Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation as a Remedy

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ACHIEVING THE PROPER BALANCE BETWEEN THE PUBLIC AND PRIVATE PROPERTY INTERESTS: CLOSELY TAILORED LEGISLATION AS A REMEDY

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Balancing the individual’s right to exclusive control of his land against the public interest in its preservation has become increasingly controversial in the last thirty years. Considering the conservative nature of the recently elected Republican Congress, the issue is likely to come to a head in the near future. Part I of this paper discusses the emergence of the “ takings” problem by tracing its historical origins. Part II details two alternative solutions to the problem: a judicial remedy and a legislative remedy. Part III scrutinizes and points out the disadvantages of these two solutions. And finally, Part IV suggests a modified legislative remedy—passage of a narrowly tailored takings law requiring specific agencies to assess the impact of various regulations on private property. The final Part of the paper also proposes that Congress continue its practice of amending controversial environmental statutes to ensure that the law addresses the concerns of both environmentalists and property owners.

I. HISTORICAL DEVELOPMENT OF THE ISSUE

A. Original View: Expansive Land Rights

When the Europeans first arrived in America, the individual’s right to control his own land was fundamental. Perhaps due to the scarcity of land in England, contrasted to its abundance in America,1 many of the early settlers considered ownership of land an “essential and unalienable” right of every citizen.2 Indeed, Thomas Jefferson, an early proponent of individual property rights, stated, “the true foundation of republican government is the equal right of

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1. See Thomas Jefferson, Notes on the State of Virginia, in 1 ANTHOLOGY OF AMERICAN LITERATURE 433, 441 (George McMichael et al. eds., 1989) [hereinafter ANTHOLOGY OF AMERICAN LITERATURE] (“In Europe the lands are either cultivated or locked up against the cultivator . . . . But we have an immensity of land courting the industry of the husbandman.”).

2. See ADDITIONS PROPOSED BY THE VIRGINIA CONVENTION: A PROPOSED BILL OF RIGHTS (JUNE 27, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 219 (Ralph Ketcham ed., 1986) (“there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are . . . the means of acquiring, possessing, and protecting property . . . .”).
every citizen, in his person and property, and in their management." This view of nearly unrestricted property use is perhaps best stated by the philosopher John Locke, upon whose theories many of our Founding Fathers relied in creating our system of government:

Property, whose Original is from the Right a Man has to use any of the inferior Creatures for the Subsistence and Comfort of his Life, is for the benefit and sole advantage of the proprietor, so that he may even destroy the thing, that he has Property in by his use of it, when need requires.

The Fifth Amendment to the Constitution highlights the fundamental importance of property rights for these early citizens. It states in pertinent part: "nor shall private property be taken for public use without just compensation."

B. Environmental Movement

The drafters of the United States Constitution never specifically contemplated air too unhealthy to breathe, water too polluted to drink or wildlife on the brink of extinction. They lived in a world of abundant, fertile land, very different from the modern industrial America. In their wisdom, though, they did anticipate generally changing circumstances which would demand new laws. Thomas Jefferson, for example, criticized those who "ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment." He stated that, "as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times." True to this prediction, in the 1960s various scientific discoveries led to an advanced understanding of, and concern by the American people for, the environmental consequences of their activities. "Rivers caught on fire, air

4. See, e.g., ANTHOLOGY OF AMERICAN LITERATURE, supra note 1, at 430 (comparing the reference in THE DECLARATION OF INDEPENDENCE to "Life, Liberty and the pursuit of Happiness" with John Locke's assertion in Treatises of Civil Government (1690) "that human rights include life, liberty, and property.").
6. U.S. CONST. amend. V. This prohibition applies to the federal government. Through the Fourteenth Amendment's Due Process Clause, its application extends to state governments as well. Chicago Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).
8. Id. at 451.
emergencies were declared, people waited for chemical time bombs to go off in their bodies, and the country watched as species after species, including the American Bald Eagle, teetered on the brink of extinction. In response to these discoveries and disasters, “Congress had a strong mandate from the American people for environmental change.” This new awareness led to the passage of a proliferation of environmental laws including the National Environmental Policy Act (“NEPA”), the Clean Air Act of 1970, the Clean Water Act of 1972, the Endangered Species Act (“ESA”) in 1973, the Resource Conservation and Recovery Act (“RCRA”) in 1976, and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) in 1980. These laws, designed primarily to protect and preserve the environment, conditioned and restricted formerly lawful landowner activities. The two hundred years of almost unfettered freedom for landowners was challenged, and a shift occurred from protection of individual landowners’ rights toward greater protection of the public environmental good. One noteworthy example, clearly illustrative of the conflict between property rights advocates and environmentalists, arises in the context of the ESA.

1. Private Property and the Endangered Species Act

The scientific discoveries that prompted the environmental movement revealed among other things that, in addition to their inherent natural beauty, many species of plants provide valuable medical benefits. For example, the Pacific Yew, which was considered worthless in the past, produces taxol, a drug effectively used to treat ovarian and breast cancer. In addition, “more than 3 million American heart disease sufferers would find their lives cut short within 72 hours without digitalis, a drug derived from the purple foxglove plant.” Indeed, according to studies reported by the National Wildlife Federation, forty percent of all prescriptions written today are for drugs derived either in whole or in part from natural compounds from various species. Future discoveries may

12. Id. §§ 7401-7671.
16. Id. §§ 9601-9661.
18. Id.
19. Id.
demonstrate that other species of plants and animals are equally beneficial. However, as a result of industrialization and extensive development which destroys the habitat of these species, many plants and animals are increasingly threatened with extinction.

In response, Congress enacted the ESA in 1973. The purpose of the ESA is to conserve ecosystems "upon which endangered species and threatened species [of fish, animals, and plants] depend" and to "halt and reverse the trend toward species extinction, whatever the cost." Thus, Congress placed the protection of species above the protection of individual property rights. In its effectuation of this purpose, two major sections of the Act impact private uses of land—Section 9 and Section 7.

Section 9 of the Act prohibits any individual or federal agency from "taking" wildlife listed as "endangered" or "threatened" by the Fish and Wildlife Service ("FWS") of the Department of the Interior. The definition of "taking" includes almost any act which adversely affects a species. Thus, any significant habitat modification of a listed species may constitute a taking under the ESA even without any intentional or actual physical contact with a plant or an animal if it results in actual injury to the listed species. Penalties for violation include forfeiture of fish, wildlife or plants, strict liability civil penalties of up to $500, civil penalties of no more than twenty-five dollars for intentional violations and misdemeanor criminal penalties of not more than one year in jail and/or a $50,000 fine for knowing violations. Furthermore, protection of property does not constitute a valid defense under a section 9 taking of a listed species. Thus, the Act holds a property owner liable for harming a listed species even when that species has damaged or is damaging his land. In effect, this section restricts and, in some cases, eliminates entirely the ability of a landowner to use his land as he sees fit if it would threaten any species designated by the government as threatened or endangered.

In addition, section 7 of the Act requires federal agencies to limit the likelihood that any action it authorizes, funds or carries out will jeopardize the

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21. Id. § 1531(b).
22. Id. (emphasis added).
27. Id.
continued existence of any listed species.\textsuperscript{30} This provision may curtail the use of private property in situations in which a landowner must obtain a land development permit from a particular agency to authorize the development.

As a result of these broadly worded provisions, the protection of endangered species and the use of private land frequently conflict. One commentator states: “With more than 800 domestic species listed as endangered or threatened under the ESA, and thousands more awaiting consideration, the specter has been raised by some that the ESA presents a ubiquitous threat to the institution of private property.”\textsuperscript{31} For example, in a small Utah town near St. George, implementation of ESA has curtailed private real estate development.\textsuperscript{32} After the FWS listed the desert tortoise as endangered, Utah’s Division of Wildlife Resources set aside 20,000 acres of land to preserve its habitat.\textsuperscript{33}

C. Emergence of the Grassroots “Property Rights” Movement in Response to Growing Environmental Laws

In the late 1980s these numerous land use restrictions imposed by environmental laws led to what one commentator describes as a “growing anger about what many people see as heavy-handed rules that are striking increasingly close to their daily lives.”\textsuperscript{34} A direct result of this antiregulatory sentiment was the emergence of a reactionary property rights movement which “at its core . . . is railing against land use laws, particularly those protecting wetlands and endangered species, which the movement claims rob property owners of the full use and value of their land.”\textsuperscript{35} Farmers and ranchers joined with small landowners, all of whom had been prohibited from developing their land because of some environmental law, to form “mom and pop organizations” advocating stronger property rights.\textsuperscript{36} Indeed, according to the Alliance for America, the movement’s umbrella group, nearly 600 local property rights groups have formed since the late 1980s.\textsuperscript{37}

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  \item 31. \textit{ESA and Private Property, supra} note 26, at 379.
  \item 33. \textit{Id.}
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Faithful to the truism that "political power grows from the grassroots," what began as a "100 percent grassroots activity" has grown into a "powerful force that is throwing its weight around in Washington, state capitals and the courts." With the financial support of "much wealthier and well-established agriculture and industrial trade associations, lobbyists for large energy, mining and timber companies and conservative public interest law firms," the property rights coalition has targeted both the courts and the legislature with the hopes of achieving greater protection for private landowners.

D. Issue

The issue that awaits resolution in this political drama is clearly articulated by one commentator as "a fundamental dilemma in American jurisprudence: How should the law accommodate the interests of property owners and the achievement of broader social objectives?" On one side are the property rights advocates who invoke the protection of the Fifth Amendment which prohibits the taking of private property for public use "without just compensation." They contend that prohibiting landowners from developing or extracting materials from their own privately owned land is tantamount to condemnation which entitles the deprived property owner to compensation from the government. Failure to provide this compensation, they assert, would be contrary to the purpose of the Fifth Amendment which is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." On the other side are the environmentalists who believe that the protection of the environment, and thus the public good, should trump the personal desires of the landowners. Furthermore, they "dismiss the compensation argument as a foil for irresponsible land use and warn that federal and state coffers would be bankrupted by compensation rules."

Two potential solutions exist to resolve this dilemma. The first is the currently existing solution in which the courts, on a case by case basis, grapple over the meaning of the Takings Clause and the appropriate policy to use when

40. Schneider, supra note 37, at A12.
41. Id.
42. Id.
44. U.S. CONST. amend. V.
45. Lavelle, supra note 32, at 1.
47. Kay, supra note 10, at 43.
balancing these competing interests. Under this approach, the affected property owner must bring a takings claim against the government and must prove that the regulation in question affects private land in a way that violates the Fifth Amendment, thus meriting an award of just compensation. An alternative solution is for Congress to enact a takings law under which legislators must bear the responsibility of ensuring that the public environmental interest does not unfairly trammel the rights of individual property owners.

II. ALTERNATIVE SOLUTIONS TO THE PROBLEM

A. Judicial—Constitutional Litigation System

To resolve this issue today, the normal procedure is for the affected property owner to bring suit against the federal government alleging a violation of his Fifth Amendment rights. The claim, in effect, is that by imposing regulatory restrictions on the land, the government has taken that property and thus owes just compensation to its owner. Pursuant to the Tucker Act, this action must first be brought in the United States Claims Court. In order to prevail, the affected landowner must first demonstrate that his claim is "ripe." In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, the Supreme Court described the two components of the ripeness doctrine. First, before a court is authorized to hear the claim, the plaintiff must have submitted a development proposal to the appropriate agency and learned the "final, definitive position" of that agency. This finality component requires a plaintiff to exhaust all administrative procedures available. The rationale supporting this requirement is that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Second, the deprived landowner must demonstrate that not only was the above

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49. Id. at 329.  
50. Id. at 328.  
51. Id. at 329.  
52. Id.  
53. 28 U.S.C. § 1491 (1988). Passed in 1887, the Tucker Act extended the jurisdiction of the Court of Claims to include claims founded upon the Constitution. Id.  
56. Id.  
57. Id. at 191.  
58. Id.  
determination final, but that it did not provide him with adequate compensation.\(^6\)

The rationale for this second component is that the Fifth Amendment does not prohibit governmental takings but merely takings that go uncompensated.\(^6\)

After overcoming these threshold ripeness requirements, the property owner can then proceed to address the substantive merits of the claim. The Supreme Court has yet to articulate one clear rule to apply in every takings claim. Rather, the determination of whether the government has violated the Fifth Amendment and unjustly taken property without providing compensation depends on the facts of each case.\(^6\)

For an ad hoc, regulatory taking determination, courts rely on numerous factors, weighing each differently as the facts of each case demand.\(^6\) In 1978, in the case of Penn Central Transportation Co. v. New York City, the Supreme Court attempted to iterate a set of broadly worded factors to provide guidance to lower courts for general takings cases.\(^6\) These factors included the economic impact of the government action, the extent to which the government action interferes with distinct investment-backed expectations and the character of the government action.\(^6\) Two years later in Agins v. City of Tiburon,\(^6\) the Court refined these factors when it established criteria specifically for takings determinations in land use control cases.\(^6\) In Agins, the Court held that an unconstitutional taking occurs if the regulation denies the property owner of all economically viable use of his property, or if it does not substantially advance a legitimate government interest.\(^6\) Until 1987 application of these factors generally led to the courts' denial of any compensation award.\(^6\)

However, recent Supreme Court regulatory takings jurisprudence reveals increasing sympathy toward private property owners.\(^7\) For example, in 1992, David Lucas, a South Carolina property owner brought his regulatory takings suit against the government before the Supreme Court in Lucas v. South Carolina Coastal Council.\(^7\) He argued that, by enacting the Beachfront Management Act\(^7\)

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60. Williamson County, 473 U.S. at 195.
61. Id. at 194 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 297 (1981)).
63. Penn Central, 438 U.S. at 124.
64. Id.
65. Id.
67. Id.
68. Id. (citing Penn Central, 438 U.S. at 104, and Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).
69. See infra text accompanying notes 93-97.
70. Martinez, supra note 43, at 337.
which prohibited the construction of single-family residences on his two beachfront lots, the state denied him the use of his land and thus owed him compensation. Ruling in Lucas' favor, the Supreme Court held that a regulation that denies "all economically productive or beneficial uses of land" is a per se taking that entitles the landowner to a payment of just compensation.

In 1994, the Court once again held in favor of the property owner in Dolan v. City of Tigard. Dolan was the owner of a plumbing supply store who applied for a permit to expand her store and pave its parking lot. The city conditioned its approval on her willingness to dedicate ten percent of her land for a bicycle path, green space and drainage area. The Court ruled that the city had taken Dolan's land without paying just compensation. The Court held that without the government's demonstration of a "rough proportionality" between the required dedication and the particular harm posed by the development, conditioning expansion or building upon a public easement was an unconstitutional taking.

B. Legislative Solution

As an alternative to the judicial remedy, Congress or individual states may enact takings laws to address directly the issue of whether a proposed regulation on privately owned land triggers the Fifth Amendment. The popularity of this alternative has grown since the emergence of the property rights movement and the states have taken the lead on embracing this type of legislation. As of June 1994 almost one hundred bills addressing regulatory takings had been introduced in close to forty states, and as of April 12, 1994, property rights legislation had actually been enacted in Arizona, Utah,

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73. Lucas, 112 S. Ct. at 2886.
74. Id. at 2901.
75. 114 S. Ct. 2309 (1994).
76. Id. at 2313.
77. Id. at 2314.
78. Id. at 2322.
79. Id. at 2319.
80. Martinez, supra note 43.
81. Id. at 329.
82. DEFENDERS OF PROPERTY RIGHTS, THE POCKET GUIDE TO YOUR PRIVATE PROPERTY RIGHTS (1994).
84. PROPERTY RIGHTS REPORTER, supra note 83, at 7 ("An act passed in 1993 required state agencies to analyze takings implications of proposed regulations. An act passed in 1994 requires local governments to do the same.").
Virginia, Indiana, Delaware, Washington and Mississippi. Congress is slowly following the states' example. In the 103rd Congress, twenty-two pieces of legislation addressing the protection of property rights stood pending before Congress. Although the Democratic majority successfully blocked the enactment of all these bills, the chances of some version of takings legislation passing in the 104th Congress increased after the Republicans took control in the November 1994 elections.

Essentially, there are two versions of takings legislation: the "compensation" version and the "assessment" version. Both shift the burden of ensuring the protection of private property rights from the individual to the regulatory agency.

1. **Compensation Approach**

In a typical compensation style of takings legislation, the legislature sets a statutory standard for compensating property owners. Basically a compensation law automatically entitles a private landowner to just compensation upon either the occurrence of a specified governmental action or the resulting diminution in property value by a certain statutorily set percentage. This automatic trigger completely eliminates any examination of the facts surrounding a particular claim. The sole consideration in compensation legislation is whether the fair market value of the property is diminished by the required percentage. If the answer to that question is in the affirmative, compensation is granted, and there will be no need to examine the public benefit of the regulation or its effect on the environment.

Furthermore, these adopted statutory standards expand the amount of protection currently provided to property owners pursuant to modern Fifth

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85. See id. (noting that "[t]his is a study bill that created a joint subcommittee to study if current [laws] are adequate.").
86. Id.
87. Lehman, supra note 35, at E1.
88. Id. at E24.
90. See Martinez, supra note 43, at 336; ESA and Private Property, supra note 26, at 413 n.234.
91. Martinez, supra note 43, at 337.
92. Id.
Amendment regulatory takings jurisprudence. The Supreme Court has never held that a diminution in the value of property alone constitutes a taking and indeed has expressly rejected that proposition. According to Senator Joseph Liebermann of Connecticut, "[a] 'taking' is a concept defined by the courts interpreting the Fifth Amendment. It has never been interpreted to include a diminution in property value." To support his statement, the Senator points to *Lucas* where "the Supreme Court concluded that a regulatory action might categorically be a taking only if the owner was denied all economically viable uses of the property." Examination of the key provisions in typical compensation bills illustrates the protection that the bills usually provide private landowners.

a. The Private Property Owners' Bill of Rights

At the heart of most compensation laws is the determination of when an affected landowner is entitled to a payment of just compensation by the government. One particular bill, H.R. 3875, introduced by Representative Tauzin of Louisiana, requires that the government pay compensation to property owners who, as a result of final agency action, are "deprived of 50% or more of the fair market value, or the economically viable use, of the affected portion of" his land. As in most compensation bills, the required payment is automatic. The nature of the regulated activity, its effect on the environment and the public benefit received by its regulation are irrelevant if a "qualified appraisal expert" determines that the value of the land has decreased by 50%.

93. Robert Meltz, *Property Rights Legislation in the 103rd Congress*, 1994 CRS REPORT FOR CONGRESS (July 22, 1994). The Fifth Amendment to the Constitution sets a minimum standard of property owner protection below which regulators cannot fall. However, "there is no constitutional objection to Congress providing compensation over and above the 5th Amendment standard." *ESA and Private Property*, supra note 26, at 413 n.234 (citing United States v. Fifty Acres of Land, 469 U.S. 24, 30 (1984)).


96. Id.


98. Id. § 8(a).

99. Id. *See also* H.R. 1388, Just Compensation Act (providing for compensation of an owner suffering "any diminution in value" of property); H.R. 3784 (compensation for owner who is "substantially deprived of . . . economically viable use"); H.R. 3978 Endangered Species Act ("taking" defined as 25% reduction in value of land).

100. H.R. 3875 § 8(a).
compensation, but the deprivation of the owner’s ability to earn a living as a result of the regulation may also trigger this right.  

Finally, it is important to note the bill’s reference to “the affected portion” of the land. Essentially, in appraising the value of the land, the relevant comparison is the fair market value of the affected portion of the land, not of the entire tract, prior and subsequent to imposition of the regulation. Thus, if the regulation affects only two percent of the land, but that small portion has diminished in value by fifty percent, Tauzin’s bill requires the government to compensate the owner. Focusing on the affected portion rather than the entire tract owned by the property owner will result in more frequent findings of takings.

b. Contract with America—Job Creation and Wage Enhancement Act

A more extreme example of the compensation approach appears in the Job Creation and Wage Enhancement Act, which is part of the recently proposed Contract with America. Pursuant to the private property provisions of that plan, property owners are entitled “to receive compensation (up to ten percent of fair market value) from the federal government for any reduction in the value of their property.” Thus, although the plan limits the requisite compensation to ten percent of the fair market value of the land, it triggers the requirement if the property owner experiences any reduction in value of his land as a result of government regulation.

2. Assessment Approach

A more flexible version of takings legislation, and the type passed in most states, is legislation that adopts the assessment approach. Pursuant to this model federal agencies, before implementing a proposed regulation or action, must analyze and assess the regulation’s potential impacts on private property owners to determine whether the regulation mandates compensation. In an assessment approach analysis, the agency considers the nature and purpose of the proposed regulation or action as well as the effects on both the environment and

101. See infra text accompanying notes 170-73.
102. Id.
103. Id.
104. H.R. 3875 § 8.
105. See GINGRICH, supra note 89.
106. Id. at 135.
107. Id.
108. Cf. PROPERTY RIGHTS REPORTER, supra note 83, at 1. The only compensation bill that has been passed is in Mississippi and was signed into law on April 8, 1994. Id.
private land. Thus, unlike the compensation approach which predetermines the need to compensate the affected landowner without examination of the particular facts, the assessment approach requires the agency to determine whether compensation would be required before implementing the regulation or conducting the action. As opposed to a compensation bill, an assessment bill does not propose to expand existing rights for property owners or environmentalists but rather attempts merely to maintain the status quo for both interests. Senator Burns characterizes assessment laws as "look before you leap" legislation, unobjectionable because they do not set new standards but rather reflect the present conditions.

Assessment bills generally codify Executive Order 12,630 signed by President Reagan in 1988. The Order calls for takings assessments of all governmental regulations that could affect a taking. The purpose of a taking assessment is to determine the risk of liability under the Fifth Amendment takings clause before an agency undertakes any new regulatory program. Until actually codified by Congress, the status of the Executive Order is precarious because it can be rescinded by President Clinton at any time. As a result, it is used infrequently causing it to have limited effect.

An example of an assessment bill is S. 2019, the takings amendment added by the Senate to the Safe Drinking Water Act on May 19, 1994. This assessment bill requires all federal agencies to "complete a private property taking impact analysis (["TIA"]) before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." Each TIA shall include the purpose of the agency action, the likelihood that a taking may occur and alternatives that would lessen adverse effects on private property. Thus, not only must the agency consider the regulation's impact on the environment and private property, but under the bill the agency must consider alternatives to most effectively balance the two conflicting interests. Presumably, the agency will choose to implement the regulation in a manner that least infringes on private property while

110. Id.
111. Id.
112. 140 CONG. REC. S5905 (daily ed. May 12, 1994) (statement of Senator Burns: "[this bill] just says, 'Government, look before you leap in the area of private property on any kind of a rule or regulation that is promulgated out of Washington.'")
114. Id.
115. Lavelle, supra note 32, at 1.
116. Camia, supra note 34, at 1063.
117. Id.
119. Id. § 19(e)(1)(B).
120. Id. § 19(e)(2).
simultaneously ensuring protection of the environmental interest targeted by the regulation.

C. Programmatic Adjustments

A third legislative option to remedy the takings issue involves statutory amendments to controversial acts that reflect a new balancing of the interests of private property owners and the general public. Thus, Congress can reexamine those acts which have given rise to numerous takings claims and can incorporate new provisions directly into the acts that reduce any overly harsh impact on private property. The most notable example of this type of adjustment is the "incidental take" provision of the ESA which exempts property owners from liability for performing certain acts on their land. Additional examples of concessions built into legislation to protect property owners are the ESA's provisions governing critical habitat designation and the protection of the property owner's land.

1. Incidental Take Provision

As explained earlier, section 7 of the ESA requires federal agencies to ensure that any actions affiliated with it do not violate the Act. This provision affects property owners who need federal authorization before they may develop their land. Compliance with this provision requires the federal agency to consult with the FWS before issuing the development permit to ensure that the landowner's proposed development is not likely to jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat. If the FWS concludes that the proposed activity is in complete compliance with the ESA except for an incidental taking of a species, it will suggest to the agency reasonable measures that will minimize the incidental danger. If the agency follows these measures, it may grant the permit to the landowner and the agency and landowner will still be protected from liability under the ESA.

In 1982, Congress added an incidental take provision to the ESA which applies to private landowners who do not need federal authorization for their activity. According to the provision, a taking may be excused if it is incidental

122. See infra text accompanying notes 127-30.
123. See supra text accompanying note 30.
to, and thus not the purpose of, a landowner’s lawful activity.129 The FWS will issue an incidental take permit after the landowner submits an acceptable “habitat conservation plan.”130 This plan must describe the impact of the taking, the steps the landowner will take to mitigate the taking, funding for these “minimizing” steps and explanations for alternative measures that were considered by the landowner and rejected.131

2. Critical Habitat Designation

Other examples of programmatic adjustments to the ESA are its provisions pertaining to the Secretary of the Interior’s designation of “critical habitat.”132 Although the Act authorizes the Secretary of the Interior to determine which species to list as threatened or endangered “solely on the basis of the best scientific and commercial data”133 and thus without considering any impact on property, designation of critical habitat should be based both on scientific data and an assessment of the “economic impact and any other relevant impact” on the landowner.134

3. Protection of Private Property

A final ESA provision which softens the Act’s impact on private property rights involves the ability of property owners to protect their property. Although protection of private property does not provide a defense to an ESA section 9 violation, the FWS does permit government agents to remove members of threatened species and experimental populations that have actually harmed private property.135

III. PROBLEMS WITH THESE SOLUTIONS

Although each of the previously discussed options provides an arguable solution to the takings dilemma, they each carry their own set of problems.

135. 50 C.F.R. § 17.40(b) (1993) (government agents may “humanely” remove grizzly bears that have damaged property); id. § 17.84(c)(5) (government agents may remove harmful red wolves.).
A. Judicial

The constitutional litigation remedy creates uncertainty for both landowners, who cannot reasonably predict the outcomes of their cases, and regulators, who do not receive adequate guidelines to assist them in determining whether or not a regulation effects a taking. Furthermore, this judicial solution is time consuming and exposes both regulators and landowners to considerable costs. 

1. Uncertainty

Before expending the considerable effort involved in litigating a regulatory takings suit, property owners must be able to realistically predict whether or not their claims will succeed. Despite the Supreme Court's articulation of the factors to be considered in deciding a landowner's claim for compensation, mechanical application of these criteria cannot accurately predict the outcomes of takings cases. Courts weigh each factor differently depending on the facts of each controversy. No one factor is dispositive as "courts on occasion adopt what seems the wrong test, use more than one test in a single opinion, mix elements from the various approaches, or dispense with prescribed formulations entirely and look to fundamental fairness." Indeed some commentators believe that the ideological beliefs of the judges regarding government interference with private property is essential to the courts' decisions to award or deny compensation. Thus, if the courts favor the environmental view with its emphasis on government regulation, they will deny compensation. Likewise, if the court espouses more of a laissez-faire view of the proper role of the government, it will award just compensation.

Although in the past, the judicial trend favoring municipalities and regulators provided some degree of predictability for the litigants, this trend has...
begun to shift.\textsuperscript{144} For the first sixty-five years after the Supreme Court affirmed the validity of the regulatory taking cause of action,\textsuperscript{145} property rights advocates met with little success in challenging the right of the government to restrict property use in order to protect the environment.\textsuperscript{146} However, in 1987 the Supreme Court decided three landmark takings cases demonstrating more sympathy toward the rights of private landowners.\textsuperscript{147} Thus, court responsiveness is no longer a reliable indication of whether an imposed regulation on private property demands the payment of just compensation to its owner.

In addition, uncertainty exists concerning the boundaries of recent Supreme Court decisions.\textsuperscript{148} Because holdings in takings decisions are extremely fact specific and judges are precluded from deciding issues that do not appear before them, the opinions in many takings cases often leave various open-ended questions unanswered.\textsuperscript{149} Examination of the holdings in \textit{Lucas}\textsuperscript{150} and \textit{Dolan}\textsuperscript{151} illustrate the inability of court decisions to provide clear guidelines regarding whether a land use regulation merits just compensation.

\textbf{a. Uncertainty Resulting from \textit{Lucas} v. South Carolina Coastal Commission}

In \textit{Lucas}, the Court held that the government must pay just compensation when a regulation deprives an owner of "all economically productive or beneficial uses of land."\textsuperscript{152} However, just how far the regulation may curtail land use before it meets the "all" standard is questionable because the Supreme Court did not make a finding of complete deprivation in that case.\textsuperscript{153} Rather, it accepted the lower court's finding that the regulation deprived the owner of "all economically viable use."\textsuperscript{154}

In the majority opinion, Justice Scalia stated that a ninety-five percent deprivation does not necessarily constitute "all," indicating that the standard is difficult to meet.\textsuperscript{155} In addition, the Court qualified its holding with a nuisance

\textsuperscript{144} \textit{See supra} text accompanying notes 70-79.
\textsuperscript{145} \textit{See} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").
\textsuperscript{146} \textit{See supra} text accompanying notes 51-69.
\textsuperscript{147} \textit{See} Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); \textit{Keystone}, 480 U.S. 470.
\textsuperscript{148} \textit{See}, e.g., \textit{Dolan}, 114 S. Ct. 2309; \textit{Lucas}, 112 S. Ct. 2886; \textit{Nollan}, 483 U.S. 825.
\textsuperscript{149} \textit{See supra} text accompanying notes 138-40.
\textsuperscript{150} 112 S. Ct. 2886.
\textsuperscript{151} 114 S. Ct. 2309.
\textsuperscript{152} \textit{Lucas}, 112 S. Ct. at 2901.
\textsuperscript{153} \textit{Id.} at 2896.
\textsuperscript{154} \textit{Id.} (emphasis added).
\textsuperscript{155} \textit{Id.} at 2895 n.8 ("It is true that in at least some cases the landowner with a 95% loss will get nothing, while the landowner with a total loss will recover in full."). \textit{But see High Court "Victory" for Property Rights Movement, Advocates Say}, Vol. XII, No. 3 ENVIRONMENTAL POLICY ALERT
exception suggesting that, in some instances, even a complete deprivation of all uses of land may not require payment of just compensation. The Court stated that, when the government can show that "the proscribed use interests were not part of [the plaintiff's] title to begin with," it need not pay that owner just compensation for regulating the use of the land. As a result of this nuisance exception, "Lucas left the door wide open for government regulations that diminish private property value substantially—as long as they are rooted in the principle of nuisance law." Thus, in order to meet his burden, a landowner must demonstrate not only that he was deprived of all use of his land but also that the proscribed use was not a "nuisance." Although, the Court narrowly defined a "nuisance" as only those activities which would have constituted a nuisance at common law, this definition is precarious in light of Justice White's retirement and Justice Kennedy's concurring opinion in which he objected to this interpretation of nuisance as being too narrow.

A final issue which Lucas addressed in dicta and which creates uncertainty for regulators and landowners is the question of parcel. Precisely what portion of the property must the courts or legislatures examine to determine whether the property owner has been deprived of all economically viable use of his land? Is it the entire tract of land owned by the individual or only the portion of the tract being regulated? One controversial issue is how to determine property as a whole when the extent of the plaintiff's ownership varies over time. Dicta in Lucas indicates that the Court might consider qualifying its current rule that parcels must be viewed as a whole.

(EPA, Washington D.C.) February 1, 1995, at 30. Property rights advocates hailed the Supreme Court's recent denial of certiorari in a Florida land takings case as proof that "compensation is warranted when the government through regulations 'takes less than the full value of the property'." Id. On the other hand, environmentalists called the Court's decision "bizarre" because "it is neither an agreement or a disagreement to [the] lower court ruling." Id. In this case, the Claims Court found that, when the U.S. Corps of Engineers denied a permit to mine land designated as wetlands area, it deprived the owner of all economically viable use, despite the fact that the government proffered various other economic uses for which the land could be used. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161 (1990), vacated on other grounds, 18 F.3d 1560 (1994), cert. denied, 115 S. Ct. 848 (1995).

156. Lucas, 112 S. Ct. at 2899.
157. Id.
158. Lavelle, supra note 32, at 5.
159. Cf. id.
161. Lavelle, supra note 32, at 5.
162. This doctrine is also referred to as the "parcel as a whole" rule or the "rule against segmentation." ESA and Private Property, supra note 26, at 385 n.94.
163. See supra text accompanying note 103.
164. The Supreme Court first endorsed the "parcel as a whole" doctrine in 1978. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). However, since then the Court has indicated its willingness to revisit the issue and perhaps accept segmentation of the property for the
b. *Uncertainty Resulting from Dolan v. City of Tigard* 165

The Court in *Dolan* addressed the question of the required degree of connection between a regulation and the projected impact of the proposed development. 166 The Court’s holding requires that the regulator demonstrate a “rough proportionality” between the dedication required by the owner and the impact of the proposed development in order to avoid the payment of just compensation. 167 Thus, the case was remanded in order to give the City of Tigard the opportunity to demonstrate, among other things, that the resulting reduction in traffic from the required dedication of land for a bicycle path reasonably relates to the expected increase in traffic from the proposed expansion of Dolan’s store. 168 In addition, the Court in *Dolan* shifted the burden of proof in takings cases from the property owner to the government. 169

Controversy surrounding *Dolan* focuses primarily on whether the Court’s holding applies only to permit conditions that compel the conveyance of possessory interests in land or whether it applies equally to exactions that do not effect per se takings and which do not involve physical invasions or the deprivation of all economically viable use of land. If *Dolan* only applies to possessory interests, its impact on environmental laws is greatly reduced.

Proponents of the limited reading of *Dolan* rely on a statement in the majority opinion that states “if the city had been content to prohibit Mrs. Dolan from building on the relevant portions of her parcel, without requiring a dedication to the city, that restriction would have been constitutional; it was the fact that ‘the city demanded more’ that created the constitutional defect.” 170 Narrow *Dolan* interpretations rely on the Court’s acceptance of certain traditional requirements of physical dedications: “[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.” 171 This interpretation asserts that *Dolan* only holds that “if a required dedication does not accord with common experience, a rationalization that makes a big jump in logic or otherwise seems glib may prove vulnerable to attack.” 172 Finally, during his Senate confirmation

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pursposes of determining whether a taking has occurred. *Lucas*, 112 S. Ct. at 2894 n.7.
165. 114 S. Ct. 2309.
166. *Id.*
167. *Id.* See also Washington Legal Foundation, *Dolan v. City of Tigard: Takings Clause No Longer a Poor Relation*, 9 LEGAL BACKGROUNDER, no. 24 (1994) [hereinafter LEGAL BACKGROUNDER].
169. *Id.* at 2319.
hearing, Justice Stephen Breyer indicated his adoption of this limited reading when he stated that "the ‘special’ part of the Dolan case was the ‘physical occupation of a piece of property.’"\(^{173}\)

Supporters for the application of Dolan to nonpossessory interests in land, as well as possessory interests, rely primarily on common sense. The premise supporting a broad reading is that, by analogy, "requiring property to be left in its natural state deprives the owner of the use of that property, regardless of whether the land is required to be dedicated to achieve that purpose or whether a conservation easement is demanded."\(^{174}\) Similarly, if Dolan only applies to possessory land interests, its holding would not affect requirements of development, mitigation or impact fees in which case "regulators could easily exploit the loophole to avoid unconstitutional takings by exacting sufficiently large impact fees to enable the governmental entity to condemn that portion or interest in the land it wanted to preserve in the first place, pay the landowner just compensation and perhaps have some money left over for its general coffers."\(^{175}\)

The most concrete support for a broad reading of Dolan happened four days after the Dolan decision when the Court vacated the judgment in Erlich v. Culver City.\(^{176}\) This Case involved the city’s attempt to impose fees in return for approving development projects.\(^{177}\) This regulation was neither a physical invasion nor a complete destruction of all economically viable use of land.\(^{178}\) In vacating the lower court’s decision, the Court suggested that Dolan is relevant to the determination of whether an imposition of fees effects a regulatory taking.

With regard to Dolan’s shifting of the burden from the property owner to the government or municipality to justify the regulation, uncertainty exists as to whether this shift refers to the burden of persuasion or merely to the burden of production. Moreover, the consequences of this shift may be irrelevant: "Once a constitutional challenge exceeds a certain threshold of seriousness, the outcome is affected less by which side ostensibly has what burden, than by the courts’ basic perceptions of fairness."\(^{179}\)

2. Expense

In addition to the uncertainty problems created by reliance on the courts for the resolution of takings claims, the high costs involved in litigating these suits is problematic. Expense presents an obstacle for both litigating parties. Governments that lose takings suits are exposed to considerable monetary liability

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173. LEGAL BACKGROUNDER, supra note 167, at 24.
175. Id.
177. Id.
178. Id. at 470.
in the form of just compensation. The court in Whitney Benefits v. United States awarded to the property owner as just compensation $60 million plus interest amounting to $180 million as of 1991. The loss in Bowles v. United States cost the government $55,000 plus interest, compounded annually from 1984 as just compensation for the denial of a permit to fill in wetlands. Requiring the government to pay these large just compensation awards discourages the passage and enforcement of land use regulations because the government lacks the funds to pay these costs.

From the perspective of the property owner, the considerable time and expense required to litigate a regulatory takings claim makes the system inaccessible for many potential plaintiffs. Litigation costs can range from $50,000 to $500,000. As a consequence of these high costs, "most individuals do not pursue such claims." During the Senate debate on the Safe Drinking Water Act, Senator Dole reflected on the injustice of the litigation system on private property owners by explaining: "The Government, backed by the seemingly limitless resources of the U.S. Justice Department, usually outlasts by outspending, while the poor citizen pays for the lawyers for both sides through fees and taxes."

3. Time

Compounded with the uncertainty and the high expenses facing property owners is the considerable amount of time landowners and the government must spend litigating the suit. Even before litigation is possible, the landowner must overcome the ripeness hurdles set forth in Williamson County. This process can take years. As a result, "[p]laintiffs whose rights must be protected quickly if they are to be protected at all may be fatally delayed by a doctrine designed to limit their access to federal court." The resulting delay in bringing the suit may cause the property owner to suffer additional damages. The government imposing the regulation subsequently faces even more liability.

180. See Stein, supra note 54, at 4.
182. No. 303-88L (Cl. Ct. filed Mar. 24, 1994).
183. See Martinez, supra note 43, at 342 (noting that, "The chilling effect of having a taking award deducted from an agency's budget might prove a particularly formidable disincentive to even the most dedicated public administrator.").
185. Id.
187. See supra text accompanying notes 54-61.
188. Stein, supra note 54, at 5.
189. Id.
190. See id.
In summary, the constitutional litigation system is inadequate in the context of Fifth Amendment Takings Law. One commentator summarizes the problem by stating:

Any synthesis of the Court's takings procedures, takings law and takings remedies leaves litigants with an unusually high level of risk and uncertainty during the years of disagreement and can lead to the financial devastation of one or both parties. Landowners and Regulators must make a variety of critical decisions early in the regulatory process without knowing the legal consequences of those decisions and without knowing how many years it will be before they will learn those legal consequences.191

B. Legislation

Current legislation is also fraught with problems. In general, the passage of any takings statute has the potential to undermine important health, safety and environmental laws. More specifically, the compensation and the assessment approaches each have their own disadvantages.

Especially disturbing is the potential application of takings legislation to every action undertaken by the federal government.192 Such a broad sweep threatens to undermine many of the basic protections that guard American citizens.193 If the government faces potential liability for every action that impacts private land, it will be less inclined to take that action unless it has the money to pay for it. The result is the weakening of civil rights and disability laws, OSHA worker safety requirements and health care reform and even basic zoning requirements—all under the premise of protecting property rights which will instead deprive the public of the protection of its rights to health and safety.194 Succinctly put, "if giant redwoods were cut, if animal or plant species ceased to exist, or if water and air quality substantially deteriorated, each of us would be poorer."195

191. Id. at 4.
193. This threat raises the additional issue of whether takings legislation potentially violates the government's system of checks and balances. Essentially, takings statutes give enforcement agencies the authority to act in both a legislative capacity (by determining whether or not to repeal a regulatory statute) and a judicial capacity (by interpreting Fifth Amendment constitutional law). See Martinez, supra note 43, at 339.
194. See NATIONAL WILDLIFE FEDERATION, HOW FAR WILL "TAKINGS" BILLS GO? (1994).
1. Disadvantages of the Compensation Approach

Although compensation legislation reduces uncertainty, it does not completely eliminate it. By establishing a set point that triggers the government’s duty to pay just compensation, this legislation seems to eliminate the uncertainty that results from litigation. However, in reality, this compensation provision merely shifts the focus of litigation. Whereas in traditional constitutional litigation the issue is whether the government must pay compensation at all, pursuant to a compensation model, the issue becomes whether the value of the property is diminished by the statutorily set percentage. Thus, although compensation laws will reduce the number of regulatory takings claims per se, litigation will increase for determining the diminution in value of the land.

And, as in the case of traditional regulatory takings claims, parties will need to speculate as to the outcome of these “50% or more diminution in value” claims, especially in light of the likely conflicting opinions of many expert appraisers. Furthermore, compensation laws unfairly weigh the interests of property owners more heavily than those of the general public. Most problematic about the “compensation” version of legislation is its failure to consider the environmental perspective. By replacing the traditional criteria for evaluating a landowner’s claim for compensation with the sole consideration of whether the value of the property is sufficiently diminished, compensation laws unfairly weigh the rights of property owners more heavily than the need to protect the environment.

2. Disadvantages of the Assessment Approach

Similar to the judicial remedy, passage of an assessment law presents the potential for increased costs. Opponents of assessment bills claim that they will cause a “fiscal and bureaucratic nightmare.” The argument is that these “budget busters” will require taxpayer dollars to create new bureaucracy and red tape in order to conduct essentially “meaningless” takings analyses. According

196. Lavelle, supra note 32, at 1.
197. See id.
198. Id.
199. See id. (stating that compensation bills “could result in a flood of claims against the government [because] ‘you can always find an appraiser who will say your land would have been worth so much.’”').
200. Id.
201. See supra text accompanying notes 89-107.
203. See BUDGET BUSTER, supra note 17.
to Senator Leahy, "these [TIAs] might be intellectually stimulating, if they were not so expensive... A conservative estimate puts [the cost to the government and taxpayers of conducting TIAs under this bill] at over $150 million a year."  

IV. REMEDY

Clearly none of these proposed solutions is perfect. There are benefits and drawbacks to each one. The challenge is to pick the solution that represents a fair and realistic balancing and acknowledgement of both the value of property rights and the need to preserve our fragile environment. A carefully tailored legislative assessment approach that targets specific agency actions best fulfills this objective. In addition, Congress should continue to revise its environmental statutes to ensure adequate balancing between these competing interests.

In order to avoid completely the risk that such a statute will be used as a tool to destroy public interest laws, Congress must carefully tailor its assessment bill to apply only to specific agencies. For example, if Congress means to require a TIA for implementation of the ESA, it should do so clearly by making the bill applicable to "the Fish and Wildlife Service of the Department of the Interior as it implements [the] ESA." Finally, it is important to remember that, to the extent that any of these public interest laws do constitute takings of private property, the Constitution already requires the payment of just compensation.

Although these bills do not provide property owners with any additional protection, they will help agency personnel better understand the result of their actions from both the fiscal and property rights standpoints. Thus, although the assessment bill will initially increase agency expenditures, in the long run it should reduce overall costs. Requiring governments to conduct, at a minimum, a takings assessment analysis will enable regulations effecting takings to be identified and modified before going into effect. This informed decisionmaking will reduce the extent of inadvertent regulatory takings, actually saving government agencies and municipalities money currently spent defending lawsuits and paying uncontemplated compensation awards.

Many opponents to "takings" legislation (both "compensation" and "assessment" bills) fear that due to the high cost of implementing these schemes,
American will no longer be able to afford to protect its natural resources. However, unless another means of resolving the issue is discovered, “takings” legislation must be passed or America will no longer have any legislation to protect natural resources. Because the grassroots property rights movement is growing so strong, it poses the risk of eliminating environmental protection statutes unless these statutes can accommodate their legitimate concerns. The ongoing controversy over “takings” and over whether or not to pass an “assessment” bill effectively blocked the passage of much needed environmental legislation during the 103d Congressional session. According to one commentator, much of this legislation was “stymied by a burgeoning private property rights movement” and “congressional support for adding cost-benefit analysis requirements to environmental statutes.” Of the numerous environmental laws in much need of revision, the only major piece of legislation that passed in the 103d Congress was the California Desert Protection Act. A specific example of how the tension between the two groups created “legislative paralysis” is the withdrawal of the National Biological Survey bill after advocates of stronger property rights introduced an amendment restricting government access to private property and forbidding authorities from using volunteers to complete the survey. This amendment would have made the project too difficult and costly to run.

In fact, passing an “assessment” type of “takings” bill may actually increase environmental protection. Landowners with vested interests in their land have great incentives to protect it in order to maintain its value. However, if protecting this land will actually reduce its value as a result of ESA and property values will plummet if, for example, a listed species is found on the land, this incentive will become a disincentive. In the words of one landowner, “I am convinced that most people like wildlife, and they would go out of their way to attract wildlife to their land, if they weren’t likely to lose the use of their land if they did this.” Takings assessment bills assure landowners who wish to attract

209. See Kay, supra note 10, at 43; Camia, supra note 34, at 1062.
212. Kay, supra note 10, at 43.
213. Id.
214. Reauthorization of the Endangered Species Act: Hearings Before the Subcomm. on Clean Water, Fisheries & Wildlife of the Senate Comm. on Environment and Public Works, 103d Cong., 2d Sess. 9 (1994) [hereinafter ESA Hearings] (testimony of Mary Davidson, property owner in Austin, Texas). “Many owners say privately, they don’t want to make a home for protected red-cockaded woodpeckers and the accompanying infringement of property rights. They’re cutting trees before they’re old enough to be woodpecker habitat.” Id. at 2 (statement of Sen. Craig).
wildlife on their own that their actions will not cause them to suffer an unconstitutional taking.\textsuperscript{215}

Finally, skeptics suggest that the true purpose for promulgating takings legislation is "to get a carte blanche for unrestrained activities by large corporate landowners and agribusinesses."\textsuperscript{216} They worry that the effect of the legislation will be a massive unleashing of big business. Concededly, requiring a TIA reduces inadvertent takings of property belonging to big businesses and thus may in some instances facilitate development. However, this legislation will protect small landowners with valid Fifth Amendment claims even more. Unlike big businesses that possess the resources to litigate their claims, many small landowners with valid Fifth Amendment claims lack sufficient funding to obtain relief. For example, Mary Davidson and her husband worked hard for nine years to save enough money to build a home on 1.45 acres of undeveloped land in Texas.\textsuperscript{217} However, because the FWS believed the land is a "suitable habitat area" for the golden-cheeked warbler, a type of bird protected by the ESA, it required the Davidsons to set aside land for a bird habitat before it would issue a building permit.\textsuperscript{218} The potential costs of complying with the requirements were "astronomical."\textsuperscript{219} Indeed, the Texas Fish and Wildlife Service agreed: "The procedure outlined by Congress in the 10(A) permit are not procedures the small landowner can go through."\textsuperscript{220}

Similarly, due to designation of his land as wetlands, Robert Spiller of Louisiana could not obtain the required permit to raise crawfish and harvest cypress trees on his 160 acres.\textsuperscript{221} His resulting loss in crawfish sales is estimated at $24,000.\textsuperscript{222} Takings legislation promises to help small landowners like Mary Davidson and Robert Spiller more than big businesses.

In addition to a separate assessment statute, modifications to existing laws will help to ensure an adequate balance between the environment and private property. For example, proposals for the reauthorization of the ESA include incentives to encourage property owners to voluntarily conserve habitats.\textsuperscript{223} A recent amendment proposed by Senators Baucus and Chaffee provides Federal grants to private landowners for taking steps beyond those required by the ESA to conserve species’ habitats.\textsuperscript{224} Other promising nonconfiscatory alternatives

\textsuperscript{215} See id.
\textsuperscript{216} Kay, supra note 10, at 43.
\textsuperscript{217} ESA Hearings, supra note 214 (testimony of Mary Davidson, property owner from Austin, Texas).
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id. (quoting Joe Johnson of the FWS).
\textsuperscript{221} Camia, supra note 34, at 1061.
\textsuperscript{222} Id.
\textsuperscript{223} See S. 1521, 103d Cong., 1st Sess. § 6 (1993) (authorizing federal grants to private persons to assist them in preserving habitat).
\textsuperscript{224} S. 921, 103d Cong., 1st Sess. § 9(a) (1993).
include developing tax incentives for property owners to preserve critical habitat and creating transferable development rights to enable private entities to trade, buy and sell the right to destroy habitat in exchange for protection or improvement of habitat elsewhere. Furthermore, Congress might adjust controversial environmental laws by exploring the possibility of pursuing voluntary agreements between government and private landowners. For example, California has successfully used voluntary agreements between the Department of Fish and Game and landowners to protect sage-scrub habitat.

V. CONCLUSION

The United States is founded on the premise that private property rights are extremely valuable and among the fundamental rights of man. In the words of James Madison, "in its larger and juster meaning, [property] embraces everything to which a man may attach a value and have a right." The Fifth Amendment embraces this concept by protecting the rights of American citizens to receive just compensation should the government deprive them of their property. However, as with all other fundamental rights, such as freedom of speech, there are limits to this protection. Just as it is inappropriate to scream "Fire!" falsely in a crowded theater, it is inappropriate to destroy significant environmental resources when developing land. Indeed, "one of the hallmarks of our system of government is that all rights are balanced and none are absolute. Even the freedom to speak, which is the cornerstone of democracy, has its limits." The environmental arena is one that demands balancing. The need to protect the health and welfare of American citizens through protection of the environment is equally as important as the value of private property.

Senator Baucus, former chairman of the Committee on Environment and Public Works, seems to understand the importance of abandoning the attitude that one is either pro-environment or pro-private property. In urging the Senate to continue working together to promote both the environment and to reduce burdensome regulations, he stated, "We do not have to pit the environment against the economy. Rather, if we work together, listen to legitimate arguments on both sides and take creative approaches ... we can write environmental laws that protect the environment and promote economic growth."

226. Id.
228. Id. at S5930 (statement of Sen. Hatch).
229. See ESA Hearings, supra note 214 (statement of Sen. Craig analogizing restrictions on Fifth Amendment rights to restrictions on freedom of speech).
231. Id. at S5926 (statement of Sen. Baucus).
Requiring agencies to assess and evaluate the impact of environmental regulations on private property is a step in this direction. It is true that passage of an assessment takings bill may involve initial expense to the implementing agencies which may need to hire more lawyers and accountants to determine the extent of expected liability. However, this expense will be offset in the long run by decreased liability penalties, especially if the current trend favoring property owners continues and regulators are subjected to high compensation awards such as that awarded in Whitney Benefits. In addition, “up front” TIAs will help reduce the expense to property owners who “too often are presented with a bureaucratic fait accompli” and are forced to vindicate their rights through costly and time consuming lawsuits. Furthermore, after a thorough TIA has been conducted, both property owners and regulators can rest more certain that an unconstitutional taking has not occurred.

232. See supra text accompanying note 147.
233. See supra text accompanying notes 179-82.