³⁹

At first glance, these four categories appear to afford significant protection to property owners. However, appearances can sometimes be deceiving. In reality, current jurisprudence fails to protect property owners in the vast majority of regulatory takings cases — cases where government regulations result in a substantial, though less than total, diminution in property value. One commentator aptly explains:

Most regulations do not reduce the value of a person's property to zero or near zero. Rather, they reduce the value by 25 percent, 50 percent, or some other fraction of the whole. In these circumstances — the vast majority of circumstances — the owner gets nothing. Only if he is "lucky" enough to be completely wiped out by a regulation does he get compensation.⁴⁰

It makes no difference to the affected property owner whether he loses his property's value through direct condemnation or through a regulation's effects.⁴¹ In either situation, absent the receipt of just compensation, he alone must bear the costs of providing a benefit to the public-at-large. However, current jurisprudence recognizes a significant difference between full and partial takings. If the owner suffers his loss from a formal condemnation (i.e., where the government appropriates

36. *United States v. Clarke*, 445 U.S. 253, 255-58 (1980).

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

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

39. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320-21 (1994).

40. Pilon, *Constitution Subcomm. Statement*, *supra* note 13; *see also* Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 828 (1993); *see also* *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (holding that \$1.9 million loss out of \$2 million investment not a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 409-11 (1915) (property owner denied compensation even though the government regulation caused the land to decrease in value 88%); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (no compensation required even though regulation's effect was to decrease property's value 75%).

41. *See United States v. Lynah*, 188 U.S. 445, 470 (1903) ("[W]here the government by the construction of . . . public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested.").

the property's title)⁴² or he loses his property's entire value,⁴³ then just compensation will be forthcoming. If, on the other hand, the owner loses some, but not all, of the value of his property as a result of a government regulation, no compensation will be forthcoming. The law treats property owners in these situations differently, even though the economic harm to them both is the same because the Supreme Court currently analyzes regulatory takings cases backwards.⁴⁴ Rather than asking whether a government action has reduced the value of an owner's property and, if so, by how much, the Court asks what economic value the owner retains in his regulated property.⁴⁵ If the remaining value is zero, compensation is required;⁴⁶ otherwise, the owner receives nothing. This approach is logically akin to asking whether someone is a thief if he merely takes the stereo and television but beneficently leaves behind the furniture and car.⁴⁷ After all, the thief did not deprive the unlucky victim of everything.

The Supreme Court's "backwards" approach dates back to its decision in *Pennsylvania Coal Co. v. Mahon*,⁴⁸ which laid an inadequate foundation on which to build a principled and systematic theory of regulatory takings.⁴⁹ *Mahon's* majority opinion, drafted by Justice Oliver Wendell Holmes, Jr., originated the emphasis on the "diminution in value" to private property caused by an alleged regulatory taking.⁵⁰ Instead of creating a clear rule requiring compensation whenever a regulation reduces property values, the Court decided that a regulation's effect requires just compensation only when it "goes too far."⁵¹

Besides not protecting property owners sufficiently, current regulatory takings jurisprudence (which is based on the "goes too far" standard) lacks any consistent or unifying theme or formula.⁵² Distinguishing between regulations which require

42. *Clarke*, 445 U.S. at 255-58.

43. *Lucas*, 505 U.S. at 1028-29.

44. See Pilon, Constitution Subcomm. Statement, *supra* note 13.

45. See *id.*; *Lucas*, 505 U.S. at 1029-30 (requiring courts to evaluate whether the owner's property has any economic value remaining after the imposition of a regulation); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (requiring courts to evaluate, inter alia, "the economic impact of the regulation").

46. *Lucas*, 505 U.S. at 1030.

47. See Roger Pilon, Director, Center for Constitutional Studies, Cato Institute, Statement Before the Senate Env't & Pub. Works Comm., at 5 (June 27, 1995), available in 1995 WL 10387624. Analogizing government actions that result in uncompensated takings of private property to a common thief is quite apt, for one could argue that the Fifth Amendment's Takings Clause does nothing more than apply the Bible's pronouncement "Thou shalt not steal" to the government. See Siegan, *supra* note 20, at 1.

48. 260 U.S. 393 (1922).

49. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984) (stating that *Mahon* has generated much of the current confusion in takings law); see also BRUCE ACKERMAN, PROPERTY AND THE CONSTITUTION 163-66 (1977) (same); James L. Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 603-09 (1981) (same).

50. Rose, *supra* note 49, at 562.

51. See *Mahon*, 260 U.S. at 415.

52. Burton, *supra* note 33, at 611-13. Though this article deals mostly with federal takings jurisprudence, state courts have fared little better in arriving at an adequate takings jurisprudence. See

compensation and those that do not has proven virtually impossible for courts⁵³ and commentators.⁵⁴ One commentator describes the angst of those wrestling with the question of when a regulation "goes too far":

Moving beyond the Olympian principles of Justice Holmes in a multiplicity of factual settings, Takings Clause jurisprudence has never been an easy structure of bright line rules and clear policy analysis. It is widely perceived that modern case law has spiraled dizzyingly downwards into a bog of inconsistencies and idiosyncratic results, lacking any unifying formula or theme that could rationalize the cases. The case law has been correctly characterized as a "crazy-quilt pattern" — a veritable "Mulligan's stew of homilies, word play, ridicule, and maxims" containing judicial excesses leaning to the right and to the left.⁵⁵

This confusion prompted the Chief Judge of the United States Court of Federal Claims, a forum that hears numerous takings cases,⁵⁶ to express exasperation at the state of regulatory takings law. Chief Judge Loren Smith wrote:

This [regulatory takings] case presents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more precedential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights.⁵⁷

Though regulatory takings law needs to be rescued from its "hopeless state of disarray,"⁵⁸ the federal judiciary is probably not the appropriate government institution to rebalance regulatory takings jurisprudence by extending property right protec-

Gideon Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, in THE COMPENSATION ISSUE: LIABILITY FOR DAMAGES FROM PLANNING AND LAND USE CONTROLS 32 (ALI-ABA Course of Study 1984) ("If the U.S. Supreme Court's track record on remedies presents one with a reasonably straightforward path toward compensation, the state courts' endeavors form a chaotic pattern, reminiscent of Professor Dunham's general characterization of this field as a 'crazy-quilt pattern.'") (citations omitted).

53. See, e.g., *Bowles v. United States*, 31 Fed. Cl. 37, 39-40 (1994) (explaining that prior to a long and costly inverse condemnation case, neither the government nor the individual had the precedential guidance to determine whether a taking existed); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975, writ ref'd n.r.e.) ("[T]he crazy-quilt pattern of judicial doctrine in this area has not yet yielded a principle upon which the cases can be rationalized . . .").

54. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I — A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1304 (1989).

55. Burton, *supra* note 33, at 611-12 (citations omitted).

56. Richard Minitzer, *You Just Can't Take It Anymore*, POLICY REVIEW, Fall 1994, at 44 (quoting attorney Keven Coakley stating that the United States Court of Federal Claims has been at the "forefront of attempting to rationalize the theories of takings for a long time").

57. *Bowles*, 31 Fed. Cl. at 39-40 (Smith, C.J.).

58. Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 604 (1991).

tions.⁵⁹ However, even if the judiciary were institutionally competent to fix the current idiosyncratic regulatory takings law, the stare decisis doctrine stands in the judiciary's way.

The traditional common law approach of incrementally creating rules of law by deciding cases has not sufficiently protected the constitutional right to private property in the regulatory takings area. Nevertheless, a common law legal system binds judges to the prior decisions of both superior courts and their own court.⁶⁰ When the highest court of either the federal or a state government decides a case, the outcome of that decision and the mode of analysis applied will be followed by the lower courts within that system, and by the highest court itself.⁶¹

Today, it is unlikely that the Supreme Court will be able to develop a comprehensive and coherent regulatory takings criteria because the stare decisis doctrine will cause the "goes too far" jurisprudence to continue to exist.⁶²

III. Congress Possesses the Constitutional Authority to Enact Legislation Expanding Property Rights Protection

Contrary to popular myth, the Judiciary is not the only branch of government empowered to protect constitutional rights. Congress and the Executive branch have equal, if not greater, responsibility for protecting and promoting constitutional rights.⁶³ When courts do not fully protect constitutionally endowed individual rights, the other branches are empowered to act to compensate for the judicial deficiency. Because Congress may enact legislation protecting individual constitutional rights, Congress may enact legislation extending greater protection to the constitutional right to private property.

A. Congress Has Authority to Expand the Protection of Individual Constitutional Rights

The notion that constitutional values are not confined solely within the confines of the federal judiciary is neither a novel nor remarkable idea; as one commentator describes it, "it is only so obvious as to be easily overlooked."⁶⁴ Though the judiciary

59. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1250 (1967) (arguing courts are institutionally incapable of making the complex "fairness" determinations required for a satisfactory answer to the question of when compensation should be awarded. Instead, the courts tend to be "attentive" only to "hardcore" or "automatic" cases — those fitting the paradigm of physical seizure or virtual destruction).

60. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176-77 (1989).

61. *Id.*

62. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (highlighting the Court's strong adherence to stare decisis by stating "the very concept of the rule of law underlying our own Constitution requires [that] respect for precedent [be] indispensable") (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16)

63. See Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 695.

64. *Id.* at 696.

often articulates constitutional values, the "[p]rotection of constitutional values has never been the exclusive domain of the Supreme Court."⁶⁵

It is not a new idea that each branch of government may independently determine the constitutionality of legislation. President Thomas Jefferson wrote that the executive's authority to decide constitutionality is equal to the judiciary's:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fire and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other.⁶⁶

In 1832, President Andrew Jackson announced an even stronger position in vetoing a bill to recharter the Bank of the United States:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the president is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.⁶⁷

The proposition that the courts are not always the best institution to interpret the Constitution and to protect its emanations comes as no surprise to anyone familiar with the "political question" doctrine.⁶⁸ The political question doctrine, in essence, holds that the subject matter of certain cases brought before a court is inappropriate for judicial consideration.⁶⁹ The Supreme Court has not infrequently invoked the political question doctrine to avoid resolving constitutional controversies. Professor Sager writes:

65. *Id.*

66. Thomas Jefferson, *Correspondence to Mrs. John Adams, September 11, 1804*, in 11 WRITINGS OF THOMAS JEFFERSON 49, 50-51 (Andrew A. Lipscomb ed., 1903).

67. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 67-68 (1986).

68. See generally Laurence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1225-26 (1978).

69. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 2.15, at 102 (3d ed. 1986).

Two prominent examples of such circumstances are provided by the executive prosecution of the Vietnam War and the legislative activities surrounding the possible impeachment of Richard Nixon. As to the prosecution of hostilities in Indochina, the federal judiciary from the first indicated that it would not intervene. And while there was some scholarly support for judicial intervention in the impeachment process,^[70] such intervention was in fact extremely unlikely. Nevertheless, in both contexts, official protagonists devoted a great deal of energy to arguments about the constitutionality of official behavior. There was no suggestion that the improbability or impossibility of judicial intervention mooted the relevant constitutional questions; to the contrary, the behavior of the involved officials indicates an implicit understanding that this was not the case.⁷¹

As the political question doctrine demonstrates, the Supreme Court itself has recognized that it has no monopoly over all societal questions having constitutional implications. Therefore, where the judiciary is ill-suited to solve certain constitutional issues, the other branches may and should act.

Congress may constitutionally enact a takings statute. As applied to federal laws and regulations, the statute would simply be "an exercise of Congress' undoubted power to control the activities of the federal government."⁷² As applied to state and local regulations, the statute would be an exercise of Congress' authority arising from section 5 of the Fourteenth Amendment.⁷³ The Fourteenth Amendment bestows upon Congress the duty to protect the rights it guarantees,⁷⁴ including the rights protected by the Takings Clause.⁷⁵ The Fourteenth Amendment grants Congress the authority to determine whether and what legislation is needed to fulfill the guarantees of the Constitution and Bill of Rights.⁷⁶

Congress may enact laws to provide greater constitutional protections than the Supreme Court has recognized. The clearest historical illustrations of Congress enacting laws to protect constitutional values are the various Voting Rights Acts in which Congress forbids discriminatory practices that the Supreme Court had tolerated.⁷⁷ For instance, while the Supreme Court had held that literacy tests for

70. Sager cites to RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103-21 (1973).

71. Sager, *supra* note 68, at 1225-26.

72. See Thomas C. Ferg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 *VILL. L. REV.* 1, 62 (1994).

73. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). The Thirteenth and Fifteenth Amendments also contain this broad enforcement power clause. See U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 2.

74. Michelle L. Stuart, *The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom After the Destruction of the Free Exercise Clause*, 20 *U. DAYTON L. REV.* 383, 417 (1994) (citation omitted).

75. See *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 252 (1897).

76. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 *BYU L. REV.* 221, 245.

77. *Id.* at 246-47.

voting do not violate the Equal Protection Clause,⁷⁸ the Supreme Court later held that Congress may ban literacy tests for voting,⁷⁹ which is exactly what Congress did.⁸⁰ Similarly, while the Supreme Court held that electoral practices with racially discriminatory effects do not violate the Constitution,⁸¹ it has found that Congress may forbid such practices,⁸² which is what Congress has done.⁸³

B. A Takings Statute Enacted by Congress Would Survive a Constitutional Challenge

Congress has the authority to examine the constitutionality of regulatory takings and enact appropriate legislation allowing for more instances of compensation than the Supreme Court has recognized. If enacted, the Takings Statute (described below) would be an appropriate exercise of congressional authority. In so enacting, Congress will have reaffirmed that the private ownership of property is an inalienable right that may not be infringed by government regulations without justly compensating the owner or proving that the regulation prevents a public nuisance. The statute would guarantee the security of private property against all government intrusions, including regulatory ones. The Takings Statute would be consistent with the letter and spirit of the Constitution because it would reinforce and protect a liberty expressly guaranteed to citizens in the constitutional text itself.⁸⁴

IV. A Legislative Proposal: The Takings Statute

A. Congress Should Provide the Judiciary with Compensation Guidelines for Cases in Which Regulations Reduce Property Values

The Supreme Court has not developed a coherent takings jurisprudence, one that is internally consistent and symmetrical with the protections granted to other civil liberties. For example, even though *Dolan v. City of Tigard*⁸⁵ indicates that the current Court may view the Fifth Amendment to be as fundamental as the First Amendment,⁸⁶ the Court as an institution will be unable to fulfill the guarantees of protection implied in *Dolan* because of the stare decisis principle discussed in Part II

78. *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 50-54 (1959).

79. *Oregon v. Mitchell*, 400 U.S. 112, 118, 131-34, 144-47, 216-17, 231-36, 282-84 (1970) (five separate opinions, collectively joined by all nine Justices).

80. See 42 U.S.C. § 1971(a)(2)(C) (1994).

81. *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980).

82. Laycock, *supra* note 76, at 247 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)).

83. See 42 U.S.C. § 1973(a) (1994).

84. Unlike the constitutional right to privacy as found by the United States Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and the constitutional right to abortion in certain cases as found by the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 163 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), the right to property is expressly mentioned in the Bill of Rights, see U.S. CONST. amend. V.

85. 114 S. Ct. 2309 (1994).

86. *Id.* at 2320.

and the reasons articulated below. Therefore, Congress should act to fulfill this guarantee.⁸⁷

Whether Congress should enact legislation turns in part on the competency of the judiciary to act in the area to be governed.⁸⁸ To date, the courts have proven themselves unable to create a coherent and predictable takings doctrine because they are locked into what the Supreme Court itself called ad hoc takings jurisprudence.⁸⁹ When the judiciary finds itself institutionally incompetent to resolve certain public policy issues⁹⁰ or protect certain rights, legislatures often act to fill the void.⁹¹

Given the complexity of modern land use, environmental law issues, and urban planning regulations, Congress itself should attempt to bring order to the field of regulatory takings, rather than relying on the incremental jurisprudence of the Supreme Court; Congress should enact a Takings Statute into law. After all, the judiciary has limited ability to make comprehensive policy decisions because the

very fact that judges must act, must respond to complaints, means that they will find it difficult to devise a coherent program of action . . . [t]he simplicity and straightforwardness of the judicial process, its strengths in some settings, may be its undoing in others. In particular, many aspects of adjudication that seem well suited to the determination of particular controversies seem unsuited to the making of general policy.⁹²

In the takings context, the judiciary lacks the means to create broad constitutional protections for property rights because, unlike Congress, it is currently bound by its own unprincipled regulatory takings jurisprudence and because it can only resolve those cases appearing before it for resolution. A legislature can review an issue at any time and can alter the law more easily than a court.⁹³

87. *Bowles v. United States*, 31 Fed. Cl. 37, 40 (1994).

88. Commentators have often questioned the competence of the judiciary to create coherent and, thereby, predictable law. HENRY R. GLICK, *COURTS, POLITICS AND JUSTICE* 314 (1983); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 22-23 (1977). It should be noted that this part concerns itself with questions of "judicial competency" and not "judicial authority." Questions of "judicial authority" ask whether a court has the legal authority to decide a case or issue. Questions of "judicial competency" assume the authority of the court to decide a case or issue, but ask whether the court can answer the question effectively. GLICK, *supra*, at 314.

89. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (stating the Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government").

90. *See* political question discussion *supra* notes 68-71 and accompanying text.

91. *See* discussion of Congress enacting Voting Rights Acts *supra* notes 77-83 and accompanying text. *See generally* GLICK, *supra* note 88, at 314.

92. HOROWITZ, *supra* note 88, at 22-23; *see also* GLICK, *supra* note 88, at 314-15; Loren A. Smith, Statement Before the United States Senate Comm. on the Judiciary (Apr. 6, 1995) ("Neither pure judicial decision-making nor the simple enactment of statutes has ever fully achieved the protection of individual rights or any other major governmental policy.") [hereinafter Smith, Judiciary Comm. Statement], available in 1995 WL 152038. *See generally* John Choon Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. (forthcoming) (explaining why federal courts are institutionally incompetent at formulating adequate remedies to ameliorate certain unconstitutional conditions).

93. After almost two decades, Congress decided in 1995 to change federal law to allow states to set

As Chief Judge Loren Smith advocated in *Bowles v. United States*,⁹⁴ Congress needs to breathe new life into the Takings Clause and make it clear to the judiciary, property owners, and government regulators that the Takings Clause means precisely what it says: government shall not take private property for public use without just compensation.⁹⁵ Given the Supreme Court's unwillingness and/or inability to enforce the Takings Clause, if Congress fails to pass a comprehensive Takings Statute, regulatory takings jurisprudence — and its limited property protections — will likely continue as an incoherent, unpredictable set of rules possibly undeserving of being labelled "law."⁹⁶

B. A Model Takings Statute

The following statutory language draws primarily from Senator Bob Dole's Private Property Restoration Act of 1995 and from a model takings compensation bill proposed by the Defenders of Property Rights organization.⁹⁷ The primary difference, although not the only material difference, between these bills and the model Takings Statute outlined here is that the model statute would protect property owners against the effects of state and local regulations, as well as federal regulations.⁹⁸

Section I. Short Title

This Act may be cited as the "Fair Compensation Rights Act."

Section II. Legislative Findings: The Individual Right to Private Property is an Inalienable Constitutional Right

(a) The Framers of the United States Constitution, recognizing the individual right to property as an inalienable right, secured its protection in the Fifth Amendment to the Constitution.

(b) The Fifth Amendment to the United States Constitution recognizes that an individual's inalienable right to property shall be protected against intrusions by the United States Government. The Fourteenth Amendment to the United States Constitution incorporates those protections of property rights guaranteed by the Fifth Amendment and thereby protects an individual's inalienable right to property against intrusions by state and local governments.

(c) The effect of government statutes, regulations, rules, and ordinances may give rise to an unconstitutional taking of property even where the relevant law, regulation,

their own speed limits. See Act of Nov. 28, 1995, Pub. L. No. 104-59, Title II, § 205(d)(1)(B), 109 Stat. 577, repealing 23 U.S.C. § 154; see also Albert R. Karr, *House Rejects an Amendment on Road Rules*, WALL ST. J., Sept. 21, 1995, at A4; Albert R. Karr, *Senate Votes to Remove Speed Limits for Cars, but Not for Trucks and Buses*, WALL ST. J., June 21, 1995, at A5.

94. 31 Fed. Cl. 37, 40 (1994).

95. See *Try this Amendment*, WALL ST. J., Mar. 3, 1995, at A10.

96. See CLEGG, *supra*, note 34, at 53.

97. See 141 CONG. REC. S214-16 (daily ed. Jan. 4, 1995); HERTHA L. LUND, PROPERTY RIGHTS LEGISLATION IN THE STATES: A REVIEW 25-27 (1995) (outlining model compensation bill).

98. For a brief, though not necessarily unbiased, review of proposed takings legislation, see Barbara Moulton, *Takings Legislation: Protection of Property Rights or Threat to the Public Interest?*, ENVIRONMENT, Mar. 1995, at 44.

ordinance, or rule was created, promulgated, or applied by a government body, actor, or agency to further a legitimate, public interest.

Section III. Private Property Rights Restoration

(a) Cause of Action

(1) The owner of any real or personal property shall have a cause of action against the United States, or any State or Territory of the United States, or Political Subdivision thereof if:

(A) the application of any statute, regulation, rule, or ordinance of the United States, or of any State or Territory of the United States, or Political Subdivision thereof restricts, limits, or otherwise takes a right or interest to real or personal property that would otherwise exist in the absence of such application; and

(B) such application described under subparagraph (A) results in a reduction in the fair market value of the affected portion of real or personal property.

(2) Notwithstanding paragraph (1)(B), an individual shall be entitled to recover a judgment against the United States, or any State or Territory of the United States, or Political Subdivision thereof only if a court makes a finding of fact that the Government action described under paragraph (1)(A) resulted in a temporary or permanent diminution of the fair market value of the affected portion of real or personal property by the lesser of

(A) 20% or more; or

(B) \$10,000 or more.

(b) Jurisdiction

An action under this Act shall be filed either in the United States Court of Federal Claims or in a United States District Court.

(c) Recovery

In any action filed under this Act, the property owner may elect to recover:

(1) a sum equal to the diminution in the fair market value of the portion of the property affected by the application of a statute, regulation, rule, or ordinance described under subsection (a)(1)(A) and retain title; or

(2) the fair market value of the affected portion of the regulated property prior to the Government action and relinquish title to the Government of the portion of property regulated.

(d) Public Nuisance Exception —

(1) No compensation shall be required by virtue of this Act if the owner's use or proposed use of the property amounts to a nuisance as defined by subsection (d)(2).

(2) For the purposes of this Act, a "nuisance" shall be defined as a substantial, unreasonable interference with another person's use or enjoyment of property which he actually possesses or to which he has a right of immediate possession. The interference with a person's right to his property must be substantial. This means that it must be offensive, inconvenient, or annoying to an average person in the community. The interference must be unreasonable. In order to be characterized as unreasonable, the severity of the inflicted injury must outweigh the utility of the property owner's conduct. Every person is entitled to use his own land in a reasonable way, considering the neighborhood, land values, and existence of any alternative courses of conduct open to other people in the community.

(3) For the purposes of this subsection, a "person" shall be defined to include individuals, corporations, partnerships, and governments except this Act shall not be interpreted or apply in a manner that would provide a cause of action by one government agency against another government agency.

(4) To bar an award of damages under this Act, the United States, State or Territory, or Political Subdivision thereof, shall have the burden of proof and the burden of production to establish that the use or proposed use of the regulated property is a public nuisance as defined under subsection (d)(2).

(5) In order to satisfy its burdens set forth under subsection (d)(2) and (d)(4), the government must (a) affirmatively demonstrate significant harm to a governmental interest if the regulation is not enforced; (b) show an actual, nonspeculative connection between the property use that the government wishes to ban or control and the harm claimed to flow from that use; and (c) demonstrate that the action taken to abate or prevent the harmful activity is closely tailored to the actual demonstrated harm.

Section IV. Application; Rights Not Restricted; Limitations of Actions

(a) Retroactive Application

This Act shall apply to statutes, regulations, rules, or ordinances as well as to any provision or condition of any permit, authorization, or governmental permission, in effect at the time of enactment of this Act or subsequently enacted.

(b) Constitutional or Statutory Rights Not Restricted

Nothing in this Act shall restrict any legal or equitable remedy or any right which any person or class of persons may have under any provision of the state or federal Constitution, statute, or laws of any state, locality, or the United States.

(c) Statute of Limitations

The statute of limitations for actions commenced pursuant to this Act shall be three years from the application to the affected property of any statute, regulation, rule, or ordinance, or the denial of any permit, license, authorization, or permission to act by the government.

Section V. Award of Costs; Litigation Costs

The court, in issuing any final order in any action brought under this Act, shall award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing plaintiff.

Section VI. Interpretation

It is Congress' intent that this Act shall be interpreted broadly in favor of protecting the Constitutional right to property against the encroachments of state, local, and federal governments.

V. Reasons for the Takings Statute

A. The Takings Statute Will Provide Greater Coherence and Consistency in Assessing the Impact of Regulatory Takings

If enacted, the Takings Statute would provide courts with helpful bright line rules to resolve cases in which a regulation results in a reduction in the value of property of either 20% or more, or \$10,000 or more. The Statute would help solve the central problem in current takings law — the absence of a clear framework for evaluating

situations where a government regulation substantially reduces the value of private property.

At present, it is difficult to predict the outcome of inverse condemnation actions without resorting to protracted litigation.⁹⁹ As a result, regulatory takings law currently fails to possess an essential element of law: the fundamental fairness which demands that people subjected to a law have the opportunity to know what it prescribes.¹⁰⁰

Current takings jurisprudence is so fractured that similar facts in different cases can lead to contradictory results. Because "[t]here is no set point at which a diminution in value is so great that a taking occurs[,] [a] diminution of 50% in the value of a chicken farm caused by low-flying government planes was sufficient to constitute a taking in *United States v. Causby*, while a 75% diminution in the value of a developer's land caused by a zoning change did not create a taking in *Village of Euclid v. Ambler Realty Co.*"¹⁰¹ A rise in river levels that blocks drainage from a rice paddy is compensable,¹⁰² but a rise that causes a loss of power-generating potential at the mouth of a tributary is not.¹⁰³ An imposition of a poultry quarantine resulting in a reduction in the value of the animals required compensation in the Federal Circuit,¹⁰⁴ but not in the Third Circuit.¹⁰⁵ Similarly, airplane flights below the 500-foot floor of navigable air space can result in a compensable loss,¹⁰⁶ but not flights above 500 feet producing the same physical effects.¹⁰⁷ These unpredictable and divergent results demonstrate that in some ways regulatory takings jurisprudence is not really law at all.¹⁰⁸

99. *Bowles v. United States*, 31 Fed. Cl. 37, 40 (1994); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting); see also Smith, *Judiciary Comm. Statement, supra* note 92, at 3-4 (explaining that because courts operate on a case-by-case basis, "neither government nor citizen has much guidance as to what will or will not be a taking"); Gary Eisenberg, *Property: The Takings Clause of the Fifth Amendment*, 1988 ANN. SURV. AM. L. 1101, 1101-02 (explaining that the Supreme Court's approach to regulatory takings "offer[s] little guidance to the government agencies that must determine whether courts will invalidate proposed regulations as unconstitutional takings").

100. See Scalia, *supra* note 60, at 1179.

101. *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 713 (3d Cir. 1985) (citations omitted), *aff'd sub nom. Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); see *United States v. Causby*, 328 U.S. 256 (1946); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

102. *United States v. Lynah*, 188 U.S. 445, 474 (1903).

103. *United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945).

104. *Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1991).

105. *Empire Kosher Poultry v. Hallowell*, 816 F.2d 907, 916 (Fed. Cir. 1987).

106. *United States v. Causby*, 328 U.S. 256, 267 (1946).

107. *Aaron v. United States*, 311 F.2d 798, 801 (Ct. Cl. 1963).

108. See CLEGG, *supra* note 34, at 53 (explaining that the Supreme Court's ad hoc approach to regulatory takings cases "results in no predictability" and "in no real 'law' at all"); see also THOMAS SOWELL, *THE VISION OF THE ANOINTED* 130 (1995) ("There cannot be a law-abiding society if no one knows in advance what law they are to abide by, but must wait for judges to create *ex post facto* legal rulings based on 'evolving standards' rather than known rules.").

In other areas of law, courts are quick to recognize the inherent unfairness in subjecting citizens to punishment when the law is vague and, thereby, unpredictable. In the criminal context, laws that are or have the potential to be applied unpredictably would be struck down as unconstitutionally vague. In fact, courts rarely hesitate to strike down vague criminal statutes as unconstitutional when those laws do not sufficiently warn those who may be subjected to them.¹⁰⁹ Even when not striking down vague criminal laws, courts interpret "ambiguous" criminal statutes against the government and for the individual by narrowly construing the prohibition.¹¹⁰ Courts justify these practices by recognizing the inherent unfairness in punishing individuals who cannot reasonably determine if the law applied to them or their actions.¹¹¹

The importance of predictable laws applies with equal force to regulatory takings cases. Although takings law implicates civil and not criminal liability, individual property owners can sometimes find themselves at greater risk in civil proceedings than in criminal ones. In the takings area, the personal loss of property can be enormous, especially when the regulated property constitutes a substantial portion of an individual's personal assets.¹¹² Imagine a government policy causing the loss of half the value of a home, half an annual income, or half of one's life savings with no recourse. Losses of this magnitude could be more devastating to an individual than paying a fine for a criminal conviction.¹¹³ Courts have created an ironic paradox in requiring more coherence in a body of law that can sometimes carry maximum \$1000 fines¹¹⁴ than in a body of law involving the potential deprivation of millions of dollars.¹¹⁵

109. See, e.g., *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135 (3d Cir. 1992) (explaining that the void for vagueness doctrine is an aspect of the Fourteenth Amendment's due process clause that arose because "it was thought unfair to punish persons for conduct which they had no notice could subject them to criminal punishment") (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

110. See generally *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.").

111. *Id.* ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal . . ."); see also *United States v. Harriss*, 347 U.S. 612, 617 (1954) ("The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.").

112. See, e.g., *POLLOT*, *supra* note 15, at xvii-xxi (chronicling the plight of several property owners who suffered severe financial losses because of onerous government regulations).

113. This discussion is not to minimize the impact of being criminally convicted but to emphasize the often forgotten suffering of individuals whose livelihood, home, or business has become entangled in regulation.

114. Examples of federal criminal statutes with maximum penalties that are de minimis, when compared to the potential loss of property from regulations, include 18 U.S.C. § 511A (1994) (fine not to exceed \$1000 for affixing to motor vehicle a theft prevention decal) and 7 U.S.C. § 3604 (1994) (fine not to exceed \$1000 if convicted of knowingly violating the International Sugar Agreement of 1977).

115. See *infra* note 119 for a list of inverse condemnation cases involving large losses to property owners. One might argue that the stigma attaching to a criminal record outweighs a pecuniary or property value loss. The argument might continue that the stigma of a criminal misdemeanor conviction would hamper efforts to find jobs, loans, or business contacts. But the economic results that arise from the government's uncompensated taking of property may also be devastating. For instance, a real estate investor who purchases a parcel of land for \$1 million with the intent to build a factory will not improve his future job or financial prospects if the government's application of a regulation precludes his

Besides their inherent unfairness to individuals, unpredictable laws hurt society by creating inefficiencies in the allocation of resources. Predictable laws render individuals, businesses, and government better able to confidently order their current and future affairs.¹¹⁶ Unpredictable laws also underutilize society's resources because people are less likely to take socially beneficial risks if they cannot readily discern if and how the law will apply to them.¹¹⁷ For instance, a prospective investor in a business venture will be less likely to do so if he is not sure which laws he must obey or the full scope of those laws.

Where precise advance planning is a necessity, a predictable rule of law is especially important.¹¹⁸ Because regulatory takings issues may arise where individuals are investing or intending to invest a great deal of time and money into commercial ventures, predictability is essential.¹¹⁹ As one observer points out:

The [Supreme] Court's . . . glorification of ad hoc balancing is impossible to reconcile with a belief in the importance of preserving "investment-backed expectation[s]." Takings law should be predictable, on this view, so that private individuals confidently can commit resources on capital projects. . . . If takings jurisprudence is both ad hoc and ex post, however, investors may have a very difficult time knowing whether a particular predictable state action will or will not be judged to be a taking. Therefore, even if the menu of possible state actions is known and probabilities can be assigned to each policy, investors will not be able to make informed choices because the Court has not provided clear standards to determine when compensation will be paid. The shifting doctrines of takings law introduce an element of uncertainty into investors' choices that has nothing to do with the underlying economics of the situation. This

development project and thereby diminishes the value of his property to the point of driving him into bankruptcy.

116. Ruth Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 YALE L.J. 1250, 1260 (1982); see SOWELL, *supra* note 108, at 130 ("[T]he freedom and safety of a whole society depend" on the "consistency and predictability of the law.").

117. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1701 (1988); RICHARD A. EPSTEIN, TAKINGS 3 (1985) (explaining that as the level of "uncertainty and insecurity" about the law diminishes, individuals can better utilize their talents and goods).

118. See *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (acknowledging that the need for advance planning requires reliance on earlier rules).

119. The amount of investment capital and individual assets at stake in takings case is often enormous. See *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1562 (Fed. Cir. 1994) (in regulatory takings case, company purchases parcel for \$2,964,000 with intention of setting up mining operations); *William C. Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (\$1.9 million loss out of \$2 million not a taking); *Horizon Adirondack Corp. v. State*, 388 N.Y.S.2d 235, 239 (Ct. Cl. 1976) (\$36 million inverse condemnation claim); *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103, 109 (Ct. App. 1978) (trial court award of \$3,169,996 plus interest and appraisal, engineering, and attorney's fees); *Prince George's County v. Blumberg*, 407 A.2d 1151, 1173 (Md. Ct. Spec. App. 1979), *modified*, 418 A.2d 1155 (Md. 1980) (trial court awarded \$373,919 for money actually expended on project, \$1.5 million for increased capital costs, and \$1.8 million for loss of earnings on anticipated profits, for a total of \$3,673,919); *Bacich v. Board of Control*, 144 P.2d 818, 823 (Cal. 1943) (\$85 million inverse condemnation claim).

uncertainty creates two problems. First, investors do not know whether or not damages will be paid. Second, in the event damages are not paid, investors will be left bearing the costs of an uninsurable risk. Thus, the Justices [of the Supreme Court] need to recognize that the investment-backed expectations they discuss are themselves affected by the nature of takings law. To the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices. . . .

. . . .
 . . . [In sum,] [i]n the face of . . . uncertainty, private interests may forgo otherwise profitable activities and thus the current state of the law may produce an inefficiently low level of investment.¹²⁰

To make current takings law predictable, Congress should enact the bright line rules found in the Takings Statute. The Takings Statute can solve the central problem in current takings law — the absence of a clear framework for evaluating cases where regulations cause property values to be substantially reduced. The Takings Statute's diminution in value approach would provide far greater certainty than the current case-by-case ad hoc approach.¹²¹ The Statute would promote the productive use of land by making land easier to purchase and use.¹²² By creating readily ascertainable legal rules, property owners could confidently order their affairs by knowing the legal limits of the use of their own land and their rights in relation to others.¹²³

B. The Takings Statute Will Ensure That the Costs of Public Goods Are Spread Equally and Will Lead to a More Efficient Use of Resources

It is common for the government to compensate property owners when their land is formally condemned for "public goods" such as military bases and highways.¹²⁴ In contrast, the government generally does not compensate property owners when regulations require owners to dedicate their property for informally declared "public goods," such as wetland preserves and wildlife refuges¹²⁵ — even when regulations

120. Rose-Ackerman, *supra* note 117, at 1700, 1701 (footnotes omitted) (quoting Michelman, *supra* note 59, at 1233).

121. Roger J. Marzulla, Statement Before Subcomm. on the Constitution of the House Comm. on the Judiciary, at 14 (Feb. 10, 1995) (concluding that a bright line definition of what constitutes a taking will foreshorten useless litigation), *available in* 1995 WL 54163.

122. Fred Bosselman, *Scalia on Land*, in *AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION* 88 (David L. Collies ed., 1993).

123. *See id.*; Robert I. McMurry, Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 731 (1982) (stating if "lawmakers stabilize the rules of substantive liability in the takings area, much of the planners' uncertainty might be removed").

124. Jonathan Tolman, *Property Rights and Wrongs*, WALL ST. J., Jan. 16, 1995, at A14 ("Whether the government builds a school, a park or a military base, the government must compensate when it takes the property of landowners, regardless of how important the activity is to the public interest.").

125. Jonathan H. Adler, Associate Director of Environmental Studies for the Competitive Enterprise Institute, Written Statement to Subcomm. on the Constitution of the House Comm. on the Judiciary, at 2 (Feb. 10, 1995) [hereinafter Adler, Constitution Subcomm. Statement], *available in* 1995 WL 54168.

were enacted "to benefit the public as a whole."¹²⁶ In such cases, the amount of land removed from private use can be substantial. Nevertheless, the Supreme Court has offered no logical distinction between these two types of takings nor explained why a government agency should be prepared to compensate property owners in one set of cases but not the other.

The constitutional prohibition on uncompensated takings was designed to bar government from forcing a few people to bear public burdens which should be borne by the public as a whole.¹²⁷ Besides being fair, requiring the government to compensate property owners when it prohibits or restricts reasonable land uses encourages a superior calculation of the costs and benefits of proposed regulatory actions. When government is allowed to take property through regulation without paying compensation, the government has no incentive to consider the costs of the proposed regulation.¹²⁸ Regulations are then falsely seen as producing benefits with no costs. Requiring the government to pay compensation forces public officials and the public to consider the actual costs of public goods.¹²⁹ Absent this economic and fiscal incentive to prioritize, government agencies have every incentive to infringe upon and, thereby, to take as much private property as possible.¹³⁰

VI. Responses to Anticipated Arguments Against the Takings Statute

As the 104th Congress debated the efficacy of some takings bills, a few points were raised repeatedly in opposition to the proposed legislation. This section addresses some of the arguments raised against takings legislation.

A. Argument: "The Public Will Have to Pay Polluters Not to Pollute"

Proposals to require government agencies to compensate property owners are routinely portrayed as anti-environmental and pro-polluter.¹³¹

126. *Id.* at attach. 1.

127. *Armstrong v. United States*, 364 U.S. 40, 49 (1959); *see Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994) (citing *Armstrong*, 364 U.S. at 49); *see also* Richard L. Stroup, Political Economy Research Ctr., *Takings and Environmental Habit*, in *DRAWING THE LINE: PROPERTY RIGHTS AND ENVIRONMENTAL PROTECTION* 13-14 (John S. Archer ed., 1992) (explaining that because regulations such as zoning, wetlands preservation, and endangered species protection purportedly provide benefits to the whole community, the whole community should pay for the costs of those policies).

128. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 387 (N.Y. 1976).

129. *Id.* ("[T]he ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding When [the social cost is] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit."); Ellig, *supra* note 29, at 84 ("[P]oliticians who impose too many regulations that are not worth the cost will find their popularity dwindle, because of the excessive tax burden that accompanies the excessive regulation."); Marzulla, *supra* note 31, at 112 ("Regulations are most cost-effective when the party to whom the alleged benefit accrues (in this case, the public) bears the cost.").

130. Government entities have little financial incentive to seek the most efficient means to achieve public goals when they know they will not be forced to pay for even the most excessive regulations. *See Burrows v. City of Keere*, 432 A.2d 15, 20 (N.H. 1981); William K. Swank, Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 *STAN. L. REV.* 779, 795 (1976); Note, *supra* note 123, at 730-32.

131. For instance, Assistant Attorney General John R. Schmidt has described takings legislation as

Contrary to such hyperbolic claims, the Takings Statute would be neither anti-environment nor pro-polluter. Instead, the Takings Statute would ensure that the costs of public policy are borne fairly throughout society, rather than by a few unfortunate individuals.

The Takings Statute, like current takings law, would not compensate property owners for polluting the environment because the Statute would prevent owners from using their property to injure public or private rights.¹³²

Under longstanding principles of common law, land uses which cause pollution constitute "trespasses" or "nuisances." As one commentator explains:

Indeed, the proper aim of federal government efforts to protect "the environment" is to prevent the imposition of harmful substances upon unconsenting persons and their properties; and, barring that, punishing those who transgress against others in this manner. This is the aim of controlling pollution — controlling the unwanted imposition of wastes or toxins by one party on another. Pollution is a "trespass" or "nuisance" under the principles of common law.¹³³

Though a comprehensive discussion of the contours of nuisance law is beyond the scope of this article, a general word of caution is in order. In defining which human activities constitute nuisances under the law, courts and legislative bodies should not define the term so broadly that any activity that has any type of adverse effect upon others is characterized as a "nuisance." After all, virtually every human activity in some sense may adversely affect another person.¹³⁴ For instance, while the advent of electricity brought about great advancements in the quality of human life, individuals who were at the time heavily invested in the candlemaking industry were adversely affected. The advent of electricity probably caused a loss of profits to candlemakers and reduced the value of their candlemaking machines and tools. Nevertheless, the activities of the individuals who used their property to expand the electricity industry could not be said to have constituted a common law nuisance, despite the clear adverse effect upon the candlemaking industry. Thus, the advent of

codifying "the unreasonable notion that . . . taxpayers must pay people to refrain from using their property in a way that harms others." Thomas Lambert, *Congress' Job: Clarify Rights of Property Owners*, DETROIT NEWS, Mar. 2, 1995, at A10; see [Transcript of] the Vice Presidential Debate, N.Y. TIMES, Oct. 10, 1996, at B15 (remarks of Vice President Al Gore) ("Some have even proposed . . . that polluters ought to be paid if they agree to stop dumping poisons into the river.").

132. See section III(d) of the Model Takings Statute set out *supra* Part IV.B. See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022 (1992) (stating "'harmful or noxious uses' of property may be proscribed by government regulation without the requirement on compensation"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 144 (1978) (Rehnquist, C.J., dissenting) (stating that the Constitution does not permit a property owner to use property in a manner that injures the health or safety of the community).

133. Adler, Constitution Subcomm. Statement, *supra* note 125, at 2; see also Stroup, *supra* note 127, at 12-13 ("[T]o force [a] company to quit dumping large quantities of a harmful chemical into a neighboring trout stream is not [a taking] because there was never the right to dump chemicals onto other people's property.").

134. POLLOT, *supra* note 15, at 134.

electricity, even if brought about through government action, would not violate any private or public rights.

Some have argued that the definition of a "nuisance" should be broad enough to prevent compensation in those situations where the societal benefit from a regulation outweighs the harms to the owner of the regulated property. In stark contrast to constitutional protections applying to criminal proceedings, when a takings question arises, some argue that courts should balance the economic harm to the property owner against the potential benefits to society from regulations.¹³⁵ However, the determination of whether a government action causes a taking of property should not depend upon a cost-benefit analysis. The cost-benefit analysis paradigm should be rejected because constitutional rights are not subject to a utilitarian calculus; constitutional rights *always* trump otherwise desirable public policy goals. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹³⁶

The cost-benefit analysis paradigm is often rejected as an inappropriate approach to analyzing issues of constitutional law. The Fourth Amendment's prohibition against unreasonable searches and seizures, for example, protects the rights of criminal defendants, despite the countervailing state interests, such as punishing the guilty.¹³⁷ Courts have also refused to compromise the Fifth Amendment protections against self-incrimination even though the effect of its application may be the frustration of the truth-seeking function of a criminal trial.¹³⁸ The Fifth Amendment's Takings Clause merits similar deference.

B. Argument: "The Takings Statute Would Render Government Programs Prohibitively Expensive"

Another oft-repeated objection to proposed takings legislation is that the increased likelihood of payment by the government to property owners would be so costly that important social and environmental programs would be disrupted.¹³⁹

This argument is unpersuasive because it fails to realize that the benefits derived from government regulations are never free. Instead, the costs are borne by a few individual property owners while most of the people who benefit from the regulations (i.e., the public-at-large) pay nothing. Indeed, merely taking something does not make it free — except to those who do the taking. To the person from whom it is taken,

135. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 409 (1922) (Brandeis, J., dissenting).

136. *Id.* at 416; see Gary Eisenberg, 1988 ANN. SURV. AM. L. 1101, 1135 ("Although in some instances governments may fail to enact potentially beneficial land use regulation, the absence of such regulation is a small price to pay in order to ensure the protection of a fundamental constitutional right.").

137. See *Miranda v. Arizona*, 384 U.S. 436, 542 (White, J., dissenting) ("In some unknown number of cases the [*Miranda*] Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him.").

138. See Edward Felsenthal, *As Fifth Amendment Is Invoked More, Would Framers Rue What They Created?*, WALL ST. J., Sept. 12, 1995, at B1 (explaining that witnesses who take the Fifth Amendment in criminal trials can thwart the trial's truth-finding function to the harm of society).

139. See, e.g., Jay D. Hair, President of the National Wildlife Federation in Lavelle, *Closing the Property Rights Contract*, NAT'L L.J., Mar. 27, 1995, at A10 (arguing that takings legislation would adversely affect environmental protections).

that action can be quite costly. For example, a thief who steals one's belongings may not have to pay for the stolen property, but the rightful owner, or at least the owner's insurance carrier, will have to pay for the lost property. To the thief, the property he stole was free, but to others, it had very real costs. Those who are concerned about the effect of takings legislation on the taxpayer, therefore, are asking the wrong question. The proper question is not what is the cost of takings legislation to the taxpayer but what is the value of the goods being acquired by the government and the public-at-large through regulation.

The failure to account for all the costs of the public goods that government acquires through regulation causes an artificially high demand for those public goods.¹⁴⁰ Imposing fiscal restraints on government agencies would result in a more efficient utilization of resources.¹⁴¹ Absent the threat of an inverse condemnation action, government regulators lack the financial incentive to seek the most efficient means possible to achieve a desirable public goal; they know their agency will never be forced to pay the costs of the attendant benefits — even for the most excessive regulatory schemes.¹⁴² Therefore, mandating a compensation remedy for regulatory takings would facilitate a more careful assessment of a regulatory action's social cost.

The Framers realized that sometimes the government must achieve public ends by taking property from private parties. In attempting to balance public and private interests, the Framers balanced the federal government's eminent domain power with the requirement of just compensation to owners forced to sacrifice their property for the public good. Only if the injured property owners were made whole would that power of eminent domain be exercised justly. To do otherwise would cause individuals to bear the full burden of the public's appetite — an unfair and costly burden to shoulder.

It is instructive to compare the argument that a takings statute would make government programs too costly with the similar claims made to preserve the now-diminished doctrine of tort sovereign immunity.¹⁴³ The traditional defense of the tort sovereign immunity doctrine, which protects states and state officers from tort liability,¹⁴⁴ recites a now-familiar refrain: "Historically governmental immunity was thought necessary to protect governmental funds from depletion by payment of

140. See Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 388 (N.Y. 1976); Douglas W. Kmiec, *Clarifying the Supreme Court's Takings Cases — An Irreverent but Otherwise Unassailable Draft Opinion in Dolan v. City of Tigard*, 71 DENV. U. L. REV. 325, 330 (1994) ("Apparently, however, it's no fun regulating if it's not for 'free.'").

141. See Note, *supra* note 123, at 737-38; see also David Schoenbrod, *On Environmental Law, Congress Keeps Passing the Buck*, WALL ST. J., Mar. 29, 1995, at A13 (explaining that regulatory takings would build cost sensitivity into environmental regulations by requiring the government (and therefore taxpayers) to pay for the cost of complying with environmental laws).

142. See *id.*; Adler, Constitution Subcomm. Statement, *supra* note 125, at 10.

143. Note, *supra* note 123, at 726-28; Owen v. City of Independence, 445 U.S. 622, 672 (1980) (Powell, J., dissenting); Leland Badler, *Municipal Zoning Liability in Damages — A New Cause of Action*, 5 URB. LAW. 25, 38 (1973).

144. CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT § 1.8, at 21-22 (Jon L. Craig ed., 1992) [hereinafter CIVIL ACTIONS].

damage claims, and it was reasoned that the individual victim's need to be made whole must give way to the public welfare."¹⁴⁵

The existence of the sovereign immunity doctrine was rationalized as preventing the government fisc from being drained by tort actions brought against it.¹⁴⁶ This argument is virtually identical to the ones made against proposed takings legislation.¹⁴⁷ Today, most states have abrogated the tort sovereign immunity doctrine.¹⁴⁸ Courts have repeatedly rejected the public fisc argument, and the expected parade of horrors has not occurred.¹⁴⁹ Even if there was empirical support for the public fisc concern, principles of fairness would still require that compensation be paid to the injured party, whether the party was injured by the negligence of a government employee¹⁵⁰ or by the effects of a government regulation.

C. Argument: "Takings in Reverse: If Government Must Pay When Regulations Reduce Property Values, Property Owners Should Compensate Government When Government Increases Property Values"

Some observers oppose takings statutes because, they allege, no requirement exists that a property owner must pay his fellow taxpayers when government action increases the value of his property.¹⁵¹ While rhetorically attractive at first glance, this argument is unpersuasive. First, unlike the Takings Clause of the Fifth Amendment, the United States Constitution does not contain a "givings" provision. Thus, this objection to the Takings Statute has no textual basis in the Constitution. Second, property owners already pay for government actions which enhance property values.¹⁵² For instance, property owners pay local taxes for municipal sewer lines and streets. Moreover, most

145. *Sambs v. City of Brookfield*, 293 N.W.2d 504, 512 (Wis. 1980).

146. See Note, *supra* note 123, at 726; WILLIAM L. PROSSER, *LAW OF TORTS* § 131, at 978 (1980) (explaining that one justification of the tort sovereign immunity doctrine is that governments cannot carry on "if money raised by taxation for public use is diverted to making good the torts of employees") (citations omitted).

147. See Note, *supra* note 123, at 726-27; see also Hair, *supra* note 139, at A10.

148. Since 1957, "many jurisdictions have judicially abrogated the common-law doctrine of sovereign immunity." CIVIL ACTIONS, *supra* note 144, § 1.8, at 23; Mark L. Van Valkenburgh, Note, *Massachusetts General Laws Chapter 258, § 10: Slouching Toward Sovereign Immunity*, 29 NEW ENG. L. REV. 1079, 1082 & n.57 (1995).

149. *Enghauser Mfg. Co. v. Eriksson Eng'g*, 451 N.E.2d 228, 231 (Ohio 1983) ("[T]here is no empirical data to support the fear that governmental functions would be curtailed as a result of imposing liability for tortious conduct.") (citations omitted); see Note, *supra*, note 123, at 727 (explaining that the "prophesied disasters" anticipated if the tort sovereign immunity doctrine were abolished have not occurred).

150. "That an individual injured by the negligence of the employees of a [government agency] should bear his loss himself . . . instead of having it borne by the public treasury to which he and all other citizens contribute, offends the basic principles of equality of burdens and of elementary justice." *Enghauser Mfg. Co.*, 451 N.E.2d at 231 (citations omitted).

151. Lambert, *supra* note 131, at A10 ("[T]he government often increases property values by providing such amenities as interstates, bridges and sewer lines. 'Perhaps, then, property owners should therefore pay every time a government action raises the value of their property.'" (internal citation omitted).

152. JONATHAN H. ADLER, *PROPERTY RIGHTS READER* 4 (1995).

municipalities base their property tax system on the value of the owner's property. Thus, the more a government action benefits an owner's land and increases its value, the higher that landowner's property taxes will be. Third, government's very purpose is to enhance the worth of an individual's life, liberty, and property above what they would be in a world without government.¹⁵³ Individuals, who already pay taxes for the express purpose of having a government improve their lives, should not pay even more tribute when the government actually fulfills that purpose.

Conclusion

Despite a relatively straightforward constitutional mandate, few legal problems have proven as resistant to judicial solution as those posed by the Constitution's requirement that private property shall not be taken for public use without just compensation. Although courts and commentators have tried to create an understandable framework for analyzing regulatory takings for almost three-quarters of a century, no effective and coherent framework has emerged. Instead, courts, government agencies, and, most importantly, property owners must rely on perplexing and often contradictory signals from the Supreme Court to discern the line between unconstitutional takings, which compel compensation, and valid exercises of police power, which do not.

Current regulatory takings jurisprudence has resulted in the unacceptably lax enforcement of the constitutional right to be secure in one's property. Trapped by over seventy years of ad hoc jurisprudence, the Supreme Court appears unable to break free of its practice of examining regulatory takings through the looking glass of the owner's remaining property value *after* regulation. It has failed to apply the constitutional mandate that an owner be compensated for the reduced value of the property appropriated by regulation, just as owners are entitled to compensation when government takes title to their property. After all, from the perspective of the property owner, the effect is the same. Accordingly, Congress should step in and resolve this jurisprudential impasse in favor of individual property owners. Through the enactment of the Takings Statute, Congress can ensure that the inalienable right to property receives the constitutional protection envisioned by the Framers and necessary to ensure a fair and flourishing society.

153. EPSTEIN, *supra* note 117, at 4 ("All government action must be justified as moving a society from the smaller to the larger [social gain]"); ADAMS, *supra* note 18, at 65 ("[T]he end of all government is the good and ease of the people, in a secure enjoyment of their rights, without oppression."). See generally JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Richard Cox ed., 1982).

