

HOW TAKINGS LEGISLATION COULD *IMPROVE* ENVIRONMENTAL REGULATION

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The conventional wisdom is wrong: Takings law and environmental regulation are not necessarily mortal adversaries. Clarifying and expanding the rights to compensation for property owners could actually *improve* environmental regulation, not “gut” it, as many commentators assume.¹

Strengthening rights of financial compensation for owners of property adversely affected by environmental regulation can *improve* the quality of environmental regulation by “regulating the regulators”—essentially creating incentives for government to design rules more carefully and maximize the environmental benefits of regulatory investments.²

The second thesis is even more striking and counterintuitive: Stronger protection for property rights also may result in *stronger* environmental laws and regulations. By spreading the costs of environmental regulation over a larger segment of the population, takings legislation not only could increase distributional

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1. See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 90 (1995) (“[T]he doctrine [of regulatory takings] protects economic interests in the development of land against otherwise valid enactments of the democratic process, thereby inhibiting experimentation with new environmental initiatives.”). I do agree, however, with many of Professor Byrne’s other points, including his appreciation of the irony that conservatives, who normally argue for judicial restraint, are rewriting the constitutional doctrine of takings law. See *id.* at 118-19. In my view, these types of changes should come through legislation.

2. Elsewhere I have used the concept of regulatory “leverage” to describe the correlation between the government’s regulatory expenditures and the resources that are redirected as a result. See E. Donald Elliott, *Environmental Law at a Crossroad*, 20 *N. KY. L. REV.* 1, 2 (1992).

fairness but also may reduce political opposition to stronger environmental protection measures.³

The conclusion that greater attention and sensitivity to the effects of environmental regulation on the rights of property owners could improve environmental protection efforts is based not only on theory⁴ and preliminary findings in the empirical literature⁵ but also on my experience as General Counsel of the United States Environmental Protection Agency (EPA) from 1989 to 1991.⁶ During that period, an Executive Order⁷ and the rising political power of the property rights movement⁸ forced the EPA to pay more attention to takings considerations. Greater sensitivity to avoiding regulatory takings of private property, however, did not prevent us from pursuing any regulatory targets; rather, greater sensitivity to the effect that our regulations might have on property owners probably improved those regulations, both from an environmental standpoint and in terms of minimizing unnecessary burdens on property owners.

Of course, much depends on how particular takings legislation is drafted; I would not support everything in the bills introduced in the 105th Congress.⁹ Conceptually, however, legislation would be useful: (1) to require agencies to assess the consequences of their proposed regulatory actions on private property, (2) to clarify the "trigger" for what constitutes a compensable regulatory burden, and (3) to provide at least partial compensation for property owners burdened disproportionately by government regulation, even if the government action falls short of a constitutional taking.¹⁰

3. See David A. Dana, *Natural Preservation and the Race To Develop*, 143 U. PA. L. REV. 655, 697 (1995).

4. See *infra* notes 28-32 and accompanying text.

5. See *infra* note 33 and accompanying text.

6. See *infra* notes 53-64 and accompanying text.

7. See Exec. Order No. 12,630, 3 C.F.R. 554 (1988), reprinted in 5 U.S.C. § 601 (1994).

8. See George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 580-85 (1996) (describing the rise of the property rights movement).

9. See S. 605, 104th Cong. (1995); H.R. 925, 104th Cong. (1995).

10. David Sive, known as the "father of environmental law," see Margaret Cronin Fisk, *Leading Lawyers Who Practice Power*, NAT'L L.J., Apr. 4, 1994, at C2, is also an advocate of legislation to provide some compensation to property owners whose interests may be damaged by environmental regulatory programs. See David Sive, *High*

The central issue in takings law is distributive justice: To what extent should society impose disproportionate burdens on particular members?¹¹ The resolution of this issue depends fundamentally on the level of burden that society expects others to bear, but that inquiry is a matter of legislative rather than adjudicative fact;¹² a central reason that the "takings muddle"¹³ has proved so intractable in regulatory takings cases is that such questions of comprehensive social accounting cannot be answered well in the context of a single adjudication.¹⁴ It is impossible, for example, for a court to determine as a matter of adjudicative fact whether the burden imposed by prohibiting farming in order to preserve a wetland is disproportionate to that imposed by drafting an eighteen year old into the army.

The only immediate way out of the "takings muddle" is for the legislature to establish a compensation "trigger" that defines, at least implicitly, the level of burden that society expects its members to bear without being compensated.¹⁵ Although legislation obviously would not bind the courts in constitutional adjudica-

Court is at a Crossroads on Takings, NAT'L L.J., Apr. 13, 1992, at 20 ("Should not property owners who suffer substantial losses of the value of their properties in some cases receive some compensation, whether or not the regulation constitutes a taking?").

11. See Leigh Raymond, Comment, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 *ECOLOGY L.Q.* 577, 578 (1996).

12. For an explanation of the general distinction between legislative and adjudicative facts, see FED. R. EVID. 201 advisory committee's note.

13. See Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 *IND. L. REV.* 329 (1995).

14. For a discussion of the complexity of accounting for the benefits and burdens of government actions on individuals, see generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165, 1214-18 (1967) (examining compensation and utility). Although a comprehensive accounting is impossible, it may be feasible to detect clear instances of disproportionality that "stick[] out like a sore thumb." Cf. E. Donald Elliott, *Goal Analysis Versus Institutional Analysis of Toxic Compensation Systems*, 73 *GEO. L.J.* 1357, 1369-72 (1985) (discussing the infeasibility of profiling all risks to which individuals are exposed but arguing that it is possible to identify large risk disparities).

15. That is what was so useful about the proposed "triggers" built into the legislation proposed in the 104th Congress. See S. 605, 104th Cong. §§ 204, 508 (1995); H.R. 925, 104th Cong. § 2 (1995). Perhaps the proposed diminution of value triggers in the legislation were too crude or the levels inappropriate, but rather than criticizing the enterprise, environmentalists should join in perfecting acceptable tests for disproportionate burdens on property through the legislative process.

tion, legislative findings as to what level of social burden is expected to be borne without compensation would be relevant to the constitutional inquiry, particularly if the legislative determination were grounded in empirical evidence of the burdens assumed routinely by other members of the community without compensation.

Environmentalists should put aside their unjustified fears that environmental regulation cannot survive unless the government takes property without compensation.¹⁶ Instead, we should welcome legislation that clarifies the extent to which society can regulate the obligations of property ownership without providing compensation. Garrett Hardin's watershed article *The Tragedy of the Commons* still offers sage advice: Private property is not the enemy but, rather, is part of the solution to environmental problems.¹⁷

I.

Takings law is a regulatory system. The constitutional principle that the government must compensate owners if it "takes" private property through regulation that "goes too far"¹⁸ is not only a matter of distributional fairness but also a way to regulate government regulators.¹⁹ If government must pay for the

16. See, e.g., Byrne, *supra* note 1, at 91 (describing the regulatory takings doctrine as "frustrating democratic attempts to protect the environment"); Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, KAN. J.L. & PUB. POL'Y, Winter 1996, at 9, 22 (suggesting that the prospect of less environmental regulation may be the driving force behind property rights legislation).

17. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1245 (1968); see generally CONRAD TOTMAN, *THE GREEN ARCHIPELAGO* 83-169 (1989) (studying the historical role that creation of property rights played in avoiding environmental disaster in pre-industrial Japan).

18. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

19. For a general discussion of other mechanisms for regulating regulation, such as the Office of Management and Budget (OMB) regulatory review process, see Symposium, *Regulating Regulation: The Political Economy of Administrative Procedures and Regulatory Instruments*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 1.

For purposes of this Article, the OMB regulatory review process under Executive Orders 12,291 and 12,866 can be viewed as a "specific deterrence" approach toward regulating government regulation. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (1994); Exec. Order No. 12,291, 3 C.F.R. 127

cost of property made valueless by regulation, it has an incentive to regulate more efficiently by looking for regulatory investments that create benefits greater than the costs they incur.²⁰

Takings law regulates government regulation at a metalevel through the general style of regulation that Calabresi has called "general deterrence": Government is not *prohibited* from taking any particular regulatory action but is subject to an incentive to consider carefully the costs and benefits of measures that may "go too far" in regulating private property because of the threat of paying compensation.²¹ Although most judgments come out of a government-wide "judgment fund,"²² proposed takings legislation would require payment of takings judgments from the budget of the agency proposing the regulation in order to encourage efficient regulation.

Like other forms of regulation, takings law does not necessarily harm the activity being regulated.²³ The effect of regulation on the underlying activity depends upon the nature of the incentives generated by the regulatory structure and on how well the regulation is designed and administered.²⁴ In some instances, regulation actually may improve the underlying activity by con-

(1982), *reprinted in* 5 U.S.C. § 601. That approach is complemented by the "general deterrence" approach provided by takings law as outlined in this Article.

For my own views on the strengths and weaknesses of the OMB regulatory review effort, see E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, LAW & CONTEMP. PROBS., Spring 1994, at 167.

20. In essence, takings law asks the prospective regulator the Rawlsian "veil of ignorance" question: Would you have done it even if you had to pay for it? See JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

21. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS 68-69 (1970) ("[General deterrence] involves giving people freedom to choose whether they would rather engage in the activity and pay the costs of doing so . . . or, given the accident costs, engage in safer activities that might otherwise have seemed less desirable.").

22. Payson R. Peabody, *Will the 104th Congress Revolutionize Fifth Amendment Takings Law?: An Analysis of the Private Property Protection Act of 1995*, 5 FED. CIR. B.J. 199, 205 (1995).

23. But see Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 FED. B. NEWS & J. 95, 96 (1990) ("[I]t takes but a handful of decisions against the government to undercut program effectiveness.").

24. See Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. ON REG. 233, 253 (1991) ("[T]he extent to which net benefits accrue will depend on how the government actually implements programs designed to address specific social problems . . .").

tributing more to improving the activity's efficiency than the regulation itself costs.²⁵

The idea that, in theory, regulation may improve the activity being regulated is well understood for forms of government regulation other than takings law.²⁶ For example, Professors Porter and van der Linde have argued that environmental regulation may encourage enterprises to become more efficient in their use of raw materials.²⁷

An analogous point can be made with regard to takings law that regulates government regulators: Takings law may result in improvements in government regulation by giving government an incentive to weigh the costs as well as the benefits of proposed regulations.²⁸ Put into the language of economics and public choice theory, the point is a simple one: Any activity that is costless to the user—whether using the air as a global waste dump or confiscating other people's property as a wetlands preserve—will tend to be overconsumed because the user will be able to appropriate a portion of the benefits from the activity while externalizing most of the costs.²⁹ This principle underlies

25. See *id.* at 254 (“Although the benefits of social regulation may equal or exceed its costs, the potential exists for far greater efficiency improvements since it is unlikely that marginal benefits equal marginal costs.”).

26. See *id.* (“[A]reas for potential efficiency gains include drug, pesticide, and occupational safety regulation.”).

27.

Properly designed environmental standards can trigger innovations that lower the total cost of a product or improve its value. Such innovations allow companies to use a range of inputs more productively—from raw materials to energy to labor—thus offsetting the costs of improving environmental impact Ultimately, this enhanced *resource productivity* makes companies more competitive, not less.

Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, HARV. BUS. REV., Sept.-Oct. 1995, at 120.

28. See Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595, 611 (1995) (“By forcing the government to pay when it takes, the clause forces government to weigh the costs of regulation against the benefits.”); John P. Lodise, Note, *Retroactive Compensation and the Illusion of Economic Efficiency: An Analysis of the First English Decision*, 35 UCLA L. REV. 1267, 1272-73 (1988) (“*First English* forces the government to consider whether a land-use regulation is more valuable than the cost it creates.”).

29. See Hardin, *supra* note 17, at 1244; Christopher D. Stone, *What To Do About Biodiversity: Property Rights, Public Goods, and the Earth's Biological Riches*, 68 S. CAL. L. REV. 577, 581 (1995).

the modern economic theory of environmental pollution (as well as tort law); regulation ultimately attempts to counteract overconsumption by internalizing externalities where the market fails to do so because of transaction costs.³⁰

Many environmentalists, however, have been slow to recognize that the same economic argument applies, at a metalevel, to the regulation of government regulation itself. For instance, if government regulators can appropriate the political credit for their regulatory actions³¹ but are able to externalize most of the costs as uncompensated losses to property owners, they will have incentives to overconsume regulation in the same way that polluters have an incentive to overconsume the air or the water.³²

The empirical literature on uncompensated governmental takings has begun to confirm the point predicted by economic theory. For example, an army that obtains "free" labor through the draft tends to oversubstitute human capital for technology; an army that pays market rates for human labor is a different army, but it is not necessarily an inferior one—it may even be cheaper and more efficient.³³ This counterintuitive point is the same one made by Professors Porter and van der Linde about environmental regulation: The discipline engendered by having to pay market rates for inputs, rather than obtaining some of them as "subsidies" (because the legal system protects them inadequately), can improve government regulation.

The discipline engendered by paying market rates for inputs can improve the quality, as well as affect the *quantity*, of gov-

30. See, e.g., David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 651-52 (1994) ("Because the regulated market internalizes costs that would be externalities in an unregulated market, the regulated market more closely approximates a perfect market.").

31. On political credit-claiming as an incentive for regulatory development, see generally E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-35 (1985).

32. See Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 749-62 (1990) (utilizing economics to explain environmental law); Hahn & Hird, *supra* note 24, at 235 ("Current fiscal pressures . . . are likely to encourage Congress and the President increasingly to use social regulations as a tool for achieving political objectives.").

33. See generally William A. Fischel, *The Political Economy of Just Compensation: Lessons from the Military Draft for the Takings Issue 5-7* (Mar. 7, 1996) (unpublished manuscript on file with the American Enterprise Institute).

ernment regulation. This distinction is important because the consensus is that our problem is not one of too much regulation but rather improving the *quality* of regulation by making sure that regulatory investments produce benefits commensurate with their costs.³⁴ For example, the United States continues to lose approximately 70,000 acres of wetlands per year.³⁵ Appropriately designed incentives³⁶ would not necessarily cut back on the total acreage of wetlands being preserved by government regulation. Rather, appropriate incentives can help influence government regulation to focus more effectively on preserving those wetlands that produce the greatest benefits in terms of wetlands values (where the government would be presumably most willing to pay compensation, if necessary). Moreover, as discussed below,³⁷ it is wrong to assume that government has to pay for property that is "taken."

To be sure, thinking about takings law as a system for regulating government regulation is not the whole story behind takings law (as the other contributions to this Symposium make clear). Nor is it true to say that everything that has been proposed to date in so-called takings legislation is defensible or would not gut government regulation.³⁸

Mine is a narrower, but nonetheless important point, which is borne out in the literature and in my own experience in government: *greater protection for the legitimate expectations of property owners does not necessarily have to gut regulation, including environmental regulation.*³⁹ On the contrary, just as environmental protection and economic growth can be compatible and mutually reinforcing, rather than locked in a "zero sum game,"⁴⁰ so too can protection of private property be compatible with environmental protection or other forms of government regulation.

34. See, e.g., Elliot, *supra* note 2, at 5-11.

35. See, e.g., *A Victory for Wetlands*, N.Y. TIMES, Dec. 15, 1996, at E12.

36. See *infra* notes 80-82 and accompanying text.

37. See *infra* notes 58-76 and accompanying text.

38. See *supra* note 9 and accompanying text.

39. See *supra* notes 1-2 and accompanying text.

40. Porter & van der Linde, *supra* note 27, at 120.

II.

I approach the takings issue largely from the perspective of an ex-regulator and a life-long environmentalist. I served as General Counsel of the EPA from 1989 to 1991. In that capacity, I had the distinct personal privilege of being regulated by one of the other participants in this conference, Jim Brookshire of the Department of Justice, as we attempted to implement the 1988 Executive Order on Takings.⁴¹

At the risk of being accused of falling prey to the Stockholm Syndrome (in which hostages begin to identify with their captors),⁴² I want to argue generally in favor of takings legislation. As an ex-regulator and a continuing proponent of sensible government regulation to protect the environment, I maintain that further development of regulatory takings law—and particularly legislative clarification of the level of impact that is compensable—is not a bad thing. Further progress in takings law could improve environmental regulation if done properly.

One of the ironies of modern administrative law is that many of the techniques of environmental regulation developed in the 1970s and 1980s now are being used at a metalevel in an attempt to regulate government regulators.⁴³ Not surprisingly, we now hear the same kinds of complaints by government regulators who face imminent regulation that we used to hear from industry: "This is unnecessary"; "We are already doing it on our

41. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994). Section 3(a) of the Executive Order states that "[g]overnmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc." 3 C.F.R. at 556. Section 4 establishes specific criteria with which executive departments and agencies must comply when implementing policies that have takings implications. *See* 3 C.F.R. at 557. For example, section 4(b) states that, "[w]hen a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress." *Id.*

42. *See generally* David Gelman, *Still Psychic Captives*, NEWSWEEK, Aug. 26, 1991, at 27 (addressing the effects of the Stockholm Syndrome).

43. *Cf.* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 37-42 (tracing the history of regulatory review).

own”; or “The administrative and process costs would be too great.”⁴⁴ The outraged squeals of those who are about to be regulated should be discounted as much when they come from the government as when they come from the private sector.

Many of the same techniques borrowed from environmental regulation can be adapted quite usefully to the problem of regulating government regulators. For example, the concept of takings assessments⁴⁵ is modeled on the environmental impact statements required by the National Environmental Policy Act.⁴⁶ In some instances, requiring a bureaucracy to develop information about effects that it ordinarily would not consider results in better regulations. Requirements to develop and make available information (1) reduce the risk of “accidental takings” in which the government inadvertently and unnecessarily takes property through a regulatory measure just because no one focused on the issue when designing the regulatory approach;⁴⁷ and (2) enhance the ability of the politically responsible levels of government to balance regulatory priorities against other social goals.⁴⁸ In short, the mandatory production of information usefully solves agent/principal problems by reducing monitoring costs.⁴⁹ Thus, I generally favor takings assessment legislation similar to that already enacted by fourteen states⁵⁰ and re-

44. *Cf. id.* at 38-39 (recognizing environmentalists and the EPA as those most outraged by regulatory review).

45. *See* S. 605, 104th Cong. § 403(a)(1)(B) (1995) (directing federal agencies to complete a “private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property”).

46. National Environmental Policy Act of 1969 § 102(C), 42 U.S.C. § 4332(C) (1994) (requiring federal agencies to prepare “a detailed statement . . . on . . . the environmental impact of the proposed action” for “major Federal actions significantly affecting the quality of the human environment”).

47. *Cf.* Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 764 n.202 (1993) (explaining how accidental takings occur).

48. *See* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 78 (1994) (“Agencies have more, and better, information than Congress and the President about the content and consequences (political and otherwise) of their regulatory policies. Legislative decisions concerning administrative structure, then, will be grounded in an effort to correct this information imbalance.”).

49. *See id.*

50. Those states are Arizona, Delaware, Florida, Idaho, Indiana, Kansas, Missouri, Montana, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. *Cf.*

quired at the federal level by Executive Order.⁵¹

III.

Although I generally support the concept of takings compensation legislation, many serious problems existed in specific provisions of the bills proposed in the 105th Congress.⁵² To assist in improving future takings compensation legislation, I want to share one of my experiences as General Counsel of the EPA and suggest some lessons that can be learned from it in order to facilitate better legislation in the takings area.

David A. Thomas, *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 URB. LAW. 223, 224-32 (1996) (analyzing and criticizing new state property protection laws).

51. See *supra* note 7 and accompanying text.

52. See S. 605, 104th Cong. (1995); H.R. 9, 104th Cong. (1995). The House property rights bill was passed originally as H.R. 925, 104th Cong. (1995).

One of the biggest problems with the proposed legislation was its lack of symmetry. The proposed legislation gave relatively clear triggers for what percentage diminution in value constitutes a presumptive taking, but it put the burden on the government to prove essentially a nuisance. See S. 605, § 204(d)(1) ("No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated . . ."). The vagueness of the standards of nuisance law can increase the "demoralization costs" for government. Cf. Michelman, *supra* note 14, at 1214. According to Professor Michelman, if property owners are not compensated, then they and society as a whole incur demoralization costs, which are defined as:

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Id. Although Professor Michelman referred to the demoralization of property owners, the concept can be applied equally well to government actors. With these hidden demoralization costs, the proposed takings legislation is not much of an improvement over current takings law.

A.

When the new, more aggressive takings case law began to emerge in the late 1980s,⁵³ EPA Administrator William Reilly was concerned that a court might hold that the EPA had “taken” private property through wetland protection. We regarded this as a potential political disaster for the wetlands program, which already was quite controversial. We did not need any more “poster child” cases appearing on the pages of *The New York Times*⁵⁴ or *The Wall Street Journal*⁵⁵ about the (alleged) jackboot of government coming down on some poor family farmer.

I bore the task of trying to ensure that we did not unintentionally act in a way that might result in a taking in the wetlands area. Rather than write a memo, we convened all of the Agency’s Regional Administrators (RAs) for a day-long seminar on takings law. The RAs are the top political appointees in each of the ten EPA geographic regions who actually make the decisions in particular wetlands cases.

As a law professor who sometimes teaches property, constitutional, and environmental law, I essentially conducted a day-long seminar for the EPA decisionmakers on takings law. I handed out to the RAs (some of whom were lawyers and some of whom were not) a draft legal opinion in a hypothetical case to demonstrate how easy it would be—on certain facts—to find a taking in a wetlands case. The hypothetical involved a small family farm. Declaring certain crucial portions of the farm a pro-

53. Several cases decided by the courts in the late 1980s suggest a growing distrust of regulation of land. *See, e.g.,* *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding that an “essential nexus” must exist between the condition attached to a development permit and the original purpose for the restriction on the property); *Loveladies Harbor, Inc., v. United States*, 21 Cl. Ct. 153, 160 (1990) (finding that denial of a Clean Water Act wetlands fill permit diminished the economic value of the property by more than 99% without a “countervailing substantial legitimate state interest” and awarding plaintiff \$2.6 million in compensation), *aff’d*, 28 F.3d 1171 (Fed. Cir. 1994).

54. *See* William Robbins, *For Farmers, Wetlands Mean a Legal Quagmire*, N.Y. TIMES, Apr. 24, 1990, at A1 (discussing an Army Corps of Engineers proposal requiring a farmer to cede 25% of his 225-acre farm to the federal government as a wildlife easement “in ‘mitigation’” of damage to wetlands).

55. *See Rogue Regulators*, WALL ST. J., Apr. 17, 1991, at A14 (criticizing “rogue actions of the wetlands bureaucracy,” such as classifying a 127-acre ancestral farm as wetlands and prohibiting its sale).

tected wetland would have made it impossible for the owners to continue operating the farm, making the property essentially worthless.

The reaction of the RAs was very interesting. After some discussion and initial resistance, they eventually concluded that they did not need to act as the government had in the hypothetical in order to achieve the goals of the program; once the RAs understood the problem, they realized that they could work around the problem to avoid a taking.⁵⁶ The episode succeeded in the sense that over the next few years, the EPA did not do anything that constituted a taking in the wetlands program.⁵⁷

Trying to convey to the RAs how to avoid government action that might constitute a taking was a very difficult experience. In part, the task was difficult because we faced the "muddle"⁵⁸ of the developing Supreme Court case law on takings. In addition, quite a different body of jurisprudence is developing in the Federal Circuit, which is, in many ways, even more aggressive than that at the Supreme Court level.⁵⁹ For a government agency

56. In reaching that conclusion, however, we relied in part on the doctrine that to constitute a taking, property has to be rendered essentially valueless. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that a taking occurs when the owner of real property is "called upon to sacrifice *all* economically beneficial uses in the name of the common good"); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that a taking occurs when a regulation "denies an owner economically viable use of his land"). Some versions of proposed legislation would overturn that rule by focusing on particular portions or segments of the property. *See* S. 605 § 204(a)(2)(D), 104th Cong. (1995) ("A property owner shall receive just compensation if . . . [agency] action diminishes the fair market value of the property *or the affected portion of the property* which is the subject of the action by 33 percent or more . . .") (emphasis added); H.R. 925 § 3(a), 104th Cong. (1995) ("The Federal Government shall compensate an owner of property whose use *of any portion of that property* has been limited by an agency action . . . that diminishes the fair market value of that portion by 20 percent or more . . .") (emphasis added).

57. *But see* *Formanek v. United States*, 26 Cl. Ct. 332 (1992) (holding that a U.S. Army Corps of Engineers' denial of a Clean Water Act permit constituted a taking for which landowners were entitled to just compensation). Under current law, the EPA and the Corps exercise separate roles. *Compare* 33 U.S.C. § 1344(a) (1994) (stating that the Corps may issue or deny wetlands file permit), *with* 33 U.S.C. § 1344(c) (stating that the EPA may veto permits issued by Corps).

58. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984)

59. *See Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994),

planning an action, however, it is impossible to know in advance whether a case will go to the Federal Circuit or to the Supreme Court. Moreover, my experience in the private sector counseling clients in the takings area was that the case law did not provide clear guidance that would allow landowners to plan their conduct accordingly.

I want to make two points in connection with my EPA experience. First, it is *not* true that an increased obligation to pay compensation for government regulation will necessarily result in less government regulation, or less stringent government regulation.⁶⁰ Second, legislation clarifying the standards for what constitutes a compensable event would increase the effectiveness of regulation.⁶¹

Both of these points grow out of a common intellectual perspective: a dynamic, or game-theory approach to legal rules.⁶² This approach, unlike the static perspective of traditional law and economics, takes into account the fact that legal actors change their behavior to adapt to legal rules.⁶³ Thus, takings law is part of a dynamic system in which legal actors change

cert. denied, 115 S. Ct. 898 (1995). In *Florida Rock*, the court found that a government wetlands regulation violated the Just Compensation Clause when it worked a "partial taking" of property. *See id.* at 1570. That is, a regulation that deprived the owner of a substantial part of the economic use of his property constituted a compensable "partial taking," rather than noncompensable "mere diminution" in value. *See id.* The court indicated that the line should be drawn where a regulation ceases to produce a "reciprocity of advantage." *See id.* at 1570-71; *see also* *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179-82 (Fed. Cir. 1994) (concluding that land could be segmented for purposes of evaluating a takings claim and affirming that the relevant parcel of property for takings analysis was only the parcel burdened by the regulation, rather than the entire tract of land).

60. *See supra* note 3 and accompanying text.

61. *See supra* notes 15, 17 and accompanying text.

62. *See generally* DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994) (outlining and applying game theory in the legal context). "The early applications of economic reasoning to the law were made with an eye toward understanding how legal rules affect behavior." *Id.* at 4; *accord* Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1991).

63. *See* BAIRD, *supra* note 62, at 4; *cf.* E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 152 (applying game theory to the legislative veto and observing that "the most effective kind of power [is] . . . the kind that does not have to be used to be effective").

their behavior according to the incentives created.⁶⁴

B.

It seems intuitively obvious that if government has to pay more for some of its regulatory actions, a marginal incentive will be created to cut back on the amount and stringency of regulation. This logic, however, only goes so far, and there are a number of factors cutting in the other direction that must also be taken into account.

The first countervailing factor is the effect of the political counterreaction. When government regulation affects a particular individual or small group adversely and makes that identifiable group bear a relatively large economic burden for the benefit of society as a whole, a political backlash can occur that may undermine support for the regulatory programs.⁶⁵ I referred to an example earlier in terms of adverse press coverage of sympathetic wetlands takings cases.⁶⁶ The long-term costs of the political setback suffered by the regulatory program can be greater than the short-term benefit achieved through stringent regulation; thus, paradoxically, less can work out to be more. This was the sense to which Bill Reilly and I responded in 1990 in the wetlands area.

Recently, the phenomenon of political counterreaction has been explored in more formal terms in an excellent paper by Professor Barton Thompson of Stanford Law School.⁶⁷ In his working paper on the Endangered Species Act for the American Enterprise Institute, Professor Thompson applied Nobel Prize winner George Stigler's model of regulatory politics to analyze the effect of takings compensation on the stringency of regula-

64. Cf. Elliott, *supra* note 63, at 152 (discussing strategic behavior).

65. *See id.*

66. *See supra* notes 54-55 and accompanying text.

67. *See* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives* 61 (Mar. 7, 1996) (unpublished conference paper presented at the American Enterprise Institute seminar entitled "Economic and Constitutional Perspectives on Takings," on file with the American Enterprise Institute) ("By removing property owner opposition, a compensation requirement might well free Congress and the [Fish and Wildlife Service] to pursue greater habitat preservation.").

tion.⁶⁸ Stigler's thesis is that if a burden falls on a well-organized, concentrated interest, such a group may be more effective in securing political redress than a larger group would where the burden is spread over a larger number of people.⁶⁹ The implication of the Stiglerian analysis for regulatory takings is that there will be much less political backlash if the burden of preserving wetlands, for example, is spread over a large group of people instead of concentrated on a few. Of course, the effect of compensation for takings is to spread the cost burden of regulation over a large group (taxpayers) rather than a small group (owners of the property taken). Paradoxically, imposing a small cost on a large group may actually result in less effective political opposition to regulation.

Some limited empirical evidence from Australia supports the thesis that paying partial compensation may decrease opposition to strong environmental protection measures.⁷⁰ Australia adopted a partial compensation system for preserving habitat and strengthened its protection of habitat at the same time.⁷¹ Although the results are not conclusive, the limited empirical evidence available belies the assumption that paying compensation to those who are affected adversely leads automatically to less stringent government regulation.⁷²

The conclusion that paying compensation does not necessarily impede the underlying activity's effectiveness is also confirmed by experience in other areas. The volunteer army is a good example.⁷³ At the time that the all-volunteer army was originally proposed, the country had long been subject to the draft, which

68. See *id.* at 58-62.

69. See *id.* at 58-59; see also George J. Stigler, *The Theory of Economic Regulation*, in *THE CITIZEN AND THE STATE* 114, 123 (1975) (advancing the theory that concentrated interest groups often are able to exert a disproportionate influence on the political process).

70. See Thompson, *supra* note 67, at 61 (citing David Farrier, *Conserving Biodiversity on Private Land* 5, 9 (Jan. 1995) (unpublished paper on file with the University of Colorado National Resources Law Center)). For a fuller version of this article, see David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 *HARV. ENVTL. L. REV.* 303 (1995) [hereinafter Farrier, *Incentives*].

71. See Farrier, *Incentives*, *supra* note 70, at 395-96.

72. See *id.* at 396.

73. See generally Fischel, *supra* note 33, at 4-7.

was essentially an uncompensated regulatory solution to raising an army;⁷⁴ the fear expressed at the time was that if the government had to pay people fair compensation at market rates in return for their service in the army, the cost would destroy the army.⁷⁵ This fear is very similar to that expressed by environmentalists today that we cannot afford to pay for resources for environmental amenities; we must use uncompensated regulation. The prophecies of doom about destroying the army by paying for labor, however, have not been borne out by experience. We have a better army today by most assessments.⁷⁶

Of course, preserving the environment is different in many ways from raising an army, but the experience does call into question the glib assumption that an activity will inevitably be destroyed if government has to pay market prices for resources. Indeed, despite its vituperative rhetoric against takings legislation,⁷⁷ the Clinton Administration has learned the political lesson that strong environmental protection measures often are made more acceptable politically if accomplished through programs that provide partial compensation—for example, through “swaps” of other federal lands—to those who are asked to take actions for the good of the public as a whole.⁷⁸

This realization is part of a more general movement in environmental law in which we are (re)discovering that in some circumstances, positive incentives can change social behavior more effectively than can negative ones.⁷⁹

74. See *id.* at 4-5.

75. Cf. *id.* at 4-6 (discussing high costs of market-priced army members).

76. See *id.* at 6-7.

77. According to the Clinton Administration, the property rights bills seek to “replace the constitutional standards of fairness and justice with a rigid, one-size-fits-all approach that focuses on the extent to which regulations affect property value.” H. Jane Lehman, *Property Rights Fight Heats Up on Hill; Environmental Concerns, Reimbursement Costs at Center of Debates*, WASH. POST, Feb. 18, 1995, at F1 (quoting Associate Attorney General John R. Schmidt).

78. See John H. Cushman, Jr., *Swaps Broaden Federal Efforts To Shield Land*, N.Y. TIMES, Sept. 30, 1996, at A1 (describing the success of a program to “swap” federal lands for environmentally sensitive parcels).

79. See, e.g., E. Donald Elliott, *Environmental TQM: Anatomy of a Pollution Control Program That Works!*, 92 MICH. L. REV. 1840 (1994) (reviewing the report by the Quality Environmental Management Subcommittee of the President’s Commission On Environmental Quality entitled *Total Quality Management: A Framework for Pol-*

C.

The second lesson that I propose from my EPA experience relates to the nature of takings law as a system of incentives for regulating government behavior. The EPA RAs altered their behavior in response to takings law only to the extent that they were able to divine a comprehensible "signal" in the takings case law.⁸⁰ The developing case law offers some messages,⁸¹ but codifying clearer tests through legislation would improve greatly the ability of the takings law system to send a clear signal to regulators as to appropriate behavior.

One of the major breakthroughs in modern legal scholarship was the recognition that a series of compensation verdicts can constitute a regulatory system.⁸² It does not follow, however, that all systems of incentives are equally effective in conveying a message to those that they regulate. Here I take issue with Professor Krier's contribution to this Symposium. I agree that the application of general principles to particular factual situations is a primary source of uncertainty in regulatory takings law.⁸³ I do *not*, however, agree (if indeed Professor Krier intends to make the claim) that all forms of legal rules have equal, and therefore irreducible, levels of uncertainty. Some tests are clearer than others: The clearer the test, the easier it is to predict the outcome accurately.

Elsewhere, I have argued that the existing negligence system in tort law does not effectively regulate future conduct because it does not give sufficiently precise and clear signals as to how to alter behavior in order to minimize liability.⁸⁴ In order to promote effective behavioral change, the legal system must provide

lution Prevention (1993)).

80. See *supra* notes 53, 56 and accompanying text.

81. See *id.*

82. See *supra* notes 21-22 and accompanying text.

83. See James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143 (1997).

84. See E. Donald Elliott, *Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?*, 43 RUTGERS L. REV. 1069, 1072 (1991) (arguing that "present tort doctrines and institutions are not well-suited to provide the kinds of information and predictability that are necessary if potential injurers are to change their risk-creating behaviors, rather than just raise their prices and restrict activity levels").

something similar to what is called a "safe harbor" in tax law: clear, simple, predictable *ex ante* rules. Such rules are more likely to elicit a change in behavior than muddled standards that depend upon weighing multiple facts and circumstances *ex post*.⁸⁵ Rather than emulate the majestic vagueness of negligence law, we should learn the lesson in takings law that a clear incentive signal will alter behavior more successfully to achieve specified policy goals than a muddled one.

To alter government behavior effectively without demoralizing government regulation, takings compensation legislation should provide relatively clear, bright-line tests for what types of government actions are and are not compensable. This can be done best by separating takings compensation *legislation* from mandatory constitutional standards that define a taking.

85. *Cf. id.* at 1079-83 (discussing post hoc evaluation of facts in negligence law).