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Taming The Takings Clause of the Fifth Amendment

by Tyme

INTRODUCTION

> *. . . nor shall private property be taken for public use, without just compensation.*
>
> U.S. Constitution, Amendment V [1791]

One clause. Twelve simple words. Four distinct parts: "private property", "taken", "public use", "just compensation". Not even its own amendment. A mere exhalation of the living, breathing Constitution of the United States.

Who is to say what each component part means? Benjamin Franklin wrote, *"Private property is a creature of society and is subject to the calls of that society."*[1] Since 1803, the U.S. Supreme Court has declared that it has the right to interpret these component parts for society. Using Marbury v. Madison (1803)[2], the U.S. Supreme Court established the courts' right of judicial review. Since 1991, 18 states have imposed legislative restraints upon the notion of eminent domain. Today, the House of Representatives seeks to lord over the Fifth Amendment through the Private Property Protection Act of 1995 (H.R. 925), while the Senate develops a tighter choke-hold with the proposed Omnibus Property Rights Act of 1995 (S-605). Why such eagerness to tame the savage beast of the *takings* clause? Who should be its master? Is the *takings* clause really a beast or simply a lion with a thorn in its paw? Or, does the thorn even exist?

HISTORICAL BACKGROUND

More than 200 years ago, in order to form a more perfect union, a delegation of state representatives drafted a document to help maintain an orderly and democratic society. Through the Constitution of the United States, the delegation established three branches of government: the Executive, Legislature, and Judiciary. While the *takings* issue involves all three branches, the debate focuses

on the role of the Legislature verses that of the Judiciary. Article I, Section 1, of the Constitution empowers “a Congress” with “legislative Powers”, and Section 2 of Article III extends judicial power to “all Cases, in Law and Equity, arising under this Constitution.”[3] The Separation of Powers Doctrine dictates that the Legislature may not settle legal disputes, and the Judiciary may not create legislation. However, the system was devised with checks and balances so that adjustments can be made.

In 1803, the Court gave itself the power to review acts of government to determine their compatibility with the Constitution. (Ironically, this self-empowerment is offensive to the Separation of Powers Doctrine.) While this judicial power was not explicitly provided by the Constitution, it has been widely accepted. Throughout its nearly 200-year history, this power of judicial review has been used often to check the Congress when it tried to assume too much power, or violated the Constitution. As keeper of the Constitution, the Judiciary is duty bound to ensure that the provisions of the Constitution are met and maintained. To accomplish this goal, the Court often must interpret vague or ambiguous language within the Constitution. In a number of instances, the Framers loosely constructed provisions so that the Constitution would remain a flexible document. In these instances, the Framers intended the Legislature to ‘flesh out’ the provisions through the creation of statutes, or to allow common law to govern. For those provisions that the Legislature has left alone, it has intended the Judiciary to interpret. If the Legislature is unhappy with the judicial review emanating from the federal courts, it may choose to alter the structure of the Court by modifying its size or appellate jurisdiction, for example. (*See* Franklin D. Roosevelt’s notorious attempt to ‘pack’ the Court.) While the Legislature rarely considers such a modification, it does often create laws in order to provide its own interpretation of the Constitution. And, if the laws do not violate the Constitution (a determination the Court makes most often through legal precedent), the Court must defer to the judgment of the Congress and, consequently, uphold the law. Herein lies the present-day controversy about who will tame the ‘beast’ of the Takings Clause of the Fifth Amendment.

THE SUPREME COURT AS GUARDIAN OF THE TAKINGS CLAUSE

For nearly two decades, the court alone has been balancing the rights of private individuals with the public trust through its interpretation of the Takings Clause of the Fifth Amendment. Throughout history, the courts have decided *takings* cases

on an individual basis, weighing the action's (or regulation's) impact on private property against the public need for the action or regulation. A state government may infringe upon the private rights of an individual for the benefit of the public trust by using its constitutionally authorized police powers, as Justice Scalia observed in Lucas:

> *The property owner necessarily expects the use 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.*[4]

The police powers enable the state to regulate for the health, safety, morals, and general welfare of its citizens, and they are a necessary function of government.

In the many cases decided, both 'liberal' and 'conservative' courts have found for the landowner as well as for the government agency. With each case heard, the court (in particular here, the Supreme Court) addresses a new aspect of the legal issue, establishing a principle or test for that issue. In the case of the Takings Clause, the Supreme Court has established a number of key principles: 1) no absolute right of use; 2) legitimate public interest or *balancing test*; 3) reasonable return/use or *economic impact test*; 4) consider the parcel as a whole; 5) no speculative plans; 6) temporary *takings*; 7) use of exactions; 8) what constitutes just compensation; 9) nuisance. The following section provides a thumbnail sketch of the judicial history of *takings* cases, discussing a few particular cases which have shaped the current analysis of *takings* issues.

Condemnation of Physical Property for Public Use

Historically, an assumption of 'the right to hold property' has been a duty to refrain from using it in a manner that would cause harm or injury to neighboring landowners or the general public. Based on this assumption, absolute use has never been considered a protected property right among the 'bundle of sticks'. However, the courts have not hesitated to award compensation to landowners whose physical land (especially undeveloped land) has been taken for public use, such as a road or highway. The U.S. Supreme Court first endorsed the Takings Clause in Barron v. Baltimore[5] in 1833, but more directly addressed the issue in Chicago, Burlington, and Quincy Railroad Company v. Chicago (1897) where the court held that *"without such compensation the appropriation of private property to public uses, no matter under what form of procedure is taken, would violate the provisions of the Federal Constitution."*[6] With this ruling, the right of government

to take private property for legitimate public use was established. Furthermore, in Loretta v. Teleprompter Manhattan CATV Corp.[7] (1982), the Court established that any degree of physical condemnation of property, imposed even by something as small as a cable box, constituted a taking for which compensation must be made.

Regulatory Taking (Without Physical Invasion)

Balancing Test

As early as 1833, the U.S. Supreme Court heard a case that dealt with an intangible private property *taking* (*see* Barron v. Baltimore[8]). Although the Court focused on whether the Fifth Amendment applied to states, the issue raised the property owner's concern for loss of income as a result of a government's action. In 1915, the Supreme Court used a *balancing test* to weigh the legitimate public interest against the impact to the property owner, or, as it is often referred, "balancing of public benefit against private loss."[9] The courts have consistently held that where the public interest outweighs the private property impact, a regulatory taking has **not** occurred. Because no concrete rule or formula exists to determine when a regulatory taking has occurred, the courts must decide the issue on a case-by-case basis depending on the facts of each situation. Most courts in recent years have assessed the economic impact of land-use regulation by determining whether the owner is left with a "reasonable economic use" of the property. Simply denying the "highest and best use" of a property does not give rise to a taking.[10] To determine impact to the property, the court will consider also whether the property owner knew in advance of the regulation; whether the loss claimed by the property owner was a speculative value of future development; whether the owner can make a reasonable return on the property given the regulation or action; and "investment-back expectations".

In Hadacheck, the Court declared that the concern for public health (as a result of pollutants emitted by a brick manufacturer) justified the regulation; and, moreover, the property owner could use the property for another purpose. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision"). Generally, the Court has determined that government regulation that incidentally infringes on the owner's use of property is not a taking, nor is regulation that outlaws noxious or dangerous use of property. When the state of Pennsylvania tried to forbid coal

mining that caused streets and buildings to subside, the Supreme Court invalidated the legislation. In this case, Pennsylvania Coal Company v. Mahon (1922), Justice Oliver Wendall Holmes states: *"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."*[11] Likewise, in United States v. Causby[12] (1946), the Supreme Court determined that a government action went too far. In Causby, however, the Court found that low-flying military aircraft were such a nuisance to the owners and their livestock (poultry) so as to constitute a *taking*. Justice Douglas delivered the opinion of the Court, an excerpt of which follows.

> *The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. . . . For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.*[13]

Compare the above cases with Keystone Bituminous Coal Association v. DeBenedictis[14] (1987) in which the Supreme Court determined that a mining safety act did not constitute a *taking*. The law at play in Keystone required coal mining companies to leave 50% of the coal beneath public buildings, homes, and cemeteries to provide surface support, thereby reducing the chance of subsidence. The Court rejected this *takings* claim because the mining regulation did not deny the operators all "economically viable use" of their land. For a case so similar to Pennsylvania Coal, the Court's decision is quite different. Consider also Lucas v. South Carolina Coastal Council in which the Court held that there is categorically a *taking* "where regulation denies all economically beneficial or productive use of land,"[15] no matter how significant the legitimate public interest.

[Frankly, given the precedent set by the Causby opinion, it is difficult to believe that any subsequent property rights case was decided in favor of the government, particularly Penn Central Transportation Company v. New York (discussed later). This opinion seems to drastically violate the *balancing test*, particularly as quoted in Hadacheck (see opinion excerpt above) as well as the *economic impact test*, since the Court recognizes only a "**diminution** in value of the property," not a complete loss of value. Not only is the unencumbered use of airspace a viable public interest, but the property could have been used for another purpose (*see*

Hadacheck). In the 200+ documents that I consulted, only one mentioned this case – it seems to be a bit of a *stare decisis* anomaly. However, it seems that the case has considerable implications, in particular, that a mere 'loss of enjoyment' can invoke the Fifth Amendment.]

The Supreme Court heard several zoning cases which generated a range of judicial responses: denial on the basis on *ripeness* (in particular, *see* Agins v. City of Tiburon, 447 U.S. 255 (1980) and Lucas v. South Carolina Coastal Council, 505 U.S. (1992), Justice Blackmun's dissent); rejection as a *political question*; finding of a *taking*; and no finding of a *taking*. In general, the courts have deferred to the judgment of elected officials (i.e. zoning commissions). However, in cases decided in favor of the landowner, economic impact is the key test applied. As examples of zoning cases, *see* Village of Euclid v. Ambler[16] (1926) and Nectow v. Cambridge[17] (1928).

Evaluating the Property as a Whole

In 1978, in Penn Central Transportation Company v. New York City[18], the U.S. Supreme Court reaffirmed the *takings* analysis that a government condemnation must deny all reasonable use of a property for a taking to occur. In deciding the case, the Court considered such relevant factors as the economic impact of the regulation on claimant and, particularly, the extent to which the regulation "interfer[ed] with distinct investment-backed expectations," and the character of the government action.[19] Perhaps more importantly to the *takings* issue history, the Court established a principle of considering the interference in relation to the parcel as a whole: *"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . ."*[20] The Court in Keystone also focused on the issue of evaluating the parcel as a whole, upholding the principle set down in Penn Central. *See also* Concrete Pipe and Products v. Construction Laborers Pension Trust, 113 S.Ct. 2264 (1993). However, in a 1995 case, The Saga of Loveladies Harbor, Inc. v. United States[21], United States Court of Federal Claims considered the affected portion only, awarding the landowner an Amended Judgment in the amount of $7,340,000, plus attorneys' fees. In this case, the Court determined that only the 12.5 acres of wetlands for which a development permit was sought should be considered, not the lands developed prior to the Clean Water Act. (The United States did not appeal the case to the U.S. Supreme Court.)

Temporary Taking

Feeling somewhat defeated by Penn Central, industry and real estate development advocates employed a new strategy for minimizing government regulating. Property rights proponents argued that invalidating an offending regulation is not enough compensation for a *taking*; monetary damages for the full value of the property must be paid. The Supreme Court rejected this extreme position, but did establish a situation in which a temporary *taking* may occur. In First English Evangelical Lutheran Church v. County of Los Angeles[22], the plaintiff argued that interim floodplain development restrictions amounted to a *taking* for which payment was due. Although not deciding whether a *taking* had occurred, the Supreme Court did reject the notion that the sole remedy for a *taking* is payment of the full value of the affected property, and held that

> *[W]here government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.*[23]

Furthermore, the Court stressed that "temporary takings" was not intended to refer to "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[24]

Use of Exactions

The Court heard several cases dealing with development conditions or "exactions", particularly noteworthy: Nollan v. California Coastal Commission[25] (1987) and Dolan v. City of Tigard[26] (1994). Although the cases did not share the same outcome, there was a commonality in the principles that the Court established. The Court declared that exactions such as public beach accesses, bike paths, pedestrian walkways, and floodplain zones will be upheld, but that there must be a "nexus" between the exaction and the impact of the property use. For example, in Nollan, the Court pointed out that there was no relationship between the conditional public access **along** the beach and access **to** the beach (the activity that the development otherwise denied). Likewise, in Dolan, the city imposed a development condition upon the permit seeker. The Court agreed that the additional development of the property necessitated a floodplain zone, but the city could not prove that the floodplain corridor needed to be accessible to the public or that the conditional

bike path and pedestrian trail would mitigate the problem of additional traffic to the area.

Nuisance Exception

The case of Lucas v. South Carolina Coastal Council[27] (1992) invoked yet another principle of *takings* litigation, that of the "nuisance exception". Previous *takings* cases applied the maxim that where a property use is recognized as a nuisance, that use may be forbidden without the necessity of just compensation, regardless of the economic loss. However, the Court in Lucas, while not dismantling the nuisance exception, narrowed it. The Court held that in the "relatively rare" instances where a regulation goes so far as to deny **all** economic use of the property, a taking will be considered to have occurred, unless the prohibited use is "barred by existing rules or understandings" derived from background principles of property law or nuisance.

Perhaps more engaging than the Lucas opinion is Justice Blackmun's dissent. In the dissent, he contends that Lucas should not have been heard by the Court, because the case was not *ripe* – Lucas had not actually been denied a development permit. Furthermore, he questions whether the interest affected is actually part of the 'bundle of sticks' or represents a future interest.

THE LEGISLATIVE PROPOSALS

A movement has been underway to 'reform' the application of the Takings Clause of the Fifth Amendment. Some believe that the property rights bills will stop government overregulation, while others believe that the *takings* legislation is merely an attempt to undermine the most fundamental environmental legislation, such as the Clean Water Act (wetlands) and the Endangered Species Act. Every state but Connecticut has considered *takings* legislation, and at present, 18 states have passed *takings* legislation of either (or combination) of the two basic types: compensation or assessment. Compensation bills require taxpayer funded payments to those claiming that their property use has been restricted by government action or regulation. Assessment bills generally require local governments to conduct complex and expensive studies to predetermine how their programs might affect property owners.

Backed by a strong lobby of real estate developers, builders, timber and coal mining companies, both the House of Representatives and the Senate have

developed property rights bills. In fact, the House of Representatives has passed its bill, the Private Property Protection Act of 1995 (H.R. 925). While the congress' efforts may be well-supported by some powerful lobby groups, the bills are opposed by groups such as environmental organizations, the American Planning Association, the National League of Cities, the National Governors Association, the National Conference of State Legislatures, more than 30 state attorneys general, the U.S. Conference of Mayors, the Western State Land Commissioners Association, and President Bill Clinton.[28]

Congress contends that it must provide the court, through statutory language, a clear and concise guide for determining when a taking has occurred, in order to avoid property rights abuses, as an excerpt from S-605 indicates:

> *[T]he incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights . . . has been ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy.*[29]

Of particular concern to Congress are those *takings* that occur as a result of the Clean Water Act (wetlands provisions), and the Endangered Species Act. In general, the Court has maintained that *takings* cases are best decided on a case-by-case basis, relying on the *stare decisis* principles already at hand; although the Supreme Court does recognize the challenge.

> *The question of what constitutes a 'taking' for the purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. . . . [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.*
>
> Justice Brennan; opinion of the Court, Penn Central[30]

No matter what side of the moral fence Americans find themselves, one thing is certain: property rights legislation will cost taxpayers billions of dollars. The Office of Management and Budget estimates that H.R. 925 would cost taxpayers $28 billion over seven years, and the broader S-605 would cost billions more.

Most of the money would pay for a huge, new bureaucracy to assess all regulatory impacts.[31]

Private Property Protection Act of 1995 (H.R. 925)

On March 3, 1995, the House of Representatives passed the Private Property Protection Act of 1995 (bill H.R. 925) as an inclusion to the Contract With America. The bill, introduced by Representative Canady of Florida on February 14, 1995, contained sections addressing the following issues: right to compensation; effects of state law; exceptions; procedure; definitions. Throughout the bill's history, 11 amendments were proposed. [Note: Wording from the act as **passed** appears in boldface type.]

Federal Policy and Direction

This section was not contained in the original bill. However, the bill's author, Representative Canady, introduced it with amendment HA 247, very much as it appears in final form.

> ***(a) General Policy. It is the policy of the Federal Government that no law or agency action should limit the use of privately owned property so as to diminish its value.***
> ***(b) Application to Federal Agency Action. Each Federal agency, officer, and employee should exercise Federal authority to ensure that agency action will not limit the use of privately owned property so as to diminish its value.***[32]

Later that day, Representative Porter introduced an amendment (HA 249) that would require agencies to consider property impacts but as an exemption to the compensation requirement. Porter's bill proposed that compensation need not be paid if the agency prepared a "private property impact assessment" for the agency action or regulation before taking the action. This assessment would discuss the impact of the action, alternatives to the 'intrusive' regulation, whether the action constituted a *taking* under the Fifth Amendment (a remedy that the property owner could still seek), etc. The legislative record further reports that *"the amendment, in effect, would write into law Executive Order #12630 except that, under the*

amendment, the agency analyses would be made available to the public."[33] Needless to say, the amendment was rejected.

Right to Compensation

Most proposed amendments pertained to the amount (percentage) of property value diminution and the resulting compensation. The bill was first introduced with the compensation aim as follows:

> *The Federal Government shall compensate an owner of property whose use of that property has been limited by an agency action, pursuant to a specified regulatory law, that diminishes the fair market value of that property by 33 1/3 percent or more, for that diminution in value.*[34]

The first amendment (HA 247) proposed compensation where there was at least a 10% property value loss to the "affected portion" of the property as opposed to the whole property. As proposed, the second amendment (HA 248) further required the Federal government to purchase that affected portion of property "if the loss in value exceeds 50% and the owner so requests."[35] Representative Goss' failed amendment (HA 251) proposed to raise the minimum threshold for compensation from 10% to 30% loss in property value amendment. That day, a fellow representative (Mineta) offered a compromise, proposing an increase from 10% to 20% instead. This amendment too was defeated. However, the next day, Representative Goss offered the same compromise (HA 254) of 10% to 20% increase in compensation threshold, and the amendment was passed.[36] Apparently, Goss rallied the necessary support overnight, or perhaps, the next morning he was just having a good hair day. In any event, the compensation threshold was established at 20% to yield the final compensation clause as thus:

> ***(a) <u>In General</u>. The Federal Government shall compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action. If the diminution in value of a portion of that property is greater than 50 percent, at the option of the***

owner, the Federal Government shall buy that portion of the property for its fair market value.[37]

The reported version of the bill included an interesting subpart to the compensation section yet was not included in the final bill referred to the Senate.

(b) Duration of Limitation on Use. Property with respect to which compensation has been paid under this Act shall not thereafter be used contrary to the limitation imposed by the agency action, even if that action is later rescinded or otherwise vitiated. However, if that action is later rescinded or otherwise vitiated, and the owner elects to refund the amount of the compensation, adjusted for inflation, to the Treasury of the United States, the property may be so used.[38]

[NOTE: While this clause must have been removed by amendment, there is no record of the specific amendment by which it was removed. However, the legislative history list four amendments for which there is no description.[39]]

Effects of State Law

The Effects of State Law section underwent little change throughout the process, other than editing for conciseness. In final form, the clause reads as follows:

If a use is a nuisance as defined by the law of a State or is already prohibited under a local zoning ordinance, no compensation shall be made under this Act with respect to a limitation on that use.[40]

Exceptions

The Exceptions section received only one change. While minor in word count, its impact looms large. The words "except to the extent such servitude is interpreted to apply to wetlands" was added to yield the following final provision:

(a) Prevention of Hazard to Health or Safety or Damage to Specific Property. No compensation shall be made under

this Act with respect to an agency action the primary purpose of which is to prevent an identifiable

(1) hazard to public health or safety; or

(2) damage to specific property other than the property whose use is limited.

(b) <u>Navigation Servitude</u>. No compensation shall be made under this Act with respect to an agency action pursuant to the Federal navigation servitude, as defined by the courts of the United States, except to the extent such servitude is interpreted to apply to wetlands.[41]

Procedure

The Procedure section of the bill has several components: request of owner; negotiations; choice of remedies; arbitration; civil action; and source of payment. While the section appears to have been insignificantly modified from the original bill, it receives a fair amount of attention, relative to the amount of verbiage of the other sections. This section describes in considerable detail the claim process, providing for several *takings* remedies. Essentially, the section states that within 180 days after receiving notice from the agency regarding the property "limitation", the owner may file a *takings* claim with the agency. If the parties cannot reach an agreement (parties may negotiation) or if compensation is not received within 180 days, the property owner may employ arbitration or civil litigation. (*See* Appendix for complete section.) Moreover, this section requires the 'offending' agency to make the necessary payment to the aggrieved party out of its own budget. However, if the 'offending' agency was acting upon the command of another agency, it may seek partial or complete reimbursement from that agency.

Definitions

This section of the bill serves to narrowly define the scope of the legislation through explanation, in particular, of the terms "property", "agency", "agency action", "specified regulatory law", and "fair market value". The portion defining "specified regulatory law" is particularly relevant to environmental issues as the environmental protection programs are those being targeted by the bill. (*See* Appendix for complete section.)

(5) the term 'specified regulatory law' means:

(A) section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(B) the Endangered Species Act of 1979 (16 U.S.C. 1531 et seq.);

(C) title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.); or

(D) with respect to an owner`s right to use or receive water only:

(i) the Act of June 17, 1902, and all Acts amendatory thereof or supplementary thereto, popularly called the `Reclamation Acts` (43 U.S.C. 371 et seq.);

(ii) the Federal Land Policy Management Act (43 U.S.C. 1701 et seq.); or

(iii) section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);[42]

The original bill referred only to "*section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); . . . the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or . . . subtitle C of title XII of the Food Security Act of 1985.*"[43] However, Representative Tauzin's amendment (HA 248) insisted that the bill target the *"[r]ights to receive and use water under the Reclamation Acts, Federal Land Policy and Management Act, and Forest and Rangeland Renewable Resources Planning Act"* in addition to the Clean Water Act wetland permitting program, Endangered Species Act, and Resource Conservation provisions of the 1985 Farm Bill.[44]

Added Sections

Along with the Policy section, three other sections were added to the original bill: Limitation; Duty of Notice to Owners; and Rules of Construction. Basically, these sections merely dispense with formalities. The Limitation section states that payment under the Act is limited to availability of appropriations. Duty of Notice to Owners section requires the agency to notify the owners of the action and explain to them their rights under this Act. And, the Rules of Construction section

interestingly states, in part, that *"[n]othing in this Act shall be construed to limit any right to compensation that exists under the Constitution or under other laws of the United States."*[45]

Failed Amendments

One failed amendment proposed that *"compensation would not be paid if the agency involved has prepared a 'private property impact assessment' for the particular regulation or other agency action, prior to taking the action."*[46]

Representative Schroeder introduced an amendment (HA 250) to *"specify that the amount of compensation provided for in the bill for a private property 'taking' will be reduced by an amount equal to any increase in overall value of the property as a result of any agency action."*[47] This proposal too was rejected.

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995 (S-605)

The Senate's legislative proposal is much more complex than the House of Representative's act. Primarily, S-605 includes the following: 1) the same provisions established in H.R. 925, but often expanded; 2) a restatement of *takings* principles established in the legal precedent, as the above section describes; 3) 'legalese' and other statutory formalities. (H.R. 925 does not include item two above, and little of item three.) For the sake of brevity, only the modifications and additions from the House bill, excepting the established legal principles and statutory formalities, will be discussed here.

The first departure from H.R. 925 occurs in Section 204. While the section reiterates the legal principle that action must deprive property owner of "all or substantially all economically beneficial or production use of the property," it also expands it to include

> *such action [that] diminishes the fair market value of the affected portion of the property which is the subject of the action by 33 percent or more with respect to the value immediately prior to the governmental action . . .*[48]

Perhaps the most significant and substantial additions (or modifications) occur in the definition section (Section 203), particular with respect to terms "agency" and "property". So important are these definitions that they bear repeating verbatim.

> *'agency' means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government . . .*[49]

Unlike the House bill, **all** government regulatory agencies are at issue. Property rights bill opponents fear that this broad scope will allow claims for such actions as OSHA regulations, hazardous waste regulations, the Americans with Disabilities Act (ADA) requirements, or virtually all other regulations designed to protect public health and safety.

The scope of "property" too has been broadened well beyond what the courts have established. Under S-605, "property" shall include the following:

> *. . . real property, whether vested or unvested, including – estates in fee, life estates, estates for years, or otherwise; inchoate interests in real property such as remainders and future interests; personality that is affixed to or appurtenant to real property; easements; leaseholds; recorded liens; and contracts or other security interests in, or related to, real property.*[50]

In addition, property shall include:

> *the right to use water or the right to receive water, including any recorded lines on such water right; rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy; property rights provided by, or memorialized in, a contract . . . any interest defined as property under State law; or, any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest . . .*[51]

Truly, the implications of the bill are staggering. Under this proposal, it is easy to see why Marshall Kuykendall, head of *takings* group Take Back Texas, would

conclude: "When Lincoln freed the slaves, he did not pay for them, and that was a taking."[52] It is easy to see also why such a bill will cost taxpayers tens of billions of dollars.

One particular section (Section 205) addresses an apparent, much-needed reform – that of court jurisdiction for *takings* cases. Section 205 proposes to allow civil claims to be heard in either the United States District Court or the United States Court of Federal Claims, with both courts having concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Congressional act or agency regulation.[53] This reform appears to be a worthwhile pursuit either within or without a property rights act.

An especially burdensome proposal is that of the "private property taking impact analysis," which would be required of every agency prior to issuing or promulgating a rule that is likely to result in a private property *taking*. The clause requires each agency to provide the analysis *"as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with a proposed regulation."*[54] While it may seem worthwhile for agencies to informally consider the property rights impact of their regulations, the requirement Section 405(a) is particularly debilitating: *"No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this Act."*[55] This provision begs the question: Will regulation become extinct? Many people suspect that Congress is explicitly attempting to impede agency rulemaking, especially that of the environmental agencies. In fact, President Clinton indicated his concerns along those lines in a letter to the Judiciary threatening a veto of S-605.

> *The bill instead creates a system of rewards for the least responsible and potentially most dangerous uses of property. It would effectively block implementation and enforcement of existing laws protecting public health, safety, and the environment.*[56]

Consider Sections 506 and 507 in which the Senate proposes amendments to § 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) and § 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) whereby a property owner can appeal an administrative decision resulting from provisions of the acts. For the WPCA, private property owners or their authorized representatives may appeal from the following actions:

(B) The denial of a permit.
(C) The terms and conditions of a permit.
(D) The imposition of an administrative penalty.
(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.[57]

And, for the ESA, private property owners or their authorized representatives may appeal from the following actions:

(A) A determination that a particular parcel of property is critical habitat of a listed species.
(B) The denial of a permit for an incidental take.
(C) The terms and conditions of an incidental take permit.
(D) The finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.
(E) Any incidental `take' statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).
(F) The imposition of an administrative penalty.
(G) The imposition of an order prohibiting or substantially limiting the use of the property.[58]

And, finally, in the Compensation section, the bill proposes two remedies where a *taking* has occurred. The government agency may offer to:

> *(1) purchase the affected property of the private property owner at a fair market value . . . (2) compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.* [59]

CONCLUSION

The Framers of the U.S. Constitution expressly intended for the Constitution to protect citizens from government interference and threat of tyranny. While clauses of the Constitution are vague or ambiguous, they provide flexibility, allowing the

Constitution to evolve as America evolves. Perhaps no where has this been more important than in civil rights and environmental issues. Technology and development have necessitated environmental regulations to conserve natural resources and to protect the health and welfare of those who utilize those resources. Congress seems to feel that these regulations, in particular, are offensive to private property rights as protected by the Fifth Amendment.

> *[A] clear Federal policy is needed to guide and direct Federal agencies with respect to the implementation of environmental laws that directly impact private property . . .*[60]

In any case, the most fundamental issue in the *takings* debate is whether the Judiciary is effectively moderating private and public interests. Certainly, the Judiciary believes that it has the matter under control. However, Congress does not agree and, therefore, is exercising its constitutional authority to legislate a change. The one point upon which all can agree is that a property rights bill will cost Americans billions of dollars. On that note, it is wise for all citizens to remember the observation of Justice Oliver Wendall Holmes: *"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."*[61]

APPENDIX 1

Private Property Protection Act of 1995

(As Passed)

APPENDIX 2

Omnibus Property Rights Act of 1995

(Table of Context)
(As Reported)

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