

## The Politics of Property Rights

Until about five years ago, the courts had essentially exclusive, rather sleepy dominion over the "property rights" issue. Today, legislation addressing the issue has been debated repeatedly in Congress and in almost every state legislature. Several state ballot contests have been fought over property rights. And property rights have become a familiar topic of public debate, on television talk shows, on the op-ed pages of the nation's newspapers, and even in the vice-presidential debate during the 1996 national elections.

The property rights argument in the political arena is straight-forward and proponents repeat it with an impressive frequency and consistency. We support, they say, the goals of environmental laws and programs. However, when the public pursues these goals the public that benefits should, as a matter of fairness, pay financial "compensation" to property owners who see any resulting reduction in the value of their property. If the public cannot achieve its regulatory objectives without affecting property values, or cannot afford compensation for the adverse effects on property values, the public cannot fairly enforce the regulation. While few contend that this absolutist position is consistent with the Supreme Court's traditional interpretation of the Taking Clause of the Fifth Amendment,<sup>(1)</sup> many argue that it is consistent with the original, or at any rate the best understanding of the constitutional command "nor shall private property be taken for public use, without just compensation."<sup>(2)</sup>

The impact of the property rights argument on the tone and content of environmental policy discussions could hardly be overstated. Whereas debates over environmental policy in years past have focused largely on the question of the relative importance of environmental policy goals, the property rights argument introduced a new focus on the fairness of the means used to achieve these goals. The property rights position also represents a new normative argument against the assertion of

regulatory power to protect the environment: the preservation of individual dignity and autonomy depends upon reining in regulations that protect the environment.

From one perspective, it appears that the property rights storm in the political arena may have begun to blow itself out. The property rights, or taking, agenda is commonly viewed as one of the singular excesses unleashed by the Contract with America in the 104th Congress. There is less enthusiasm for pursuing taking legislation in the 105th Congress than there was in the last Congress. In the states, interest in property legislation has also waned.

At the same time, the property issue remains a major political obstacle to implementation and development of environmental protection measures. The property rights issue is a major impediment to the reauthorization of several major pieces of legislation, including the Clean Water Act<sup>(3)</sup> and the Endangered Species Act.<sup>(4)</sup> In part because of the property issue, the Clinton Administration, a fierce foe of property legislation proposed in the 104th Congress, has focused some of its most high profile environmental effort on initiatives that explicitly seek to satisfy both environmental and private property interests. In short, the property issue appears to have significantly altered the environmental policy landscape for the foreseeable future.

This paper offers a critical analysis of property rights as a political issue. Part I discusses the apparent causes and contradictions of the emergence of property rights as a modern political phenomenon. Part II describes the recent political history of the property rights issue. Part III discusses the substantive issues in this political debate, and the natural as well as surprising political alliances which have formed on both sides of the issue. Finally, part IV suggests some potential strategies to reinvigorate and advance the cause of environmental protection in the present political environment.

## I. Property As a Political Issue

The rise of the property issue reflects the erosion in all realms of the former political consensus favoring an activist role for government. It manifests a loss of faith in expansive Federal authority, which blossomed in the New Deal era, and the revival of an earlier political philosophy supporting private property protection. The prior constitutional touchstone for the property agenda was the Due Process Clause of the Fifth Amendment, upon which the Supreme Court relied to strike down wage and hour laws and other types of intervention in the economy.<sup>(5)</sup> In part to avoid the appearance of reviving an older, widely vilified social program, the property agenda today has reemerged under the new banner of the Taking Clause rather than the Due Process Clause of the Fifth Amendment.

The rise of the property issue also reflects the powerful influence of libertarian ideology on political and public discourse. Led by such politically active organizations as the Cato Institute and the Competitive Enterprise Institute, libertarian thinking has helped shape the national political debate, in environmental policy and in other areas. In brief, libertarians reject any positive role for government except to restrain the use of force against another citizen.<sup>(6)</sup> Reflecting the breadth of their political ambition, advocates of a libertarian ideology point to the collapse of the Soviet Union and most of the rest of the communist block as evidence of a historical tide turning in their direction. As succinctly stated in a recent work by David Boaz of the Cato Institute: "It's obvious now that total statism is a total disaster, leading more and more people to wonder why a society would want to implement *some* socialism if full socialism is so catastrophic."<sup>(7)</sup>

Finally, the rise of the property issue reflects the fact that we live in an era in which property norms are changing at a relatively rapid rate. Under the weight of an exploding population, evolving scientific knowledge, and changing social values, our conceptions of appropriate uses of land and other natural resources have undergone dramatic change. It is hardly surprising that the resulting dislocations and frustrations have made this an era of property conflict.

While these broad social currents help explain the rise of the property issue, they do not directly address the conundrum of why the property issue became the focus of political, and specifically legislative debate. After all, the Taking Clause, like other provisions of the Bill of Rights, was appended to the Constitution to provide a judicial safeguard for minority interests. The Taking Clause was included in the Bill of Rights, at least in part, because the majoritarian branches were regarded as potential threats to certain property rights.<sup>(8)</sup> Therefore, at least at first blush, it is surprising that advocates of expanding property rights shifted their focus from the courts to the legislative branch.

The shift to the political arena is even more striking in view of the obvious willingness of the Rehnquist Court to reengage on the property issue. Prior to the mid-1980s, the Court had let decades pass virtually without a hint of any interest in expanding the contours of the regulatory taking doctrine. Since then, the Court has handed down about a dozen significant decisions interpreting the Taking Clause.<sup>(9)</sup> Claimants have uniformly prevailed in the land use taking cases decided by the Court over the last decade.<sup>(10)</sup>

Ironically, property rights advocates shifted their focus from the courts to the legislative branch in part because they concluded that the Rehnquist Court was unlikely to make sufficiently rapid or dramatic changes in the Court's traditional, limited reading of the Taking Clause. This reflects the fact that the Supreme Court is, at least compared to the other branches of government, an inherently conservative institution. In particular, property advocates appear to have read the Court's 1992 decision in Lucas v. South Carolina Coastal Council,<sup>(11)</sup> which by and large reaffirmed long-standing taking law principles, as a demonstration of the limitations of the litigation strategy.

While property advocates may represent a minority interest, they represent a particularly cohesive and well-financed political interest group capable of exerting significant political influence. Organizations such as the American Forest and Paper Association, the National Realtors Association, and the National Association of Homebuilders have invested great energy and resources in the property issue. More specifically, heavy investment in political campaign financing by property groups helps explain the political prominence of the property agenda. According to the Center for Responsive Politics, environmental group political action committees (PACs) contributed \$45,088 to congressional candidates in 1995.(12) By contrast, PACs for interests that supported property legislation gave \$1.4 million to members of the U.S. Senate alone.(13) All of the top ten recipients were members of the Republican party, the leadership of which championed property legislation in the 104th Congress. Eight of the ten top recipients of contributions from these PACs, all of whom were up for reelection in 1996, were cosponsors of the principal Senate taking bill.(14)

The rise of the property issue in the political arena also can be explained in part by the successful effort to create a mythology which distorts the true identity of the potential winners and losers in the property debate. According to this mythology, the overwhelming majority of those who would benefit from property legislation are middle class individuals and families seeking to make modest uses of small parcels of land. This mythology has been generated by numerous anecdotes designed to illustrate how ordinary citizens sometimes suffer economic loss as a result of regulatory programs. The goal of this effort has been to portray conflicts between land owners and government as an ordinary feature of daily life in America and to suggest that many, if not a majority, of citizens would benefit from the success of the property agenda. In reality, this mythology has obscured the fact that major resource industries and developers have the greatest direct interest in property legislation because they stand to gain the greatest financial reward from its success.

Without disputing the reality of *some* hardship cases, it is telling that many of the most common "horror stories" retailed in legislative debates over the property issue cannot withstand detailed analysis. For example, the Wilderness Society, a major national conservation group, conducted a systematic review of all of the anecdotes related during the House debate on the Contract with America property provision.(15) This analysis demonstrated that nearly all of the anecdotes grossly misstated the true facts, and some appeared to be pure urban legends.

The anecdote war reached its apex during the 1996 vice presidential debate between Vice President Al Gore and Jack Kemp. During the course of the debate, Kemp was questioned about a prior statement referring to a "regulation reign of terror." In response, Mr. Kemp recounted a lengthy, garbled anecdote concerning an Oregon farmer who "voluntarily... declared a wetland" on his property, which apparently resulted in the return of the bald eagle to the farmer's land, and an order by a federal agency that the owner no longer use his road or mend his fences.(16) This high profile anecdote sent government officials and others scurrying to discover the source of this anecdote. As recounted in a flip column in the *Washington Post* about two weeks later: "The regional fish and wildlife folks are looking hard, but nothing so far. They want the Kemp folks to give them the name of the farmer. Otherwise, the Democrats are inclined to write it off as just another bogus endangered species horror story."(17)

The courts themselves have also played a role in the rise of property as a strictly political issue. Of course, property as a political issue is, by definition, associated with activity in Congress and the state legislatures. Yet, the courts, and the Supreme Court in particular, have played a central role in shaping and encouraging the debate over property rights in the political arena.

In part as a result of dramatic changes in its membership, the Supreme Court has exhibited an increased interest in the property issue. The Supreme Court now regularly issues decisions on the property issue, which has helped foster public interest in the issue.(18) The increased activity on the taking issue at the Supreme Court level has been matched by the filing of increasing

numbers of taking suits in lower federal and state courts.(19) Most importantly perhaps, the Supreme Court's authority to pick and choose among the cases it reviews has allowed a majority of the Court to select cases that, in practice, attract public attention and support for the property agenda. In recent years, the Supreme Court has generally opted not to accept cases brought by large economic actors to reexamine the contours of taking doctrine, preferring instead cases brought by individuals and relatively small business owners. The image of houses up and down the shore from David Lucas' vacant lots in South Carolina, and the prospect of the Dolans' customers bicycling away from their plumbing store in Oregon with bathtubs on their backs,(20) have contributed powerfully to public perceptions of the property issue. Some judges, it turns out, not only read the newspapers, they also know what stories will sell newspapers!(21)

## II. Recent Political History of the Property Issue

### A. National Politics

The emergence of property as a national political issue can be traced with fair precision to the Supreme Court's 1987 decision in First English Evangelical Lutheran Church v. County of Los Angeles,(22) and the promulgation of Executive Order 12,630 the following year by President Ronald Reagan.(23) The issue decided in First English is whether it is sufficient, once a court finds that a regulation affects a taking, to enjoin enforcement of the regulation, or whether a claimant is necessarily entitled to monetary compensation.(24) The Court held that government must pay compensation for a taking, at least for the period the offending regulation was in effect. This conclusion reflected the Court's interpretation of the Fifth Amendment "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."(25) At the same time, the Court emphasized that government can avoid future liability for the taking by withdrawing the offending regulation.(26)

The Reagan Executive Order was issued shortly after the First English decision, ostensibly to safeguard the federal treasury from the financial peril created by the Court's decision. After First English, the authors of the Executive Order reasoned, federal regulatory programs which overstepped the taking line would expose the federal government to potentially large, unavoidable financial loss.(27) To minimize this risk, the Executive Order directed all federal agencies to conduct *ex ante* taking reviews of proposed regulatory actions to avoid unnecessary taking liability.(28)

While the fiscal rationale for the Executive Order is unobjectionable in theory, the Order was nonetheless highly controversial. Critics objected that some language in the Order, which purported to restate the constitutional standard for a taking, actually put an important gloss on existing law, making it far more likely that an agency would identify a potential taking using the Executive Order than by referring to Supreme Court precedent.(29)

Critics also objected that the procedures called for in the Executive Order were so cumbersome that the burden of complying with the Order would deter agencies from taking necessary regulatory action. As professor Carol Rose has explained in commenting on the Order's requirement that agencies attempt to answer detailed questions about a proposed government action's effect on private property:(30)

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

yield reliable answers. At best, such overblown procedural requirements are simply wasteful and redundant, and at worst they are a kind of harassment of regulators.(31)

The property rights agenda first appeared in Congress as an effort to pass legislation to enforce the Reagan Executive Order. In 1990, Sen. Steven Symms (R.-Idaho), offered language to enforce the Reagan Executive Order as a floor amendment to the farm bill.(32) The proposed amendment was tabled by a vote of 52-43.(33)

The following year, at the start of the 102nd Congress, Senator Symms introduced a free standing bill to enforce the Executive Order, the "Private Property Rights Act of 1991."(34) The Senate added the bill as an amendment to federal transportation legislation, but the taking language was removed from the bill in conference with the House of Representatives.(35) The year 1991 also marked the introduction of the first federal taking bills which explicitly provided for federal financial payments over and above the constitutional "just compensation" standard. Rep. Jimmy Hayes (D.-La.) introduced a bill proposing an elaborate classification scheme for the nation's wetlands based on the relative ecological worth of different wetlands. The bill maintained existing regulatory standards protecting high value wetlands, but granted owners of land subject to this classification the option to demand financial "compensation" from the Federal government in exchange for complying with the standards.(36) In addition, Rep. Bill Dannemeyer (R.-Cal.) introduced a bill offering Federal financial payments to any firm or person who incurred "economic loss" as a result of government action under the Endangered Species Act.(37) Neither the Hayes Bill nor the Dannemeyer Bill reached the floor of the House of Representatives for a vote in the 102nd Congress.

The property rights issue escalated in the 103rd Congress with the introduction of almost two dozen bills with property provisions, the first congressional committee hearing devoted to a property rights bill, and heated congressional debate over the property issue during consideration of legislation to establish a National Biological Survey and legislation to elevate the Environmental Protection Agency to cabinet status.(38) The proposals in the 103rd Congress ranged from bills to enforce the Executive Order, to bills to limit federal agency access to private lands, to various proposals to alter the constitutional just compensation standard.(39)

In the Senate, the property agenda reached its high point in May 1994, when the Senate, by voice vote, added a taking impact assessment provision, roughly modeled on the Executive Order, to a bill to reauthorize the Safe Drinking Water Act.(40) This proposal died in the 103rd Congress when the House of Representatives failed to take up the drinking water bill. In the House of Representatives, Rep. Billy Tauzin (D.-La.) emerged as a prominent and articulate leader of the effort to expand property rights with the introduction of the "Private Property Owners Bill of Rights."(41) This bill provided for financial payments to landowners whenever application of the Endangered Species Act or the Clean Water Act wetlands provision resulted in a reduction of "50 percent or more of the fair market value, or the economically viable use, of the affected portion of the property."(42) Given this proposal's evisceration of the Supreme Court's traditional approach of evaluating an alleged taking in relation to the parcel as a whole, not simply the portion of the property affected by the regulation, this bill would have mandated financial payments for essentially any type of regulatory action under each of these two laws.

Also, the 103rd Congress saw the first recent adoption of a form of property rights legislation at the federal level. The California Desert Protection Act,(43) one of the few major environmental accomplishments of the rancorous 103rd Congress, included a provision instructing federal land managers, in the course of acquiring new lands under the Act, to establish appraisal values without regard to the potential impact on property values of Endangered Species Act requirements.(44)

The property agenda reached its climax in the 104th Congress with inclusion of a sweeping taking "compensation" provision in the new House Republican majority's "Contract with America."

The original version of this proposal mandated financial compensation for any reduction in value of ten percent or more as a result of any federal regulatory program.(45) The bill provided several exceptions, including limitations on actions that would violate local zoning ordinances or state nuisance laws, limitations imposed pursuant to the federal navigational servitude, or any restriction imposed pursuant to a determination by the President that the regulated activity "poses or would pose a serious and imminent threat to . . . health and safety."(46) The actual significance of this sweeping proposal was only dimly understood by the public and many members of Congress in the midst of the 100-day rush to complete the Contract with America. In substance, it represented wholesale reinvention of the Taking Clause based on a libertarian vision.

The debate on the House floor over the Contract with America was appropriately revolutionary in spirit. During the course of the debate, proponents of the legislation decried "overzealous Government agents,"(47) "this rampant taking picnic on which the agencies have embarked,"(48) "[g]overnment bureaucrats, acting without accountability, mak[ing] decisions which, in effect, destroy households, farms, and businesses,"(49) and "government oppres[sion of] honest and hard working citizens."(50)

The bill ultimately adopted by the House of Representatives, House Bill 925, in March 1995, required federal payments for reductions in property value under six specified environmental and resource management statutes.(51) Less than a month after the House vote, a bill was introduced in the Senate which would have required federal "compensation" payments for virtually all types of federal (and some state) regulation.(52) The bill was favorably reported by the Senate Judiciary Committee,(53) but failed to reach the Senate floor.(54) The Clinton administration, shortly after the House vote, announced a strong and unwavering intention to veto the legislation.

The 105th Congress has so far exhibited somewhat less enthusiasm for pursuing the taking agenda than the last Congress. Sen. Orrin Hatch (R.-Utah), Chairman of the Judiciary Committee, after months of apparent indecision, introduced a broad compensation-type taking bill on May 22, 1997.(55) Meanwhile, sponsors of the leading initiatives in the Senate to reauthorize the Clean Water Act and the Endangered Species Act have signaled that they do not intend to include specific compensation-type provisions in their bills,(56) suggesting that Senator Hatch's decision to introduce his bill was a largely symbolic action. Traditional assessment-type bills have also been introduced in the Senate(57) and the House.(58) Rep. Lamar Smith (R.-Tex.) has introduced a bill in the House to expand the jurisdiction of the U.S. Court of Federal Claims.(59) And in late fall 1997, the House passed (248-178) a bill to expedite the prosecution of taking claims against local governments in federal court,(60) but the bill faces uncertain prospects in the Senate.(61)

At the same time, the property issue continues to pervade environmental policy discussions today. The theme that the Endangered Species Act and Clean Water Act wetlands provisions, in particular, unreasonably burden private property owners is helping to drive several proposals in Congress to substantially weaken these programs. The prospect of opposition based on property rights concerns also has stifled the introduction of new legislative proposals to address emerging environmental issues.(62) On the administrative front, some of the Clinton Administration's most recent environmental initiatives have been consciously designed to address important environmental problems while simultaneously mollifying property interests. These include the agreement struck in 1995 to block the controversial New World Mine north of Yellowstone by paying the mine promoters some \$65 million.(63) Another example is the proposal to buy out the owners of the Elwha Dam on the Olympic peninsula in Washington State for several tens of millions of dollars to help restore depleted salmon runs in the Pacific Northwest.(64)

## **B. The States**

In the wake of the introduction of property bills in Congress, property advocates also have pursued the property agenda in the state legislatures. Early state property bills generally called for some type of taking impact assessment procedure modeled on the Executive Order. Later, following the introduction of payment-type bills in Congress, state legislators introduced this version of property legislation as well. Today, property bills have been introduced in virtually every state legislature, and over 20 states have adopted some form of taking law.(65) Most of the enacted measures are assessment-type laws. Some establish a relatively innocuous requirement that the Attorney General prepare periodic summaries of taking law to increase agency expertise and sensitivity to potential taking issues. Four states, Florida, Louisiana, Mississippi, and Texas, have adopted laws which explicitly depart in some respect from the constitutional standard.(66)

Of perhaps greater long-term significance to the political debate over property than state legislative activity has been the defeat of taking bills at the polls in two States, Arizona and Washington. In Arizona, following the enactment of an assessment-type taking law, a coalition of groups succeeded in placing repeal of the law on the state ballot in November 1994. By a vote of sixty percent to forty percent, Arizona voters rescinded the taking law.(67) Similarly, in November 1995, Washington State voters rejected that state's payment-type taking bill, again by a sixty percent to forty percent margin.(68)

In 1997, state legislative interest in the property issue persists, but apparently at a lower boil. Property bills have been rejected at the committee level in a number of states, including New Mexico, North Dakota, and Wyoming. A payment-type taking bill was defeated in the Montana Senate following House approval. Property bills apparently remain under active consideration in at least Idaho, Ohio, and South Carolina.

### **III. The Political Debate Unfolded**

#### **A. The Issues**

The inherently charged nature of legislative debate has significantly shaped the content of the discussion of property issues in the political arena. Inevitably, the debate has sometimes been waged with slogans, epithets and sound bites. Just as proponents of property legislation offered alarming anecdotes to support their position, opponents of the legislation trotted out their own anecdotes to illustrate the consequences of inadequate environmental standards or lax enforcement. Both sides of the debate pitched their arguments to appeal to perceived public opinions and prejudices. Leading national experts on property law who became embroiled in the debate discovered that subtle explanations of Supreme Court taking jurisprudence often failed to help a harried Senator decide how he or she was actually going to vote.

Proponents of broad compensation-type taking bills have offered three basic arguments in favor of this legislation.(69) They argue, first, that the Supreme Court has failed to develop clear standards for identifying a taking, and the legislative branch should fill the breach. For example, just as Congress has passed civil rights legislation to bolster the constitutional protections against discrimination, property advocates argued, it is appropriate for Congress to pass legislation supplementing the Taking Clause. Second, proponents argued that property protection legislation was necessary to counteract a recent, massive government intrusion on property rights. At the federal level, this charge focused on the Endangered Species Act and the wetlands provision of the Clean Water Act. Finally, at least some proponents of property bills argued that the legislation was necessary to correct the Court's general failure to respect the original, or at any rate, the most natural, reading of the Taking Clause.

Opponents of taking legislation responded to these arguments and, more importantly, sought to develop a vigorous challenge to the proposal as a whole. Defensively, opponents argued that legislative supplementation of the Taking Clause was unnecessary because the Court's

traditional reading of the clause struck the proper balance between private rights and the broader public interest. In addition, they argued that the search for a simple mathematical formula to define a taking was a doomed effort, because the answer to the taking question necessarily depends on the thoughtful balancing of a variety of relevant factors. They also attacked the idea of legislative supplementation as a ruse to disguise a misguided effort to radically alter the constitutional definition of a taking. As to the issue of new government intrusions, opponents argued that government regulation today is not fundamentally different in kind from regulations imposed in this country for centuries. They also argued that, to the extent recent legislative developments call for some corrective action, it should be pursued directly by amending the laws being complained of, rather than by undermining the laws indirectly through taking legislation. Finally, as to the original meaning, opponents argued that the Supreme Court's current view of regulatory taking already matched, if it did not exceed in scope, the meaning attached to this clause by the drafters of the Bill of Rights.(70)

In a more proactive fashion, opponents of property rights legislation argued that the legislation would impose an enormous new burden on the public fisc, resulting in greater government deficits or higher taxes or both. The Clinton Administration, for example, produced an estimate that the Contract with America taking provision adopted by the House of Representatives would have cost taxpayers \$28 billion over the following seven years,(71) and concluded that the Senate bill would have cost "several times" more.(72) Similar estimates of fiscal impacts were used to powerful effect in state debates over property.

Proponents of property legislation, many of whom also support smaller, less costly government, responded with vigor that this fiscal argument misrepresented the intent and likely effect of property bills. They argued that the *potential* government liability created by these bills would force government officials to change their regulatory behavior to avoid burdening private property owners. This, in turn, would avoid the need actually to make large compensation payments. The difficulty with this response, of course, is that skilled lawyers would inevitably exploit a property law to extract large payments from the government when that served their clients' purpose better than regulatory relief. After all, manufacturers who advocate product liability reform do not complain primarily, if at all, that existing law over deters shoddy manufacturing; instead, they argue that existing law results in large, unjustified windfalls. A compensation-type property law would inevitably produce unfair windfalls at taxpayer expense, though in truth the total potential cost of such legislation is virtually impossible to estimate.

Closely related to the fiscal argument was the argument that property bills would generate a massive new wave of litigation and increased government bureaucracy. Opponents of taking legislation, lawyers among them, rode public antipathy for lawyers and litigation with the epithet that taking bills were "A Lawyers' Full Employment Act." This argument had undeniable force, despite proponents' assertions that one of their primary objectives was efficient access to justice, particularly for individuals of modest means. In general, property bills are complicated pieces of legislation best suited for use by sophisticated legal counsel representing well-heeled individuals and major firms. The argument that property bills would create new, complicated, and time-consuming bureaucratic chores was also a powerful strike against these proposals.

Opponents of property legislation argued that this ostensibly pro-property legislation would actually harm the majority of landowners in the United States, homeowners in particular. Upon reflection, it is obvious that so-called property legislation actually seeks to advance the interests of only a subset of property owners — those who cut trees or mine ore, those who build shopping centers or houses — in other words, those who seek to develop or otherwise work the land for economic gain. These types of property owners have an obvious interest in property legislation insofar as it would award them "compensation" for making less intensive use of their land than they intended, or grant them the opportunity to exploit the land for maximum financial return once regulatory restraints were lifted. Property owners with already established uses, by contrast, stand in a very different position. Having already developed their property, or having purchased

developed property, these owners' principal interest in land use regulation lies in the ability to forestall neighboring development which would conflict with the use and value of their property. The old saw in the real estate business is that the three primary determinants of real estate value are location, location, location; owners of property with established uses naturally seek to use all available means to preserve the value of their location. For these types of owners, regulatory restrictions on property use, far from being a limitation on property values, are a critical tool in their preservation.

Importantly, but certainly not first, opponents of property bills argued that these bills would undermine the enforcement of existing environmental standards, and unreasonably deter the adoption of necessary new measures. The obvious effect of property bills, especially in view of the limited federal budget, would be to make it impossibly expensive to implement the law. The fact that many of these bills specifically targeted environmental laws suggested, if it did not prove, that the major impetus behind the property agenda was an effort to roll back existing environmental laws through the back door.

Equally instructive, perhaps, are the arguments which did not assume great importance in the debate over property bills. For example, the extent to which property legislation diverged from existing constitutional taking standards was not an issue of paramount importance in the political debate. This seemingly crucial issue, at least in the minds of lawyers, quickly became lost in impenetrable legal jargon. Similarly, the massive wealth transfer proposed by property bills — whether measured in monetary "compensation" payments, or rearranged property interests — did not figure prominently in the debate. This may reflect a general distaste for the rhetoric of class conflict in American politics. Finally, specific groups and legislators focused on the moral and ethical dimensions of the property issue,<sup>(73)</sup> but these themes did not figure prominently in the debate.

## **B. The Players**

As the property rights debate has unfolded, virtually every significant interest in American politics has been called upon to identify, if not actively promote, a particular position on the issue. Because of the sweeping implications of property legislation, all types of business, social welfare, and public interest organizations have perceived a stake in the debate. For better or for worse, relatively few other issues in American politics provide the same opportunity for political coalition building. Just as the property issue has tended to generate somewhat unusual coalitions, it also has disclosed some interesting fault lines between particular interest groups.

The proponents of property legislation fall into four basic groups. The first is the numerous business trade associations, especially developer groups, who perceived a distinct economic stake in the outcome of the debate. The second is the owners of rural land, primarily forestry and agricultural interests, led most prominently by the American Farm Bureau. The third group is made up of ideological true believers representing the libertarian wing of the non-profit community, including Defenders of Property Rights, the Cato Institute, and the Competitive Enterprise Institute. Fourth, a variety of wise-use and property rights organizations across the country supported the legislation.

Opponents of the property legislation included virtually every conservation and environmental organization; the historic preservation community led by the National Trust for Historic Preservation; most major labor organizations, including the AFL-CIO, United Steelworkers, and other unions; the League of Women Voters; the National Catholic Conference and major Protestant denominations; and major consumer groups.

Ultimately, the single most important opponent of property rights legislation was the collection of national organizations which represent state and local governments, including the U.S.

Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, and others. On some issues, state and local government groups find themselves at odds with environmental organizations. For example, these groups generally support more liberal delegation of federal environmental programs to states and localities than environmental groups find acceptable. State and local government groups were also among the most active advocates of "unfunded mandate" legislation in the 104th Congress,(74) which environmental groups opposed. Because of both the direct and indirect financial burdens property rights legislation would impose on them, and because of the precedent federal property legislation would set for state legislatures, the state and local government groups strongly opposed federal property legislation.

The academic community played a role in the political debate, primarily as authoritative spokespeople for the point that the legislative proposal departed from longstanding Supreme Court interpretation of the Taking Clause. This was the thrust, for example, of a letter sent by 380 law professors to members of the U.S. Senate commenting on Senate Bill 605.(75) Several law professors also testified against taking legislation before House and Senate committees.(76) As indicated above, however, it is far from clear that their purely legalistic arguments ultimately had much impact on the political debate.

One of the more interesting fault lines in the taking debate relates to the cost issue. In the 104th Congress, some of the leading champions of taking legislation simultaneously championed a balanced budget, believing that both legislative objectives would ultimately help reduce the size and reach of government. Other fiscal conservatives opposed taking legislation as fiscally irresponsible. The conflict is neatly summed up by the fact that the leadership of the Concord Coalition, the leading advocacy group on behalf of a balanced federal budget, divided over the property rights issue. Warren Rudman, a former Republican Senator from New Hampshire and political ally of presidential candidate Robert Dole, stayed on the sidelines of the debate. On the other hand, the late Paul Tsongas, a former Democratic Senator from Massachusetts and a staunch environmentalist, became one of the most prominent and effective opponents of taking legislation.(77)

The position of the Christian right was both striking and politically potent. In general, the Christian right is politically aligned with Republicans, the primary champions of property legislation in the 104th Congress. However, the Christian right's approach to various moral and ethical issues is obviously in tension with the libertarian wing of the Republican Party. Donald Wildmon of the American Family Association became one of the most vocal and effective opponents of property legislation in his home state of Mississippi because he perceived property legislation as a threat to local communities' efforts to control sex-related businesses.(78)

#### **IV. Responding to the "Property Rights" Agenda**

How should advocates of environmental protection effectively advance their cause in the era of private property? For all their force, most of the arguments advanced by the opponents of property legislation are defensive in nature. They primarily describe the numerous unintended problems that property legislation would produce, without squarely addressing the central fairness argument advanced by the proponents: the public that benefits from measures that generate widespread public benefits should be willing to compensate individuals who bear the economic burden of providing these benefits. Sketched out below are four interrelated approaches for reinvigorating the environmental policy agenda in the 1990s and confronting head on, rather than talking around, the central moral and political arguments of property proponents.

##### **A. Reinventing a Private Law of Environmental Protection**

To start, environmental advocates should recognize that traditional communitarian arguments for environmental protection measures have little political impact in the face of the property rights argument. In the past, environmental advocates have generally pointed to the significant, broadly shared benefits of environmental protections. The political case for clean water, for example, has been chiefly expressed in terms of protecting public health and providing recreational benefits for all Americans. In legal terms, advocates of environmental protection have been content to rely on the broad authority granted by the police power, and the traditionally limited constitutional constraints on the exercise of this power, to justify environmental protection measures.

In elementary political terms, measures that provide significant, widespread benefits might be expected to prevail in the political arena over minority interests adversely affected by the pursuit of these benefits. Over time, therefore, the workings of the political process might lead to a readjustment of property rights to maximize total public welfare. This analysis fails to account, however, for the difficulty of organizing the large, diffuse constituency for environmental protection, or the ability of highly motivated and easily organized special interests to mobilize in opposition. Equally important, it fails to take account of the ability of individuals burdened by new measures to create a vivid moral and philosophical case against environmental measures.

This suggests that advocates of environmental protection should focus attention on policies which create or enforce individual rights to environmental protection. Legitimate claims of individual right to the redress of environmental problems should trump, or at least neutralize, property rights claims that challenge environmental measures. Vivid examples of injury to individual property owners and other citizens as a result of environmental problems should likewise help neutralize the argument that enforcement of environmental measures imposes unreasonable burdens on landowners restricted from harming their neighbors.

This approach seeks in part to revive a pre-regulatory approach to environmental protection, as exemplified by traditional nuisance remedies. Without ignoring the limitations of traditional nuisance law to address many contemporary environmental problems,<sup>(79)</sup> this recommendation reflects the judgment that the political force of the environmental agenda has been weakened to the extent that the design of typical regulatory measures has submerged the central role of environmental law in protecting private property and other personal interests of individual citizens. Many of the property measures considered in Congress included a proposed exception from a general compensation requirement for limitations which would forestall common law nuisances. Because the public would bear the burden of demonstrating that a proposed limitation would prevent the occurrence of a nuisance according to the sometimes antiquated common law principles of the particular state, this type of exception would provide precious little environmental protection. Yet, by acknowledging the need for some type of exception for nuisance-like harms, the proponents of property legislation have identified their opponents' strongest card. The challenge is to begin to rebuild the case for environmental protection from this strong foundation.

Two recent initiatives demonstrate the potential power of this approach. The first is the Homeowners Protection and Empowerment Act, a bill introduced in the 104th Congress by Sen. Ron Wyden (D.-Or.) and Sen. John Warner (R.-Va.).<sup>(80)</sup> The bill would create a "homeowner right of access to information" about activities with the potential to reduce the value of citizens' homes.<sup>(81)</sup> More specifically, the bill would require every applicant to a Federal agency seeking permission "to conduct property impacting activity" to provide individualized notice of the proposed activity to every homeowner within one-quarter mile of the boundary of the site of the proposed activity.<sup>(82)</sup> An application to conduct property impacting activity is defined in the bill to mean a license, contract, or virtually any other type of authorization "to conduct an activity that generates pollutants or produces other adverse impacts with the potential to reduce the value of any private home."<sup>(83)</sup> The notice would describe the proposed activity, the potential impacts, and the available opportunities to comment on the application. This notice process would apply, for example, to a permit for the filling of wetlands that would cause downstream flooding, the siting of hazardous waste facilities, or the issuance of industrial air emission permits.

The bill also would create a new right of action in federal court allowing any homeowner, or group of homeowners, to sue the holder of a federal permit or other authorization for compensation for lost property value. The bill establishes a right to sue on a strict liability basis, requiring only that the plaintiff demonstrate that the federally authorized activity caused a reduction in the value of one or more private homes of \$10,000 or more. A prevailing plaintiff could recover attorneys fees, but the bill also would authorize a court to assess attorney fees against the plaintiff if the suit were dismissed as "frivolous, dilatory, abusive, or brought to harass the defendant or for any other improper purpose."<sup>(84)</sup>

The political appeal of this turnabout-is-fair-play strategy is obvious. Like the compensation-type federal taking bills, homeowner protection legislation provides a virtually absolute protection against federally authorized activities which reduce private property values. Unlike traditional taking legislation, which seeks to protect and advance the interests of owners of undeveloped property, homeowner legislation seeks to protect owners of already constructed homes. Because there are over sixty-five million homeowners in the United States, and the purchase of a home represents most families' single largest financial investment, this proposed legislation has a potentially large and highly motivated constituency. The fact that the bill was introduced in the Senate by a liberal Democrat and a conservative Republican confirms the broad political appeal of this type of measure.

A second example of the individualistic approach to environmental protection is the "right to know" provisions of the Safe Drinking Water Act enacted at the end of the 104th Congress.<sup>(85)</sup> The Act requires owners and operators of public drinking water systems to provide notice to each person served by the system of any failure to comply with a maximum contaminant level or other standard, and of the grant of a variance or exemption from the requirement to comply with a contaminant level.<sup>(86)</sup> The Act contains elaborate provisions governing rulemaking regarding the form, content, and frequency of the public notice, with more extensive notice requirements mandated for violations with potentially serious adverse health effects.<sup>(87)</sup> In addition to event-specific notices, the Act requires public drinking water systems, with certain exceptions for smaller systems, to mail to each customer annually a report on the level of contaminants in the water distributed by the system.<sup>(88)</sup>

This "right to know" provision reflects the philosophy that an educated consumer will act more effectively to protect her interest, presumably by continuously agitating for more healthful drinking water supplies. Like the homeowner protection proposal, the "right to know" provision relies less on direct governmental action to protect the environment, and seeks to empower the citizen to act individually to protect his or her own self interest.

This general approach can, of course, be deployed in a variety of different forms. The Sierra Club, for example, recently advanced the proposal that builders of homes in flood-prone areas be responsible for compensating their customers for any flood losses they subsequently incur.<sup>(89)</sup> Other potential legislation might require developers to inform home purchasers whether the site includes filled wetlands, helping alert consumers to potential flooding or unstable building foundations; require sellers of real estate to inform purchasers of past flooding events affecting the site; or require a government agency to provide periodic reports to owners of homes and other property in a particular watershed of the extent and pace of floodplain alteration or wetland filling.

## **B. Reasserting Public Ownership Rights**

Another potential approach to reinventing environmental policy in the property rights era is to reaffirm and reassert common public ownership of certain environmental resources. Many environmental protection and management measures are unavoidably communitarian in nature, and the political argument in support of these measures must ultimately rest, if it rests anywhere, in a public right to these protections. This approach represents a political analog to the public

trust doctrine. In the political context, the public trust argument does not, of course, offer any particular rule of decision for resolving disputes over public trust resources. Rather, it supplies a normative argument for why the public can legitimately adopt regulations to protect certain resources in the first place.

In a 1986 article,(90) Richard Lazarus advised environmentalists to eschew reliance on the public trust doctrine to advance their cause. He stated that "[t]he public trust doctrine simply has no place in the emerging scheme" of environmental regulation.(91) "The doctrine finds its home in the legal analytic framework supported by traditional property dogma currently (and appropriately) being abandoned. It was essentially the public property analog to those private property concepts, which are now eroding."(92) Ten years later, it is apparent that Lazarus' prediction about the erosion of traditional property thinking was wide of the mark. However, Lazarus' insight into the analytic consanguinity of public ownership thinking and private property rights retains force. Just as it may well have been sound to advise abandonment of public ownership thinking in light of the apparent erosion of traditional private property thinking, the revival of private property thinking may call for a revival of the countervailing idea of public ownership to explain and justify environmental protection measures.

The most obvious opportunity to use public ownership thinking is to justify protection of publicly owned federal and state lands. Jack Ward Thomas, former chief of the U.S. Forest Service, illustrated the rhetorical force of this argument in a recent speech concerning proposed delegation of responsibility for managing federal public lands to the states:

Right up front, I clearly state, without equivocation that these are *our* lands today - the lands of all the people. These are *our* lands - they belong to us lock, stock and barrel. And they will be *our* lands and *our* children's and *our* children's children's lands far into the future unless we, as a people, through carelessness or apathy or conscious choice, allow that precious heritage to be sold or traded away for pottage.(93)

Of course, as a legal matter, it is self-evident that the federal government, as holder of the title to public lands, has very extensive legal authority over the uses of public lands. And the idea of public rights in the public's land has certainly played a part in public land conservation advocacy. Yet public ownership thinking has nonetheless not played as prominent a role as it seemingly deserves, particularly in light of the (somewhat nonsensical) strength of the property rights movement in the public lands states in the western United States. For example, in terms of public message, efforts to reform the 1872 Mining Act(94) and federal land grazing policies have focused on the severity of the environmental problems associated with these programs and the magnitude of the taxpayer-funded subsidies under these programs. Reluctance to rely heavily on the idea of public ownership rights may reflect an understandable desire to avoid legitimating the resurgence of property thinking in general. Yet it is worthwhile to consider the future potential of these reform efforts if they were more firmly grounded in the idea of public rights in public lands.

The public ownership idea is also potentially useful to address the most politically vulnerable federal conservation program, the Endangered Species Act and other regulatory efforts to protect wildlife and their habitats. If protection of wildlife is equated in the public mind with the protection of a public property resource, it is an easy step to conclude that the public property right in wildlife should trump, or at least match, conflicting private claims to use property in a way that conflicts with this public property right. As a number of commentators, most notably Oliver Houck,(95) have discussed, there is venerable legal tradition which supports this political argument.

Many state court decisions recognize that the states own their wildlife resources and serve as trustees over wildlife for the benefit of all citizens.(96) According to a survey Houck conducted, at least thirty-one states explicitly claim ownership or title of fish and wildlife either by statute or in their constitutions.(97) In part because early decisions firmly lodged ownership of wildlife at the state level, the support for federal government (simultaneous?) ownership of wildlife resources is

more attenuated. However, numerous decisions, relying on a wide variety of federal authorities, treat the federal government as standing in a trustee relationship to wildlife resources as well.(98) The larger point is that American law has long embraced the idea of public ownership of wildlife as a natural and logical necessity, suggesting the potential common sense value of this argument in the political debate.

Nonetheless, wildlife conservation advocates, like advocates of environmentally responsible public land management, have generally avoided framing their case in terms of public property rights. Defenders of the Endangered Species Act, for example, have argued that protecting endangered wildlife is important in order to preserve entire ecosystems of which the species are a part, to safeguard nature's storehouse of medicines and other useful chemical compounds, and to recognize the high value the public ostensibly places on the continued existence of individual species.(99) None of these arguments, however, directly meets the property rights argument. Indeed, because these arguments underscore the diffusely shared benefits of wildlife conservation, they appear to reinforce the property rights argument against wildlife conservation laws. The public ownership idea, by contrast, justifies and explains public wildlife conservation efforts.

### **C. Finding Out Who Owns What**

Political discourse about property suffers from a poverty of information about who actually owns what land in the United States — and consequently about the actual identity of the winners and losers in the property debate.(100) The abstract character of much academic discussion of property issues, the paucity of available data, as well as the preoccupation of both sides of the debate with the telling anecdote, has served to obscure larger issues of equity. A better public understanding of land distribution patterns would improve public understanding of the issue, and would likely build more effective political opposition to efforts to redefine property rights legislatively to benefit the owners of undeveloped land.

The available evidence, most of which has been collected by specific industry sectors, demonstrates that owners of undeveloped property who would potentially benefit from property legislation are a small minority of all property owners. There are approximately three million agricultural land owners and about eight million owners of forestland.(101) By far the largest group of property owners is home- owners — about sixty-five million.(102) In addition, there are about five million owners of commercial and industrial land.(103)

The available evidence also reveals substantial concentration of land ownership.(104) Only about 124,000 owners, representing about four percent of farmland owners, hold forty-seven percent of all U.S. farmland. The concentration of agricultural land ownership has rapidly increased since the mid-1930s. Concentration of forest land ownership is even more extreme, with fewer than one percent of the forest land owners, about 63,000 owners, owning forty-eight percent of the forest land in the United States. The 2,000 largest ownerships (10,000 acres or more) represent less than .03% of forest land ownerships, but they held eight-four million acres or twenty-five percent of all the forest land.(105)

The implications of this data for the property debate are obvious. Owners of undeveloped land would benefit from property legislation, and owners with the most undeveloped land would benefit the most. By contrast, owners of developed property, such as homeowners, would not benefit and might well see reductions in their property values. Overall, a powerful few would benefit at the expense of the majority.

While these data are instructive, the quality of general and site specific information about land ownership is very poor. In a 1995 analysis, the U.S. Department of Agriculture's Economic Research Service could arrive at an estimate of the total number of landowners in the United

States which was no more accurate than "greater than 60 million, but less than 80 million." (106) Information on the degree of concentration of ownership, or the identity of specific land owners, also tends to be poor at the community and regional levels. Improved information would do much to improve the quality of the property debate.

#### **D. Rethinking Property**

Finally, I suggest that it is necessary to consider a comprehensive reassessment of the relationship among private real property ownership, individual liberty and autonomy, and environmental protection. The classic justification for private property ownership is to secure sufficient certainty and predictability to support private investment and efficient operation of the free market system. (107) However, it is frankly difficult to square this explanation of the function of the Taking Clause with existing Supreme Court precedent or any other likely reading of the Taking Clause. After all, in Lucas v. South Carolina Coastal Council, (108) Justice Scalia wrote that "the property owner necessarily expects the uses of his property to be restricted from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." (109) Numerous Supreme Court decisions, the validity of which is not in question, have upheld regulations which significantly affect property values and undoubtedly disrupt, if not destroy, specific investment plans. (110) In short, prevailing opinion suggests that private property is subject to a kind of communitarian servitude which is frankly inconsistent with the idea that the scope of real property interests vis-à-vis the government is significantly defined by the needs of a well-functioning marketplace.

This conclusion suggests the need for a more searching examination of how conservationists, and perhaps Americans in general, should think about real property in relation to the high value many of us place on maintaining significant autonomy of action and freedom from arbitrary government action. I offer two preliminary, and concluding, suggestions.

The first is the potential value of broadening the property debate beyond the specific topic of real estate, or property as a whole, to include a much wider variety of rights and interests. As demonstrated by the data on land ownership, whatever function the rights of land ownership have had in defining the content of liberty, that function is clearly decreasing in importance for most citizens. The rise of substantive and procedural "new property" has not only built upon traditional property rights, it has also partly supplanted traditional property rights. Furthermore, for many large landowners, corporate landowners in particular, investment in land is only one of numerous investments, each of which carries different risks. Just as the courts look to the reasonable investment-backed expectations of owners of specific real property, it may be appropriate to forthrightly recognize that different types of investments are subject to differing expectations about the likelihood and reasonableness of government action that affects the value of the investment. Furthermore, in our increasingly service and information-based economy, what after all is the relative importance of investment in real property, particularly undeveloped real property, to the overall size and growth of the economy?

Second, it would be wise for environmental advocates to recognize that environmental interests are not significantly harmed, and may well be furthered, by government adherence to the principle of equitable treatment and procedural regularity. Many have commented on the interrelationship of the values protected by the Equal Protection Clause and the Taking Clause. (111) While the pursuit of environmental quality depends in part on conditioning or adjusting property interests to address new environmental problems, environmental interests are served little if at all by government action which unfairly or arbitrarily singles out one or a few owners to address a problem created by many. In fact, the opposite is more likely true. Also, to the extent procedural safeguards improve the technical accuracy of regulatory decisions, environmental protection should improve as well. Perhaps most importantly of all, a common commitment to freedom from arbitrary government action, when it occurs, would help reinforce

the point that while there is much that divides us, there also is much that should bring together all those engaged in the debate over property rights.

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(1) Under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a regulation that denies the owner all economic use of the property is presumptively a taking, subject to several broad exceptions. See *id.* at 1014-19. Whether and under what circumstances regulations which have less severe economic impacts may also result in a taking is a matter of extensive debate. Compare Zealy v. City of Waukesha, 548 N.W.2d 528, 531 (Wis. 1996), with Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994). See generally Richard Lazarus, *Putting the Correct "Spin" on Lucas*, 45 Stan. L. Rev. 1411 (1993) (arguing that Lucas decision reflects emergence of a two-tier taking test similar to longstanding two-tier due process and equal protection tests).

(2) U.S. Const. amend. V.

(3) 33 U.S.C. §§ 1251-1387 (1994).

(4) 16 U.S.C. §§ 1531-1544 (1994).

(5) See generally Laurence H. Tribe, *American Constitutional Law* 421-55 (1978) (discussing close judicial scrutiny of legislative measures during the *Lochner* era). Of course, advocates of the property agenda in the early part of this century were matched by vociferous opponents. In a 1910 speech, then-former President Theodore Roosevelt declared:

Nothing is more true than that excess of every kind is followed by reaction; a fact which should be pondered by reformer and reactionary alike. We are face to face with new conceptions of the relations of property to human welfare, chiefly because certain advocates of the rights of property as against the rights of men have been pushing their claims too far. The man who wrongly holds that every human right is secondary to his profit must now give way to the advocate of human welfare, who rightly maintains that every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it.

Theodore Roosevelt, *The New Nationalism* (speech delivered at Osawatomie, Kan., Aug. 31, 1910), reprinted in *Theodore Roosevelt, An American Mind* (Mario DiNunzio ed., 1994).

(6) See David Boaz, *Libertarianism: A Primer* 64 (1997).

(7) *Id.* at 7.

(8) See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 818-19 (1995).

(9) See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987).

(10) The most important of the land use cases recently decided by the Supreme Court include First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), and Dolan v. City of Tigard, 512 U.S. 304 (1994).

(11) 505 U.S. 1003 (1992).

(12) See *Closeup: Property Rights*, Money in Politics Alert (Ctr. for Responsive Politics, Washington, D.C.), May 13, 1996, at 1.

(13) See *id.*

(14) Omnibus Property Rights Act of 1995, S. 605, 104th Cong. (1995).

(15) See The Wilderness Soc'y, The "Takings" Debate in the House, March 1-3, 1995: The Anecdotes and the Official Records (1995) (on file with the *Oklahoma Law Review*).

(16) Federal News Serv., *Campaign '96: Transcript of the Vice-Presidential Debate*, Wash. Post, Oct. 10, 1996, at A25.

(17) Al Kamen, *Next Time, Perhaps, a Shorter Speech*, Wash. Post, Oct. 23, 1996, at A-21.

(18) See cases cited *supra* notes 9-10. However, a statement by United States Court of Federal Claims Chief Judge Loren Smith in Bowles v. United States, 31 Fed. Cl. 37 (1994), probably represents the most explicit effort by a member of the federal judiciary to promote property as a political issue. In the opening paragraph of the decision, Judge Smith endorsed the concept of takings legislation by stating that courts "cannot produce comprehensive solutions," and that constitutional protections for property rights "should . . . be understood to be a social mechanism of last, not first resort." *Id.* at 39.

(19) This conclusion is based on my own systematic monitoring of takings cases filed in federal and state courts over the last five years. See, e.g., National Audubon Soc'y, *Federal Environmental and Land Use Taking Cases* (Summer 1997).

(20) The first image is based on the widely publicized fact that David Lucas, the plaintiff in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), was seeking to build on beachfront lots on either side of which development already had occurred. The second image is based on a widely repeated quip by Justice Scalia during the oral argument in Dolan v. City of Tigard, 512 U.S. 304 (1994).

(21) The defeat of compensation-type takings legislation of the 104th Congress may signal a renewed emphasis on pursuing the property agenda through the courts. New legislative proposals to make it easier for takings claimants to bring successful takings actions in federal court certainly would help advance such a strategy. See *infra* text accompanying note 60.

(22) 482 U.S. 304 (1987).

(23) Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted as amended in* 5 U.S.C. § 601 (1994).

(24) See First English, 482 U.S. at 310.

(25) *Id.* at 315.

(26) *See id.* at 317.

(27) *See* Exec. Order No. 12,630, § 1, 3 C.F.R. 554 (1988), *reprinted as amended* at 5 U.S.C. § 601 (1994).

(28) *See id.*

(29) To support their argument, critics pointed to Charles Fried, *Order and Law: Arguing the Reagan Revolution — A First Hand Account* 183 (1991), Fried's memoirs of his experience in the Reagan Justice Department. Fried stated:

Attorney General Meese and his young advisors — many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein — had a specific, aggressive, and it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right — limiting the possible uses for a parcel of land or restricting or tying up business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.

(30) *See* Exec. Order No. 12,630, § 5(b), 3 C.F.R. 554 (1988), *reprinted as amended* at 5 U.S.C. § 601 (1994).

(31) Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and The New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 288 (1996).

(32) *See* 136 Cong. Rec. S10917 (July 27, 1990).

(33) *See id.*

(34) S. 50, 102d Cong., 1st Sess (1991). This and the other taking bills introduced in the 102nd Congress are described in detail in Robert Meltz, *Private Property Protection Legislation in the 102nd Congress*, CRS Issue Brief, Sept. 18, 1992.

(35) *See* Meltz, *supra* note <34>, at 10.

(36) *See* H.R. 1330, 102d Cong. (1991).

(37) *See* H.R. 4058, 102d Cong. (1991).

(38) For a comprehensive description of the takings issue in the 103rd Congress, see Robert Meltz, *Property Rights Legislation in the 103rd Congress*, CRS Report for Congress, July 22, 1994, at 1, 2, 3.

(39) *See id.*

(40) *See* 140 Cong. Rec. S5989 (May 19, 1994).

(41) *See* H.R. 3875, 103d Cong. (1994).

(42) *Id.*

(43) California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (codified at 16 U.S.C. §§ 410aaa to 4410aaa-83 (1994)).

(44) *See id.* § 710 (codified at 16 U.S.C. § 410aaa-80).

(45) *See* H.R. 9, 104th Cong. § 9002(a)-9002(a)(2)(B) (1995).

(46) *Id.* § 9002(a)(3)(B).

(47) 141 Cong. Rec. H2495 (daily ed. Mar. 2, 1995) (statement of Rep. Smith).

(48) 141 Cong. Rec. H2498 (daily ed. Mar. 2, 1995) (statement of Rep. Gekas).

(49) 141 Cong. Rec. H2510 (daily ed. Mar. 2, 1995) (statement of Rep. Hayworth).

(50) 141 Cong. Rec. H2523 (daily ed. Mar. 2, 1995) (statement of Rep. Calvert).

(51) *See* 141 Cong. Rec. H2629-30 (daily ed. Mar. 3, 1995).

(52) *See* S. 605, 104th Cong. (1995).

(53) *See* S. Rep. No. 104-239 (1996).

(54) On July 16, 1996, Senator Hatch introduced a revised version of S. 605 in an effort to revive the flagging effort to get taking legislation to the Senate floor. *See* S. 1954, 104th Cong. (1996). The revised bill narrowed the scope of the Senate bill to real property, raised the percentage threshold to 50%, and provided an explicit exclusion for actions mandated by any Federal law prohibiting discrimination on the basis of race, color, religion, sex, national origin, age, or disability. *See id.* The Senate leadership never brought this bill before the Senate for a vote, apparently because they also lacked sufficient support to pass this bill.

(55) *See* S. 781, 105th Cong. (1997).

(56) In addition, major industry lobby groups have signaled their willingness to abandon compensation-type taking proposals. *See Outlook Uncertain for Property Rights Bill This Congress*, Nat'l J.'s Congress Daily, May 27, 1997, available in LEXIS, Legis Library, Cngdly File (quoting Henson Moore of the American Forest and Paper Association as saying, "We still believe in it. We just don't think it is going anywhere.").

(57) *See* S. 709, 105th Cong. (1997) (introduced by Sen. Hegel, R.-Neb.).

(58) *See* Private Property Protection Act of 1997, H.R. 95, 105th Cong. (introduced by Rep. Solomon, R.-N.Y.).

(59) *See* Tucker Act Shuffle Relief Act of 1997, H.R. 992, 105th Cong. § 2 (introduced by Rep. Smith, R.-Tex.).

(60) *See* Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (introduced by Rep. Gallegly, R.-Cal.).

(61) The primary Senate counterpart to the Gallegly Bill is the Citizen's Access to Justice Act of 1997, S. 1256, 105th Cong.

(62) Among the most frequently discussed environmental issues today are land use management and the challenge of controlling "sprawl" development. Nonetheless, there is little visible interest in the 105th Congress in addressing this issue through legislation. Fear of the property issue explains, at least in part, legislators' reluctance to address this issue.

(63) See BNA's Daily Env't, May 21, 1997, at A-14. For a critical assessment of the administration's proposal, see Alexander Cockburn, *Ladies and Gentleman, I Give You the President*, Nation, Sept. 16, 1996, at 9-10.

(64) See U.S. Dep't of Interior, The Interior Budget in Brief DH-21, D-3 (Feb. 1997).

(65) See National Audubon Society, State Takings Legislative Summary for 1996 Session (Fall 1996).

(66) See Fla. Stat. ch. 70.001 (1995); La. Rev. Stat. Ann. §§ 3:3601-02, 3:3608-12, 3:3621-24 (West Supp. 1997); Miss. Code Ann. §§ 49-33-1 to 49-33-17 (1994); Tex. Gov't Code Ann. §§ 2007.021 - 2007.026 (1995).

(67) See Robert Meltz, "Property Rights" Laws in the States, CRS Report for Congress, Dec. 2, 1996, at 8 n.1.

(68) See *id.* at 8 n.2.

(69) These arguments are laid out in detail, for example, in the debate on the Contract with America taking provision which spanned three days in March 1995. See 141 Cong. Rec. H2459-639 (daily eds. Mar. 1-3, 1995); see also *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Env't and Public Works*, 104th Cong. (1995); *The Right to Own Property: Hearing Before the Senate Comm. on the Judiciary on S. 605*, 104th Cong. (1995).

(70) For an exhaustive study of land use practices in colonial America, see John F. Hart, *Colonial Land Use Law and Its Significances for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252 (1996). The author concludes that an examination of actual practice around the time of the drafting of the Bill of Rights "destroys much of the basis for applying the Takings Clause to land use regulation at all." *Id.* at 1258.

(71) See *Private Property Rights & Environmental Laws: Hearings on S. 605 and H.R. 9 Before the Senate Comm. on Env't & Pub. Works*, 104th Cong. 134-46 (1995) (testimony of Alice M. Rivlin, Director, Office of Management and Budget).

(72) See Letter from Alice Rivlin, Director, Office of Management and Budget, to Orrin Hatch, Chairman, Senate Judiciary Committee (June 7, 1995) (on file with the *Oklahoma Law Review*).

(73) The United States Catholic Conference is a notable example of a group which addressed moral and ethical considerations. See *Hearings on S. 605 Before the Senate Judiciary Comm.*, 104th Cong. (1995) (statement of Reverend John J. McRaith, Bishop of Owensboro, Kentucky, United States Catholic Conference).

(74) See Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501-1504 (Supp. I 1995)).

(75) Law Professors Opposed to S. 605 (May 2, 1996) (letter signed by 380 law professors) (on file with the *Oklahoma Law Review*).

(76) See *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on the Env't and Public Works*, 104th Cong. (1995) (statements of Richard J. Lazarus and Frank L. Michelman); *Right to Own Property: Hearings on S. 605 Before the Senate Comm. on the Judiciary*, 104th Cong. 86-101 (1995) (statement of Carol M. Rose); *Protecting Private Property Rights from Regulatory Takings: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 21-54 (1995) (statement of J. Peter Byrne).

(77) See *Private Property Rights and Environmental Laws, Hearings on 605 Before the Senate Comm. on the Env't and Pub. Works*, 104th Cong. 146-51 (1995) (statement of Paul E. Tsongas).

(78) See American Family Ass'n, Press Release, Jan. 13, 1994 (describing proposed taking legislation as a "Porn Owners Relief Measure") (on file with the *Oklahoma Law Review*).

(79) See *Private Property Rights & Environmental Laws: Hearing Before the Senate Comm. on Env't & Pub. Works*, 104th Cong. (1995) (statement of Richard J. Lazarus).

(80) See Homeowners Protection and Empowerment Act, S. 2070, 104th Cong. (1996) (introduced Sept. 12, 1996).

(81) *Id.* § 3.

(82) *Id.* § 2.

(83) *Id.* § 3.

(84) *Id.* § 5.

(85) See Safe Water Drinking Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (to be codified at 42 U.S.C. §§ 300f to 300j-3c).

(86) See 42 U.S.C.A. § 300g-3(c)(1) (West Supp. 1997).

(87) See *id.* § 300g-3(c)(2).

(88) See *id.* § 300g-3(c)(4).

(89) See Brett Hulsey & Brett Koeller, Sierra Club, Floods, Death, and Wetlands Destruction from 1993 — March 12, 1997: How Wetlands Destruction May Increase Flood Deaths 7 (Mar. 1997).

(90) See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986).

(91) *Id.* at 701.

(92) *Id.*

(93) Jack Ward Thomas, Devolution of the Public's Land — Trading a Birthright for Pottage, Address (1997) (on file with the *Oklahoma Law Review*).

(94) 30 U.S.C. §§ 21-21a (1994 & Supp. I 1995).

(95) See Oliver Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings?"*, 80 Iowa L. Rev. 297, 308-21 (1995).

(96) See *id.* at 309.

(97) See *id.* at 309-10, 310 n.76.

(98) See *id.* at 311-13.

(99) See, e.g., Endangered Species Coalition, *The Endangered Species Act: A Commitment Worth Keeping* (1997).

(100) Several scholars have identified the importance of the issue of distribution of land ownership and, working within the limitations of available data, have explained the relevance of this issue to the property debate. See, e.g., Gene Wunderlich, *Property In, Taxes On, Agricultural Land* (1995) (un-published Land Tenure Center Paper, University of Wisconsin-Madison) (on file with the *Oklahoma Law Review*).

(101) See Letter from John C. Dunmore, Acting Administrator, Economic Research Service to Sen. Patrick Leahy (Feb. 22, 1995) (on file with the *Oklahoma Law Review*).

(102) See *id.*

(103) See *id.*

(104) See *id.*

(105) See *id.*

(106) *Id.*

(107) See, e.g., Rose, *supra* note 3, at 268.

(108) 505 U.S. 1003 (1992).

(109) *Id.* at 1027.

(110) See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (rejecting taking challenge to restriction to one building on five acres which allegedly reduced property value by 85%); *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962) (upholding town regulation that barred continued operation of existing sand and gravel operation in order to protect public safety); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (rejecting taking challenge to zoning restrictions which allegedly reduced the value of property by 85%). See generally *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987) ("[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests."). Furthermore, in *Lucas*, Justice Scalia stated that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Lucas*, 505 U.S. at 1027-28. Given

the importance of personal property in commercial dealings, this statement seems to flatly contradict the idea that the Taking Clause's purpose or function is to protect the security of investments.

(111) See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *Ecology L.Q.* 89, 131 (1995).