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THE ARMSTRONG PRINCIPLE, THE NARRATIVES OF TAKINGS, AND COMPENSATION STATUTES

WILLIAM MICHAEL TREANOR*

INTRODUCTION

The Takings Clause of the Fifth Amendment¹ is famous for inspiring disagreement. More than one hundred years have passed since the Supreme Court departed from the original understanding of the clause and interpreted regulations as potentially falling within its ambit.² Although the passage of time has established the principle that regulations can run afoul of the Takings Clause, the Court has been unable to offer a coherent vision of when compensation is required.³ Academic commentators also have failed to reach agreement on the issue, offering an enormous range of solutions to the takings question.⁴ The new-

* Associate Professor, Fordham Law School. Earlier versions of this Essay were presented at the Institute of Bill of Rights Law Symposium on Defining Takings: Private Property and the Future of Government Regulation held at the College of William & Mary School of Law on April 11, 1996 and at a Fordham Law School faculty colloquium. I am grateful to all the participants in those sessions for their helpful and stimulating comments, and I am particularly grateful to Lynda Butler and Neal Devins. I also thank Louise Halper, Jim Kainen, Bob Kaczorowski, Paul Schwartz, Hank McGee, and John Nagle for their valuable suggestions and Frank Michelman for his discussions about the *Armstrong* Principle and compensation statutes. Fordham Law School generously provided research assistance for this project.

1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. See *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791-97 (1995) (explaining that the original understanding of the Takings Clause included only physical seizures of property).

3. For an excellent synthesis of different tests employed by the Court, see 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 (1989). For the leading decisions after Professor Peterson's article, see *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

4. See Treanor, *supra* note 2, at 810-18, 866-75 (listing and discussing academics' differing treatments of the Takings Clause's original understanding and describing

est field of controversy involves compensation statutes.⁵ In a few short years, the property rights movement's demand that both state and national legislatures provide compensation when government regulations diminish property value has won widespread support, which, since 1994, has begun to translate into legislative success.⁶ The Contract with America provides that "property owners [are] to receive compensation . . . for any reduction in the value of their property" greater than ten percent.⁷ Shortly after the 104th Session of the House of Representatives began, its members passed an act requiring compensation when certain regulations decreased the value of land by more than twenty percent.⁸ Five state legislatures have passed statutes directing that property owners be paid for losses that they suffer as the result of governmental regulations.⁹

The success of the property rights movement, however, has provoked a powerful response. Academic criticism has been sharp,¹⁰ and political opposition has been intense.¹¹ Property

variations among Takings Clause public choice theories).

5. See *infra* notes 6-9 and accompanying text.

6. See *infra* notes 7-9 and accompanying text.

7. Job Creation and Wage Enhancement Act, reprinted in *CONTRACT WITH AMERICA* 134-35 (Ed Gillespie & Bob Schellhas eds., 1994).

8. Private Property Protection Act of 1995, H.R. 925, 104th Cong. § 2.

9. Bert J. Harris, Jr., Private Property Rights Protection Act, ch. 181, 1995 Fla. Sess. Law Serv. 1311 (West) (codified at FLA. STAT. ANN. § 70.001 (West Supp. 1996)); Act of June 15, 1995, No. 302, 1995 La. Sess. Law Serv. 344 (West) (codified at LA. REV. STAT. ANN. §§ 3601-3602, 3608-3612, 3621-3624 (West Supp. 1996)); Mississippi Agricultural and Forestry Activity Act, 1995 Miss. Laws 379 (codified at MISS. CODE ANN. §§ 49-33-1 to -19 (Supp. 1995)); Private Real Property Rights Preservation Act, ch. 517, 1995 Tex. Sess. Law Serv. 3266 (West) (codified at TEX. GOV'T CODE ANN. §§ 2007.001-.006, .021-.026, .041-.045 (West Supp. 1996)); Private Property Regulatory Fairness Act of 1995, ch. 98, 1995 Wash. Legis. Serv. 261 (West) (repealed by referendum, Nov. 7, 1995).

10. See, e.g., Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 *FORDHAM ENVTL. L.J.* 409 (1995) (critiquing H.R. 925, 104th Cong. § 2 (1995) and S. 605, 104th Cong. (1995)). H.R. 925, which was passed by the House in March, 1995, would compensate property owners if specified government action devalued their property by 20% or more. *Id.* at 409-10. S. 605, which was introduced in the Senate on March 23, 1995, would compensate property owners in the event specified government action devalued their property by 33% or more. *Id.* at 401, 417 n.36. See also Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 *WASH. & LEE L. REV.* 265, 293 (1996) (arguing that property rights legislation "could seriously disrupt the balancing effort of takings jurisprudence").

11. See, e.g., David Postman, *Property-Rights Measure Draws Big Contributors on*

rights legislation already has been repealed by referendum in Washington state¹² and rejected in an Arizona referendum.¹³ President Clinton has threatened to veto any federal property rights bill.¹⁴ Opponents of compensation statutes accurately have seen in both the proposed and enacted statutes a direct threat to the continued existence of the regulatory state: by requiring compensation for regulations these statutes will make the imposition of many regulations too costly.

Given the extraordinary diversity of opinion about when compensation is owed, it would be only natural to expect that an equal lack of agreement would exist about what purpose the Takings Clause serves. The reality, however, directly contradicts that expectation. Justice Black crisply stated his view of the purpose of the Takings Clause in *Armstrong v. United States*:¹⁵ The Takings Clause is "designed 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."¹⁶ Justice Black's view has received a remarkable degree of assent across the spectrum of opinion.¹⁷ The *Armstrong* principle has become, according to Professor Glynn Lunney, a part of the "ritual litany" employed in takings decisions.¹⁸ The principle has been embraced repeatedly by Chief Justice Rehnquist and by Justice Scalia, the judicial champions of a broad reading of the Takings Clause,¹⁹ as well as Florida's compensation statute.²⁰ It is con-

Both Sides of Fight, SEATTLE TIMES, Oct. 27, 1995, at A1 (listing groups and individuals contributing to the fight against Washington state's property rights referendum).

12. See *Recent Legislation*, 109 HARV. L. REV. 542, 543 n.5 (1995).

13. See *Washington State Voters, Arizonans Agree on 'Takings'*, PHOENIX GAZETTE, Nov. 20, 1995, at B1.

14. See *Property Wrongs*, NEW REPUBLIC, June 17, 1996, at 8.

15. 364 U.S. 40 (1960).

16. *Id.* at 49.

17. See *infra* notes 18-22 and accompanying text.

18. Glynn S. Lunney Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 747 (1993).

19. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (Rehnquist, C.J., writing for the majority); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988) (Rehnquist, C.J., writing for the majority); *id.* at 19 (Scalia, J., concurring in part and dissenting in part); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (Scalia, J., writing for the majority); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512-13 (1987) (Rehnquist, C.J., dissenting); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting).

20. Bert J. Harris, Jr., *Private Property Rights Protection Act*, FLA. ANN. STAT. §

tained specifically in the text of, and invoked in support of, various property rights proposals recently introduced in the Senate.²¹ The champions of a narrow reading of the clause, Justices Brennan, Blackmun, Marshall, and Stevens have espoused the *Armstrong* principle with equal fervor.²²

At one level, this striking unanimity results from Justice Black's broad language. His language avoids confrontation of the hard question: What do fairness and justice require? People with very different ideas about fairness can accept the *Armstrong* principle while diverging sharply as to what it means. Nonetheless, cultural conventions exist to give the principle meaning.

Bruce Ackerman has offered the leading scholarly treatment of cultural conventions concerning the Takings Clause in his book *Private Property and the Constitution*.²³ Ackerman develops what the Takings Clause means to "Layman"²⁴ by examining "Ordinary language"²⁵ in order to reveal what would "be called takings in ordinary life."²⁶ He argues that Layman understands the word "property" to refer, most fundamentally, to tangible, physical possessions and the word "take" to refer, most fundamentally, to physical seizures.²⁷ Thus, when the government physically seizes his property and uses it for some purpose,

70.001(3)(e) (West Supp. 1996).

21. See 141 CONG. REC. S10037 (daily ed. July 14, 1995) (statement of Sen. Gramm); *id.* at S4504 (daily ed. Mar. 23, 1995) (statement of Sen. Hatch); *id.* at S4497 (daily ed. Mar. 23, 1995) (statement of Sen. Dole); *id.* at S567 (daily ed. Jan. 6, 1995) (statement of Sen. Hatch); *id.* at S391 (daily ed. Jan. 4, 1995) (statement of Sen. Hatch).

22. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1071 (1992) (Stevens, J., dissenting); *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987) (Stevens, J., writing for the majority); *United States v. Locke*, 471 U.S. 84, 106 n.15 (1985) (Marshall, J., writing for the majority); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 n.23 (1984) (Marshall, J., writing for the majority); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (Blackmun, J., writing for the majority); *Penn Central*, 438 U.S. at 123-24 (Brennan, J., writing for the majority); *National Bd. of YMCA's v. United States*, 395 U.S. 85, 89 (1969) (Brennan, J., writing for the majority).

23. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 113-67 (1977).

24. See *id.* (discussing "Layman's Things").

25. *Id.* at 129.

26. *Id.* at 139.

27. See *id.* at 123-36.

Layman would say that his property has been taken. Similarly, using "standard English," Layman would also describe his property as having been taken when the government destroys it.²⁸ Finally (and most problematically), when government renders something useless, Professor Ackerman argues that Layman again would say that that thing has been taken from him because "the principal point of property talk is to permit Layman to identify some things in his environment that he may exploit to his advantage without incurring adverse social sanction."²⁹ To say that an individual still owns something that no longer has any value is to "exhibit[] either a bad sense of humor or a complete ignorance of the point of property-talk in American society."³⁰

Ackerman's primary analytic tool is linguistic. Rather than drawing on any empirical data indicating when lay people believe property has been taken and compensation owed, he focuses on what the relevant terms mean in everyday speech. The claims he makes have an intuitive appeal: they seem to capture common understanding. Moreover, the categories of situations he identifies as being ones in which the layperson believes her property to have been taken—ones in which the property is physically seized, or destroyed, or stripped of all value—are the ones that courts treat as easy cases for compensation (even though scholars often disagree with this result).³¹ Judicial practice thus supports the existence of cultural conventions.

In this Essay, I argue that there is an additional category of cases in which there is a cultural convention that fairness requires compensation. This category consists of cases in which unanticipated regulations destroy a significant portion of the total assets of a property owner. From a legal vantage point, these cases are very different from those situations Ackerman discusses: courts will not necessarily order payment to be made to these property owners nor will they necessarily invalidate the

28. *Id.* at 130.

29. *Id.* at 140.

30. *Id.*

31. Indeed, one of the central points of Ackerman's book is that there is a gap in the takings realm between the lay perspective, which is reflected in much of the case law, and the views of "sophisticated judges and lawyers of the present day." *Id.* at 168.

regulations. Courts will not always order compensation because judicial takings inquiries typically focus on the harm to the property, not on the actual harm to the property owner. If a regulation equally affects the value of Blackacre and Whiteacre, courts will analyze the cases of the owners of Whiteacre and Blackacre identically. The courts will treat the cases in similar fashion even if the owner of Whiteacre also owns many other properties that are not affected by the regulation, and the owner of Blackacre owns nothing else and thus is deprived of most of the value of her total assets by the regulation.

As a matter of constitutional interpretation and the institutional role of the courts, this result is the correct one. The fact that courts will not direct compensation, however, does not mean that legislatures should not provide it. In this Essay, I argue for compensation statutes at the state and national level designed to ensure compensation in the final category of cases described above, those in which the total net worth of a property owner is dealt a disproportionate blow as a result of a newly instituted government regulation.

At the outset, the limited goals of this Essay should be made clear. It is an initial, but admittedly partial, attempt to sketch out a new kind of compensation statute. It begins from the twin premises that takings law and compensation practices should reflect the *Armstrong* principle—the principle that individuals should not bear an unfair share of public burdens—and that this principle should be substantiated through cultural conventions. In other words, I start from the assumption that compensation is due in at least those cases in which there is a consensus that it should be provided and then offer a model compensation statute designed to provide compensation in those cases. My claim is not that there are no additional cases in which compensation should be paid; only that compensation statutes should, at a minimum, cover this category of cases. Neither will I attempt to offer a full defense of the legitimacy of these premises. They seem to me, however, to be obviously correct. A democratic government should not treat its citizens in a way that is generally thought to be unfair.³²

32. The view that takings law should reflect cultural conventions is one that has

The enterprise of this Essay is important, in part, for prudential reasons. Though critics of the property rights movement's compensation statutes effectively have revealed a range of those statutes' shortcomings,³³ they have not offered an alternative vision for what compensation statutes should look like. As a political matter, this is a mistake. The absence of an alternative makes the property rights movement's proposals significantly more attractive to many people. Although many individuals may find these statutes too broad, the statutes offer the only mechanism available to help those who, despite being greatly harmed by regulation, have no hope of judicial redress. My proposal seeks to remedy unfairness without simultaneously making regulation impossible.

In addition, statutes of the kind I propose here are necessary if the Takings Clause is to reach its appropriate role in the constitutional framework. In the past few years, process theories about the Takings Clause have achieved prominence in scholarly debates regarding the clause.³⁴ These theories are, to quote Professor James Krier, the "latest fad in the field."³⁵ Most proponents of process theories (myself included) believe that courts should defer to the decisions made by the majoritarian political process about regulation and compensation, except in those cases in which reason exists to suspect process failure.³⁶ In focusing on the judicial role, however, process theorists have not offered a complementary theory laying out an appropriate framework for majoritarian decisionmakers' compensation deter-

important support in the scholarly literature. In particular, it lies at the heart of the approaches of Professors Fischel and Ellickson. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS* (1995); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 416-424 (1977).

33. See, e.g., *Property Wrongs*, *supra* note 14.

34. See, e.g., FISCHEL, *supra* note 32; Daniel Farber, *Public Choice and Just Compensation*, 9 *CONST. COMMENTARY* 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 *CONN. L. REV.* 285 (1990); Saul Levmore, *Takings, Torts and Special Interests*, 77 *VA. L. REV.* 1333 (1991); Glynn S. Lunney Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 *MICH. L. REV.* 1892 (1992); Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beach Front*, 46 *RUTGERS L. REV.* 243 (1993); Treanor, *supra* note 2.

35. James E. Krier, *Takings from Freund to Fischel*, 84 *GEO. L.J.* 1895, 1908 (1996) (book review) (reviewing FISCHEL, *supra* note 32).

36. See, e.g., Treanor, *supra* note 2, at 784, 855-78.

minations. My proposal here represents an effort to start filling that gap.

The project of the Essay, then, is two-fold: to demonstrate the current consensus and to develop the case for a new kind of compensation statute. To demonstrate the current consensus, I start with a surprising (because partisan) source: the narratives told by proponents of the property rights movement.

NARRATIVES OF THE PROPERTY RIGHTS MOVEMENT

The property rights movement derives its political strength from the power of its stories. As the *National Review* has observed, "[T]he real impetus for the property-rights movement is outrage at specific cases of government abuse of landowners."³⁷ Those stories of abuse are almost formulaic. Thus, Representative Billy Tauzin, the chief sponsor of one leading proposal, offers what one environmentalist has dubbed "the favorite 'horror story' of Endangered Species Act (ESA) opponents."³⁸

This insanity came to a head last year during the California brush fires. Many people watched in dismay as their homes burned down because they were not allowed to dig around them and create fire breaks. Why? Because the US Fish and Wildlife Service summarily and arbitrarily determined that such precautions would disturb the habitat of the kangaroo rat. Imagine that. A rat!³⁹

Representative Tauzin tells another prominent horror story featuring the Army Corps of Engineers as the wrong-doers:

37. Jonathan H. Adler, *Takings Cause*, NAT'L REV., Dec. 19, 1994, at 32, 35.

38. Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENVTL. L.J. 637, 644 (1995) (citing GAO *Debunks Endangered Species "Horror Story"*, BUS. WIRE, July 14, 1994 (quoting Michael Bean, Chair of Environmental Defense Fund wildlife program), available in LEXIS, News Library, Arcnews File).

39. Wolf, *supra* note 38, at 644 (citing W.J. "Billy" Tauzin, *If You Take It, Pay For It! Something's Wrong When a Rat's Home Is More Important Than an American's Home*, ROLL CALL, July 25, 1994, available in LEXIS, News Library, Arcnews File; W.J. "Billy" Tauzin, *Private Property & Public Rights*, CHRISTIAN SCI. MONITOR, Aug. 15, 1994, at 19).

[T]he Chaconases . . . bought their home from a family called the Gautreaus. The Gautreaus built their home. They built it first checking with the Corps of Engineers to see if it was all right to dig a pond and to use the material from the pond as a foundation for the home. The Corps said, "No problem." They built the home. Then they built another home across the street and sold that first home as an investment to the Chaconases. Oh, but guess what happened in the meantime. The Corps of Engineers showed up because some neighbor did not like the drainage situation in the area and reported him to the EPA.

Mr. Chairman, the Corps of Engineers showed up and said to the Chaconases, new owners, "You may have to take down part of your home because it's built on a wetland," and the Chaconases said, "What's going on here? Did anybody notice me before I bought this home that it was a wetland?" The answer was no.

[The Chaconases and the Gatreaus subsequently learned from the Corps of Engineers that the road to both their homes crossed a wetland and could not be used. Gautreau asked a government official how he could continue to use his home.] And that official of this U.S. Government who is paid by the taxes that Mr. Gautreau spends each year, sends to this Government, has the arrogance, the audacity, to tell that man, "Take a helicopter. You want to get home after noon, after work, you've sweated and toiled and sent your tax dollars to this government, take a helicopter because we're taking your road."⁴⁰

Representative Jack Fields offers another narrative that scholar Michael Allan Wolf describes as a "morality tale [that] is a favorite among opponents of the ESA."⁴¹

In Maryland, a couple was prohibited from preventing erosion on their property because the government told them that it might destroy tiger beetles. Meanwhile, a fifteen-foot section of their property plunged into the bay. Their home is now the endangered species.⁴²

40. 141 CONG. REC. H2544 (daily ed. Mar. 2, 1995) (statement of Rep. Tauzin).

41. Wolf, *supra* note 38, at 646.

42. *Id.* at 645-46 (citing 140 CONG. REC. E225 (daily ed. Feb. 23, 1994) (statement

In its discussion of abusive government regulations, the recent Senate Report on the leadership's proposed property rights statute concludes with the following dramatic example:

Bob and Mary McMackin of Pennsylvania obtained all the necessary permits to go ahead and build a house on their property. They did just that and lived in that house for 4 years. Then, they were informed that their seemingly dry land had been designated a wetland and that they faced criminal sanctions and staggering fines.⁴³

Howard Burris's tale of woe anchored pieces championing the property rights movement in the *National Review*, *Forbes*, and the *Washington Times*. The *National Review's* account of Mr. Burris's fate ran as follows:

Howard Burris of Travis County, Texas, . . . spent 15 years and millions of dollars developing some land his family had owned since World War II. Then, four years ago, Mr. Burris received a cease-and-desist order from the Fish and Wildlife Service because his land was identified as suitable habitat for the golden-cheeked warbler. "I was in a box," he says. He was unable to continue development or to make any other productive use of the land. As a result, the bank foreclosed on nearly 400 acres. "I'm not at all opposed to protecting endangered species," says Mr. Burris, "just to giving up my net worth to do it."⁴⁴

Speaker Gingrich offered the following explanation of his support of the property rights movement, as well as the broader support the movement had attracted:

Part of what happened was people had family ranches that were three and four generations old, they suddenly had a

of Rep. Fields)).

43. S. REP. NO. 104-239, at 15 (1996).

44. Adler, *supra* note 37, at 32, 35. For other accounts of Burris's attempt to develop this land, see Jonathan Adler, *Property Rights Revolt*, WASH. TIMES, July 16, 1994, at D1; Leslie Spencer, *No Dream House for Mr. Burris*, FORBES, July 18, 1994, at 78.

bureaucrat show up from Washington and say, I now control how you live on your family property. You can't take me to court, you will not get compensated but I've just changed to [sic] total value of your family inheritance. And people got into a rage. And across all of the West, in particular, you have people who are just enraged by the way in which they've been dealt with by government bureaucracies [The Private Property Rights Act] is an effort to begin to rebalance⁴⁵

These various accounts share a number of common features. In each case, the property owners are innocent actors. Not only are they not doing anything harmful, they simply are seeking to do what they have every reason to believe they would be permitted to do: build a home, set up a fire barrier, prevent their home from falling into the sea, develop property in accordance with long-standing plans, or live on the family ranch. The government's decisions seem either to reflect irrational bureaucratic judgments or to ignore justifiable reliance: after the government permits home building, wetlands are discovered; the protection of family homes loses out to tiger beetles and rats; millions of dollars in investments are sacrificed to protect the interests of golden-cheeked warblers; bureaucrats just "show up" and start to "control how you live on your family property."⁴⁶ The owner has a strong emotional investment in the affected property.

Most of the cases involve homes. Strikingly, in the one case involving property that is primarily an investment, the case of Howard Burris, the author is careful to situate the property in a family context: the property is described as "land his family had owned since World War II."⁴⁷ Most fundamentally, the property owners appear to endure catastrophic personal harm. They

45. Rep. Newt Gingrich, *Daily News Conference with House Speaker Newt Gingrich*, Federal News Service, Mar. 3, 1995, available in LEXIS, News Library, Arcnws File.

46. Gingrich, *supra* note 45.

47. Adler, *supra* note 37, at 32, 35.

lose their homes.⁴⁸ They lose their "net worth."⁴⁹ The "total value" of the family inheritance is "changed."⁵⁰ In other words, the taking is described, not in abstract economic terms, but in terms of devastation to an individual's total assets.

Property rights advocates do not narrate tales in which a regulation diminishes some small part of a giant corporation's diversified portfolio or some small part of a very wealthy individual's diversified portfolio. Rather, they tell tales in which an individual loses, if not everything, a large part of all that she owns. The *National Review* observes: "A small landowner under threat of losing her homestead is a more sympathetic victim than a corporation concerned about a moderate decline in profits."⁵¹ Representative Tauzin asserts that his "commitment to this issue was born out of the horror stories that average, middle-class landowners shared with me."⁵² It should be noted, however, that not of all the victims in these accounts are actually middle class. For example, someone who could invest "millions" in a plan for development, as did Howard Burris, is not a member of the middle class. All of the individuals in these accounts do, however, suffer drastic personal losses. The fact that Representative Tauzin and the *National Review*, as well as other sources, describe these anecdotes as involving middle class victims reveals what they believe makes these stories compelling. They are compelling because the regulations threaten the economic well-being of the property owners; the affected property is not so much an investment as it is the core of the person's savings.

Supporters of the compensation statutes favored by the property rights movement contend that the legislation is necessary because the Supreme Court has underenforced the Takings Clause.⁵³ Professor James Ely, for example, has suggested that

48. See *supra* notes 39-45 and accompanying text.

49. See *supra* note 44 and accompanying text.

50. See *supra* note 45 and accompanying text.

51. Adler, *supra* note 37, at 32, 35.

52. Wolf, *supra* note 38, at 641 (quoting Rep. Tauzin).

53. See, e.g., 141 CONG. REC. S390 (daily ed. Jan. 4, 1995) (statement of Sen. Hatch) ("Judicial protection of property rights . . . has been both inconsistent and ineffective [T]he Court has eschewed any set formula for determining how far is too far, preferring to engage in ad hoc factual inquiries").

the legislation is an appropriate remedy for the Supreme Court's failure to "put some teeth into the [T]akings [C]lause."⁵⁴ In putting teeth into the clause, the statutes fix a percentage loss in value that triggers an obligation to compensate.⁵⁵

Operating on a case-by-case basis, the Court has upheld regulations that have decreased property values by more than seventy-five percent.⁵⁶ The property rights statutes that have been proposed or enacted have lowered the trigger amounts significantly.⁵⁷ For example, Washington State's statute, which subsequently was repealed by referendum, mandated compensation when a regulation caused *any* loss in value.⁵⁸ The statute passed in the House last term required compensation whenever an agency action under the Clean Water Act,⁵⁹ the ESA,⁶⁰ or certain provisions of the Food Security Act of 1985⁶¹ caused land value to drop more than twenty percent.⁶² As these examples suggest, the various statutes enacted and proposals offered (with the exception of the Florida statute) fall into one of two categories. Either they provide that compensation is due when any regulation diminishes the value of property by a certain percentage, or they provide that compensation is due when regulations enacted pursuant to specified regulatory schemes diminish the value of certain forms of property by a certain percentage.⁶³

At the same time proponents of the property rights movement

54. Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J.L. & JURISPRUDENCE 161, 162 n.10 (1996) (quoting Professor Ely).

55. See *supra* notes 7-9 and accompanying text.

56. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

57. See *infra* notes 58-62 and accompanying text.

58. See Private Property Regulation Fairness Act of 1995, ch. 98, § 4(2), 1995 Wash. Leg. Serv. 261, 261-62 (West) (repealed by referendum, Nov. 7, 1995).

59. 33 U.S.C. §§ 1251-1387 (1994).

60. 16 U.S.C. §§ 1531-1544 (1994).

61. *Id.* §§ 3801-3862.

62. See H.R. 925, 104th Cong. § 2 (1995). For a close reading of the text of this statute and a careful analysis of its provisions, see Michelman, *supra* note 10. The state "property rights" statutes currently in effect have a trigger of between 20% and 40%. See *Recent Legislation*, *supra* note 12, at 543 n.7.

63. See *Recent Legislation*, *supra* note 12, at 543 n.7. The Florida statute compensates property owners "whenever government regulation infuses an 'inordinate burden' on the ability of a landowner to use her property." *Id.* at 543.

have sought to establish threshold figures that make a regulation give rise to a taking, the underlying concerns embodied in their narratives are in large part concerns recognized by the Court as relevant to a takings analysis.⁶⁴ The stories described above involve situations in which the harm to the individual far outweighs the benefit to society. One of the Court's standard approaches, however, an approach that can be traced back to *Pennsylvania Coal Co. v. Mahon*,⁶⁵ is a balancing test in which individual harm is weighed against societal benefit.⁶⁶ Many of the foregoing stories concern individuals whose property declined in value after they invested in legitimate reliance upon governmental authorizations or on a certain status quo.⁶⁷ The Court also has addressed such reliance. In *Penn Central Transportation Co. v. New York City*,⁶⁸ the Court recognized interference "with distinct investment-backed expectations" as a factor that can warrant a finding of a taking.⁶⁹

There is, nevertheless, one factor featured in these narratives that the Court does not treat as relevant: the extent to which the regulation harms the property owner. Of course, the Court attends to economic loss in its takings analysis. As Professor Andrea Peterson has written in summarizing the various tests applied by the Court, "the Court considers what proportion of the original value of the land (or other tangible resources) has been destroyed as a result of the challenged regulation."⁷⁰ In this regard, there is an ongoing dispute in the case law as to whether the entire property or some sub-set of interests pertaining to that property should be considered in determining whether the proportion destroyed is excessive.⁷¹ In all cases, however, the Court focuses on the property, not on the person owning the property. When Penn Central was blocked from using its air

64. See *infra* notes 65-69 and accompanying text.

65. 260 U.S. 393 (1922).

66. See *id.* at 413-16.

67. See *supra* notes 39-45 and accompanying text.

68. 438 U.S. 104 (1978).

69. *Id.* at 124.

70. Peterson, *supra* note 3, at 1325-26.

71. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988) (discussing conceptual severance).

rights over Grand Central Station,⁷² the question for the Court was the magnitude of the government action's impact on the property.⁷³ Whether Penn Central owned many properties or just this one was irrelevant to the analysis. All that mattered was the "[economic] impact of the regulation on the Terminal site."⁷⁴ When the South Carolina Coastal Commission blocked David Lucas's plans to develop two beach-front lots, no Justice discussed whether the loss of the lots' value dramatically affected David Lucas's net worth or whether he was so wealthy that the loss he suffered was, though grave, a manageable one from his personal point of view.⁷⁵ The narratives of takings, however, suggest that adherents of the property rights movement care deeply about the impact of government action on individuals' overall well being, and that this affects their view of the fair outcome. To make the point concretely: Assume two individuals, both owning a lot worth \$1 million. Jones has few other assets and is planning to put her retirement home on the lot; Smith is worth one billion dollars and the lot is part of a diversified portfolio of economic investments. She plans to build a home on the lot that she later will sell for a profit. An unanticipated regulation comes into effect, limiting what can be built on the lots and therefore lowering the value of each lot to \$300,000. Under current case law, Jones and Smith are situated identically, and, probably, neither will receive compensation. Jones's situation, however, is recognizably the kind of horror story that fuels the property rights movement; Smith's is not.

Implicit in these narratives is a belief in the declining marginal utility of money. According to that theory, the more money

72. See *Penn Central*, 438 U.S. at 107-31.

73. See *id.* at 136.

74. *Id.* The New York Court of Appeals had taken a different approach, analyzing the regulation in the context of its effect, not just on Grand Central Station, but in the context of all the "plaintiffs' heavy real estate holdings in the Grand Central area." 366 N.E.2d 1271, 1276 (1977). This approach, however, is at odds with the approach taken in Supreme Court case law and was specifically disapproved of by Justice Scalia in a footnote in his majority opinion in *Lucas*. See *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1003, 1016 n.7 (1992). Moreover, the New York Court of Appeals analysis only considered property in the immediate area. It did not examine the affect of the regulation in the context of Penn Central's total assets.

75. See *Lucas*, 505 U.S. at 1003.

that a person has, the less each new dollar means to her.⁷⁶ Thus, \$100,000 is a very different sum to a rich person than it is to a middle class person. The narratives implicitly embrace this view by focusing on the individual's pain, rather than her loss viewed in purely economic terms, the diminution of a particular property value.⁷⁷ Representative Tauzin does not put a price tag on the Chaconases' loss.⁷⁸ What is important is that they have lost their home. The property rights movement does not focus on similar stories in which a large corporation suffers a great loss with respect to one of the many lots that it owns. Indeed, the stories reflect a personality theory of property, more than a purely economic one. These properties are to be protected because of the property owner's psychic investment in them—they are in most cases the individual's home—rather than a mere economic investment.

The property rights movement is fond of citing the *Armstrong* principle.⁷⁹ As has been noted it is explicitly invoked in a range of current statutory proposals,⁸⁰ including Florida's compensation statute.⁸¹ Analysis of the narratives adds some substance to the meaning of these broad appeals to fairness principles. Regulations are most unfair when they substantially diminish the value of investments that were made on the basis of legitimate expectations and when that diminution works a great hardship on the property owner. The particular situation of the individual property owner thus is critical.

The responses to these accounts by opponents of the property rights legislation are equally significant in ascertaining cultural conventions concerning the limits of regulation. A number of sharp critiques have been advanced.⁸² One response argues that the narrative accounts are wrong or misleading, that they are, to quote Professor Wolf, "faux horror stories."⁸³ Thus, Pro-

76. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 458 (4th ed. 1992).

77. See *supra* notes 39-45 and accompanying text.

78. See *supra* note 40 and accompanying text.

79. See *supra* notes 15-18 and accompanying text.

80. See *supra* note 21 and accompanying text.

81. See *supra* note 20 and accompanying text.

82. See *infra* notes 83-95 and accompanying text.

83. Wolf, *supra* note 38, at 653.

fessor Wolf argues that the Fish and Wildlife Service's acts on behalf of the kangaroo rat did not cause houses to burn down.⁸⁴ A *Washington Post* article reprinted in the *Congressional Record* emphasized the misleading nature of one story by reporting that the Gautreaus were told that they needed a permit before building and that John Chaconas subsequently sued Roger Gautreaus over the property sale.⁸⁵ Environmental lawyer Ray Vaughan contends that it is extraordinarily rare for ESA to interfere with a property owner's plans.⁸⁶ A different response to the narratives suggests that the real support for the property rights movement lies with developers and big business, rather than with affected individual property owners.⁸⁷ Professor Frank Michelman has critiqued effectively the proposed federal property rights statutes as being either so broad as to violate our constitutional understanding that individuals can be stopped from using their property in a way that harms others⁸⁸ or so narrow—providing compensation for only certain types of regulations—as to be “pork-barrel legislation for a politically favored but not otherwise deserving constituency.”⁸⁹ Others have criticized whether the proposed legislation would even provide compensation in the cases that have received so much attention.⁹⁰

Although these critiques are telling, it is important to recognize what is missing from them. No one suggests that, if the events occurred in the way in which the property rights advocates narrate them, then the property owners who have suffered these losses deserve their fate. Although these critics of property

84. See *id.* at 644-45.

85. Tom Kenworthy, *Truth Is Victim in Rules Debate—Facts Don't Burden Some Hill Tales of Regulatory Abuse*, WASH. POST, Mar. 19, 1995, at A1, reprinted in 141 CONG. REC. S4611 (daily ed. Mar. 27, 1995).

86. See Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 581 (1995).

87. See, e.g., Peter A. Berle, *Private Property and Public Rights*, CHRISTIAN SCI. MONITOR, Aug. 15, 1994, at 19. See also *Property Wrongs*, *supra* note 14, at 8 (describing the backers of the Senate property rights proposal as “mainly timber, mining and grazing interests, along with real estate developers”).

88. See Michelman, *supra* note 10, at 416.

89. *Id.* at 420.

90. See Wolf, *supra* note 38, at 642-50 (discussing disputes involving endangered species).

rights legislation may not have envisioned a Takings Clause that would allow for (or require) compensation in these cases, they nonetheless acknowledge that, if these stories were true, then the property owners have been treated unfairly.⁹¹ These critics have described Representative Tauzin's stories as "compelling"⁹² and "moving."⁹³ "There is no question," Professor Wolf writes, "that, upon hearing or reading these tales of woe, [it] would be difficult for other politicians and their constituents to be unmoved and unsympathetic."⁹⁴ "Some of the stories would grab anyone," stated a report in the *National Journal*.⁹⁵

This reaction is worth highlighting, because proponents of a narrow reading of the Takings Clause generally are unsympathetic to the economic losses suffered by the property owner as a result of regulations. The property owner often is seen as deserving her fate because she engaged in harmful activity; under this view, no one deserves compensation if she is prevented from doing something fundamentally wrong.⁹⁶ Alternately, the regulation is seen almost as a cost of doing business. A property owner engages in certain activities. She always can anticipate the possibility of increased government regulation and, in purchasing property, gambles on what regulations subsequently will issue. When a regulation is issued, she has lost, but she no more deserves compensation than does the holder of a losing lottery ticket.⁹⁷

The very different reaction to the property rights movement's takings narratives, then, provides further evidence of a cultural consensus about fairness in assigning burdens. When a regulation substantially burdens an individual and the regulation was not one that reasonably was foreseeable, we are sympathetic to

91. See *infra* notes 92-95 and accompanying text.

92. Bruce Alpert, *Pair Disputes Tauzin's Tale of Wetland Woes*, TIMES PICAYUNE (New Orleans), Apr. 12, 1995, at B4.

93. Kenworthy, *supra* note 85, at A1.

94. See Wolf, *supra* note 38, at 650.

95. Neal R. Peirce, *Takings—the Comings and Goings*, NAT'L J., Jan. 6, 1996, at 37.

96. See John A. Humbach, *Should Taxpayers Pay People To Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 428-32 (1995).

97. See Gregory S. Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1552-55 & n.35 (1982) (discussing the utilitarian approach to takings compensation).

her plight. We are not sympathetic, however, to an individual who suffers the exact same burden on a particular parcel of property but who, because of her greater assets, is better prepared to handle the loss. Fairness is contextual. When we talk about “bar[ring] 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,”⁹⁸ fairness and justice are not simply concerned with what harm is being prevented or how widely the benefits of the regulations are spread. They also are concerned with how well-equipped the individual in question is to bear those burdens. Justice Scalia’s opinion for the Court in *Lucas* caught something of this point. He wrote:

Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” . . . in a manner that secures an “average reciprocity of advantage” to everyone concerned. . . . And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that “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,” . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.⁹⁹

To the extent that Justice Scalia spoke of an individual piece of property, the view that he took may well be incorrect. An individual who owns enough properties can enjoy an “average reciprocity of advantage” even if a regulation takes all value from one piece of property. At the same time, an individual who owns only one piece of property may be denied an “average reciprocity of advantage” if a regulation substantially diminishes the value of that property, even if some value remains. Nonetheless, Justice Scalia’s opinion suggests that, in determining whether there

98. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

99. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-18 (1992) (citations omitted).

has been "reciprocity of advantage," it is appropriate to attend to the idiosyncracies of the case and the actual effects of the regulation on the individual. When an individual owns many properties, the benefits and burdens of regulation likely will even out. A regulation may treat one parcel harshly, but other regulations will benefit other properties. Overall, the individual is not being treated unfairly. If she owns only the affected property, however, she experiences regulatory burdens without experiencing, as an individual, any direct regulatory benefits. We therefore are likely to believe that she is being treated unfairly.

THE ARMSTRONG PRINCIPLE: FAIRNESS AS A GUIDING VALUE IN TAKINGS LAW

Now, as I noted at the beginning of this Essay, there is a broad consensus that takings law should reflect the *Armstrong* principle,¹⁰⁰ with its stricture against imposing on the individual burdens that, for reasons of fairness and justice, should be shared generally. If we are committed to this principle, and if we further accept that fairness should encompass cultural conventions about what is fair, the question becomes the following: How should takings law be shaped by our cultural convention that it is unfair for an unforeseeable regulation to impose substantial burdens on an individual?

One approach would be that judicial construction of the Takings Clause should reflect this insight. For reasons I have developed in a previous article, however, I do not think that this approach is the appropriate one.¹⁰¹ Part of the reason for its inappropriateness has to do with the original understanding of the Takings Clause. If one takes a traditional approach to the application of the original understanding, these regulations would not give rise to a judicially-enforceable right to compensation. Under the original understanding, compensation was mandatory only for physical seizures, not regulations,¹⁰² and the Takings Clause was not, as a general matter, enforceable judicially.¹⁰³

100. See *supra* notes 15-22 and accompanying text.

101. See Treanor, *supra* note 2, at 791-97, 878-79, 883-85.

102. See *id.* at 798.

103. See *id.* at 791-97 & n.69.

Congress had “the sole responsibility for paying takings claims against the federal government.”¹⁰⁴ An alternative originalist approach, and one that I find more appealing, seeks to interpret the clause in a way that advances the purpose that the clause initially was meant to serve. This approach, however, yields the same result with respect to the regulations featured in the property rights narratives.

The original rationale behind the Takings Clause was to provide heightened protection for those who could not protect adequately their property through the political process.¹⁰⁵ For example, because supporters of the Takings Clause believed that landowners and slaveowners would be peculiarly unable to enter into winning political coalitions, the clause provided them with the heightened protection that, were their property to be seized, compensation would be due them.¹⁰⁶ If we are to be consistent with the clause’s original purpose, courts should protect only those who are most vulnerable to process failure, the modern analogues to late-eighteenth-century slaveowners and landowners. Today, process failure is most likely to occur in cases in which individuals or small groups are singled out and in cases involving minority groups (as in the area of environmental racism).¹⁰⁷ Thus, heightened scrutiny is appropriate with respect to regulations that affect individuals, small groups, or minorities.¹⁰⁸ In contrast, the type of people featured in the narratives of the property rights movement¹⁰⁹—middle class people whose assets are primarily in one piece of property—can defend themselves through the political process. In fact, the best evidence of this is the strength of the property rights movement.¹¹⁰ Of course, to the extent that a property owner is a vic-

104. *See id.* at 794 n.69; *see also* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 637-48 (1985) (discussing congressional control of claims in the early republic).

105. *See* Treanor, *supra* note 2, at 818-55.

106. *See id.* at 855.

107. *See id.* at 866-77.

108. *See id.* at 859-77. This portion of my argument was based on the translation model developed in Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

109. *See supra* notes 39-45 and accompanying text.

110. *See supra* notes 6-9 and accompanying text.

tim of process failure—such as by being singled out—she would have a cause of action, but she would have no *special* cause of action because the only property she owned was the one affected by the regulation at issue.

Wholly apart from originalism, I have argued for a process-based approach to the Takings Clause on the grounds that “it reflects deference to majoritarian decisionmakers where it is appropriate and a judicial check on them where it is necessary.”¹¹¹ A process theory accords with the broader commitments of our constitutional structure, under which the judiciary defers to the majority except in those areas where majoritarian decisionmaking is particularly unlikely to regard certain interests or actors fairly.¹¹² Again, the power of the property rights movement suggests that these interests can defend themselves.

Regardless of whether one accepts a process-based theory of the Takings Clause, however, it is difficult to see how one could frame a theory of judicial construction of the clause that would be sensitive to the peculiar effects of a regulation on an individual’s well-being. In other words, as I have argued, common notions of fairness cause us to view differently a regulation that affects *A*, who has no other property than the one affected by the regulation, and *B*, who has many properties, only one of which is affected by the regulation. To say, however, that courts should provide compensation to *A* in situations in which they would not compensate *B* is to say that courts should construe the Takings Clause in a way that discriminates against the wealthy. Although a great range of theories surround the clause, it is hard to see how it can be read to require courts to provide the wealthy with less protection than others who suffer similar losses.¹¹³

111. Treanor, *supra* note 2, at 887.

112. *See id.* at 882-84.

113. It should be noted that theories of the Takings Clause exist that would require compensation in the cases in which individuals are burdened substantially by regulations. In particular, Professor Richard Epstein has taken the position that “[a]ll regulations . . . are takings of private property prima facie compensable by the state.” RICHARD EPSTEIN, *TAKINGS* 95 (1985). Professor Epstein’s theory, however, is not one that is limited to situations in which cultural conventions dictate that fairness requires compensation. As a result, it is inapposite to the question of whether a construction of the Takings Clause could be framed that provides heightened pro-

The significance of the clause is not, however, limited to what courts construe it to require. Although James Madison, the clause's author, wanted it to provide the basis for judicial review, he wanted it also to serve the broader function of informing the political process by educating the public against illegitimate redistribution.¹¹⁴ Even more strikingly, as pointed out previously, the Takings Clause was limited almost wholly to the political arena for its vindication.¹¹⁵ For approximately the first one hundred years of our nation's history, Congress essentially barred the federal courts from adjudicating claims under the Takings Clause.¹¹⁶ Until Congress gave the Court of Claims jurisdiction over Takings Clause cases in 1887,¹¹⁷ compensation was at Congress's discretion.¹¹⁸ To date, Congress and state legislatures provide compensation in situations in which there is no constitutional obligation to do so.¹¹⁹ Thus, Congress and state legislatures clearly have the power to extend the compensation principle beyond those circumstances in which courts can (or should) order compensation in interpreting the clause.

If courts should not expand the Takings Clause to cover situations in which a regulation imposes an undue burden on an individual property owner, then it seems that legislation should be the means used to ensure compensation whenever our notions of fairness require it. The property rights legislation that has been proposed in Congress and the property rights legislation that

tection to individuals who are peculiarly injured by a regulation because their portfolio is not diversified.

114. See James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983). For development of this point, see Treanor, *supra* note 2, at 338-40; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 712-13 (1985).

115. See Treanor, *supra* note 2, at 794 n.69.

116. See *id.*

117. Tucker Act, ch. 35a, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

118. See Shimomura, *supra* note 104, at 637-66; Treanor, *supra* note 2, at 794 n.69.

119. See, e.g., Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971, 42 U.S.C. §§ 4601-4655 (1994). For discussion, see Note, *Condemnations, Implicit Benefits, and Collective Losses*, 107 HARV. L. REV. 696, 707 (1994) (stating that the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1971 provides for compensation that courts would not order).

has been enacted in the states, however, go beyond the limited realm in which consensus exists about what fairness requires. Statutes typically require compensation whenever property values drop beyond a certain level.¹²⁰ As critiques of the property rights movement critiques indicate,¹²¹ however, our cultural consensus is more limited. That consensus is not that *any* diminution of value is unfair; it is, rather, that a heavy and unanticipated burden on an individual property owner with limited assets is unfair.

PROPOSAL

The problem thus becomes how to craft a compensation statute in a way that allows for case-by-case resolution. This might seem to be an insolvable problem. Case-by-case resolution suggests a judicial, not a legislative, solution. There is, however, an answer: legislatures (including Congress) can empower courts to provide compensation above the constitutional minimum on a case-by-case basis. A model is provided by the one state statute that does not use a mere threshold test as a basis for requiring compensation: Florida's Bert J. Harris, Jr., Private Property Rights Protection Act.¹²² That statute provides that compensation is due whenever a regulation places an "inordinate burden" on the landowner's use of her property.¹²³ Courts are thus empowered to use a flexible standard in evaluating individual circumstances. A property owner is "inordinately burdened" if she is "permanently unable to attain . . . reasonable, investment-backed expectation" or is "left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."¹²⁴ Thus, the test used tracks, in part, the *Armstrong*

120. See *supra* notes 58-63 and accompanying text. Some statutes apply to all regulations; others to enumerated regulatory schemes. See *id.*

121. See, e.g., Michelman, *supra* note 10 (criticizing congressional property rights proposals); *Property Wrongs*, *supra* note 14 (attacking the rationale underlying property rights legislation).

122. FLA. STAT. ANN. § 70.001 (West Supp. 1996).

123. See *id.* § 70.001(3)(e).

124. *Id.*

principle.

This statutory test allows courts to focus on the way in which a regulation affects a particular piece of property. Thus, in a case in which a certain agricultural use was banned, compensation might be due if the affected land was a farm, but not if it was undeveloped, even if both properties suffered the same percentage diminution in value. The legislation seems to have been motivated by a desire to be more protective of property interests than a threshold test would allow; the underlying idea is that some people are so burdened by regulations that they deserve compensation, even if their loss failed to cross some specified threshold.¹²⁵

Even if the Florida statute reflects the antiregulatory bias of the property rights movement, the flexible standard and the notion of disproportionate burden employed by the statute are worth emulation. Following that model, an appropriate compensation statute might direct a court to award compensation in situations in which it found that the property owner bore an unfair burden in light of the effect of the regulation on her total assets, including assets other than the affected property, and in light of the foreseeability of the regulation. Such a statute, unlike the Florida statute, would focus on actual harm to the property owner, rather than the particular harm to the property. More to the point, given the limited nature of the consensus about unfairness, such a compensation statute should make clear that compensation above the constitutional mandate should be limited to exceptional cases, the kinds of cases that provide the property rights movement with its horror stories.

The type of compensation statute argued for here would not alter takings law radically. It would allow courts to provide compensation in a small class of cases not compensable under current standards, situations in which the harm to the individual is disproportionate even though the harm to the affected property is not of such a magnitude as to trigger a compensation requirement under current takings law. Although courts would actually

125. See *Recent Legislation*, *supra* note 12, at 544-47; David L. Powell et al., *Florida's New Law to Protect Private Property Rights*, FLA. B.J., Oct. 1995, at 13. I thank my colleague David Schudde for calling to my attention the latter article.

award more compensation under such a statute than they grant currently, those awards would not violate a proper understanding of the Takings Clause because they would be the product of a legislative mandate, not judicial construction of the Constitution.

Such an approach admittedly suffers from the same problem from which any flexible standard suffers. Neither policymaker nor property owner will know with certainty whether a particular regulation as applied to a particular piece of land will run afoul of the statute, although, as courts apply the statute, a body of case law will evolve to minimize the uncertainty. As a result, policymakers will thus tend to underregulate while property owners sometimes will incur substantial litigation costs before being able to vindicate their claims.¹²⁶ This problem will be limited because compensation will be mandated only in the exceptional case.

More importantly, such a statute would strike a balance more reflective of our societal norms than either the property rights movement's compensation statutes or current case law. As I have argued, it is widely felt that some people bear much more than their due share of the regulating burden and thus deserve compensation.¹²⁷ At the same time, the opposition to the property rights movement suggests that the movement's antiregulatory attitude has only limited support. The compensation statute argued for here strikes an appropriate balance, providing compensation to those people generally believed to be bearing too much of the public burdens, but without making the end of the regulatory state the cost of compensation.

126. For such a critique of the Harris Act, see *Recent Legislation*, *supra* note 12, at 544-47.

127. See *supra* notes 15-22 and accompanying text.