

# Property Rights Legislation: North Carolina's Hog Farm Problem and the Forgotten Rights of the Land Owners Downstream

Jennifer L. Davis

From the air, you can see the dead creek long before you see what killed it. For seven miles, the water runs as green as lime Jell-O, and the trees on either side are dead. Follow the trail upstream, and there's the suspect: a row of flat gray hog houses owned by J & H Milling. Near the water's edge is the spot where twin pipes pumped the raw sewage of 12,000 hogs directly into Middle Swamp [a Neuse River tributary]. The pumping went on for 14 years until the creek suffocated in waist-deep sludge.<sup>1</sup>

North Carolina has a hog farm problem. As the hog farm industry grows in North Carolina,<sup>2</sup> so do the environmental disasters that accompany it. This paper will examine the environmental dangers that the hog farm industry has posed to North Carolina's rivers and streams and the failure of the state to adequately prevent those harms from occurring.<sup>3</sup> Then, this paper will address general legal protections against regulation by state and federal legislatures, including a discussion of the U.S. Supreme Court's regulatory takings analysis and the increasing popularity of "takings bills" in state and federal legislatures.<sup>4</sup> Specifically, this paper will review a "takings bill" being considered by the North Carolina General Assembly that would compensate a private property owner for any diminution in value of her land caused by a state regulation.<sup>5</sup> At the same time, the Assembly was considering more stringent regulation of hog farms. Finally, this paper will argue that a takings bill in North Carolina would not only detrimentally affect the extent to which the state could regulate hog farms that pollute the state's rivers and streams, but would also be unfair to the landowners who live downstream from those hog farmers and who are denied beneficial use of their land because of the state's failure to regulate.<sup>6</sup>

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*Jennifer Davis is a third year law student at UNC-Chapel Hill from Charlotte, N.C. She currently serves as Managing Editor for the NORTH CAROLINA LAW REVIEW.*

## The Problem

### *Waste Spills, Intentional Dumping, and Fish Kills*

Since 1989, the swine production industry has quadrupled in North Carolina, making North Carolina the nation's second largest hog producer after Iowa.<sup>7</sup> In June of 1995, an overfilled sewage lagoon and a rain-soaked dike at Oceanview Farm Ltd., an Onslow County hog farm, caused a dam to break, dumping 22 million gallons of pure hog waste into the New River.<sup>8</sup> The North Carolina Department of Environment, Health, and Natural Resources placed blame for the spill squarely on the shoulders of the farm operators. The operators had failed to plant enough crops to take up the waste the farm generated, had let the liquid level in the 25-million gallon waste lagoon rise to the point of overflowing, and had installed irrigation pipes in the side of the lagoon (the eventual site of the breach that caused the spill) without consulting any engineers.<sup>9</sup> After the spill, a systematic survey of hog farm operations in North Carolina ordered by Governor Jim Hunt found "60 farmers who were deliberately dumping animal waste into streams through pipes or ditches . . . [and] fifty other farms . . . discharging sewage inadvertently through leaks or overflows from waste lagoons."<sup>10</sup> One commentator charged that the spills were "the predictable results of an impotent regulatory and enforcement process . . . [and] the contemptuous indifference with which our state government has treated its citizens and environment in the face of

explosive hog-farm development."<sup>11</sup>

These recent waste spills into North Carolina rivers and swamps have caused fish to die by the millions.<sup>12</sup> Rivers like the Neuse and Cape Fear have become overloaded with nitrogen and phosphorus, elements that cause a cycle of algae infestation and oxygen depletion during which fish suffocate.<sup>13</sup>

Each day, trainloads of nutrients arrive from the Midwest in the form of feed grains for livestock. The corn and soybeans are fed to pigs and poultry, and a little of the nitrogen and phosphorus is absorbed into the animals bodies. The bulk of it is excreted as animal waste. In the swine industry alone, the 8 million hogs in the state's eastern counties produce, conservatively, 10 billion pounds of manure a year, which includes about 70 million pounds of nitrogen.<sup>14</sup>

When this animal manure spills into rivers it joins nitrogen already present in the rivers from ground and ditch seepage of animal waste. Additionally, ammonia gas adds nitrogen in rivers and streams as it rises into the air from hog barns and lagoons and returns to the earth in rainfall.<sup>15</sup> The nitrogen and phosphorus cause inordinate amounts of algae to grow on river surfaces. When the algae dies, it sinks to the bottom of the river, where it is decomposed by bacteria in a process that consumes oxygen. "Unless the water is mixed or recirculated somehow, the oxygen eventually will run out," causing massive fish kills.<sup>16</sup> One discouraged environmentalist recently jested that he had "seen catfish crawling out of the water" when commenting on millions of dead eels, bream, bass and other fish that lined the Cape Fear River last summer.<sup>17</sup>

### *North Carolina's Regulation of Hog Farms*

North Carolina has relied heavily over the past several years on a voluntary approach to preventing the flood of waste into North Carolina's rivers. The North Carolina Agriculture Cost-Share Program was begun in the mid-1980's to assist farmers in paying for projects that prevent waste from entering North Carolina's streams. "Growers may be reimbursed up to \$15,000 over three years for projects such as grass-strip borders around fields or better animal-waste disposal systems."<sup>18</sup> However, the state can document no improvements in water quality from the \$56 million it has spent on the program. Also, many critics of the volunteer system complain about conflicts of

interest on the local boards that administer the funds and frequently award large sums of money to themselves.<sup>19</sup>

Prior to last summer's spills, swine industry owners had blunted almost every effort in the North Carolina General Assembly to better regulate hog farms.<sup>20</sup> Even North Carolina's nuisance laws make it extremely difficult for private property owners to maintain a nuisance suit against hog farmers.<sup>21</sup> Early last summer, however, it appeared that the tide was turning. Governor Hunt issued strong statements to state swine farmers that they should "shape up or ship out."<sup>22</sup> Not only was the Governor instrumental in getting the North Carolina Division of Environmental Management to strengthen its plans for reducing pollution in the Neuse river, but he was also the impetus behind a Blue Ribbon Commission on Agricultural Waste whose findings are due before next month's regular session of the General Assembly.<sup>23</sup> The group is considering the results of several studies it commissioned and is reviewing stricter regulation proposals for the swine industry, including strict licensing procedures, mandatory testing of lagoons and lagoon liners, emergency spillways in all lagoons, and prohibitions on hog farming in sensitive watersheds.<sup>24</sup> The commitment Governor Hunt and many North Carolina legislators have shown to regulating hog farms in order to promote the environmental welfare of North Carolina's rivers, streams, and drinking water is a decided shift away from North Carolina's former public policy.<sup>25</sup> However, if the regulations that arise from the upcoming full session of the General Assembly, sparked by the findings of the Blue Ribbon Commission, are stringent enough, many hog farmers will likely complain that the state government is interfering with their property rights and their distinct investment-backed expectations.

### *Likely Failure in the Future to Regulate Hog Farms*

As one critic has noted "it would be difficult to imagine a regulation of hog farms that could be so stringent as to affect a takings of property,"<sup>26</sup> compensable under the Supreme Court's interpretation of the Fifth Amendment of the United States Constitution. However, in the past decade courts and legislatures have slowly been moving towards greater protection of private property rights in the face of a growing regulatory state.<sup>27</sup> This trend could have an adverse effect on the extent to which the North Carolina General Assembly chooses to

regulate one of the state's biggest industries.<sup>28</sup> Already, the Blue Ribbon Commission has been criticized for moving too slowly and many critics fear the Commission's proposals will not be stringent enough.<sup>29</sup> Activists question why no environmentalists were chosen to serve on the Blue Ribbon Commission which will propose new regulations for the hog farm industry. In fact, five of the 18 members on the Commission currently raise hogs, while eight others have ties to the swine industry.<sup>30</sup> In response to criticisms regarding the failure of the Commission to include environmentalists, Co-Chairman of the Commission U.S. Representative Tim Valentine said, "What the heck—I think of myself as an environmentalist."<sup>31</sup>

### Legal Protection Against Regulation

Many critics note the existence of a changing and reactionary judicial and legislative commitment to the protection of private property rights in response to growing governmental regulation of environmental dangers like those posed by North Carolina's hog farm industry. As one commentator noted, "[o]ver the last two decades the growth of this country's environmental regulatory regime has been nothing short of astonishing. It accounts for many of the regulations covering almost every aspect of our lives, which grow by 200 pages each day in the Federal Register."<sup>32</sup> Horror stories by private property owners whose property has been devalued or condemned by environmental regulations abound in the rhetoric of the heated debate over the contradictory interests of environmentalists and property owners.<sup>33</sup> Representative Billy Tauzin of Louisiana, in a vehement speech on the "overzealousness" of regulatory officials, recently stated: "Something is fundamentally wrong in our country when a rat's home is more important than an American's home. At the rate we're going, it won't be long before we're forced to add people to the Endangered Species List."<sup>34</sup> Even federal judges have entered the public debate. U.S. Claims Court Chief Judge Loren Smith recently stated publicly that "the takings clause was meant to provide a check on

government regulatory programs."<sup>35</sup> Recent victories for private property owners at the U.S. Supreme Court in Fifth Amendment regulatory takings claims and the growing popularity of legislative protections of private property owners have combined to make for "heady times for the champions of private property."<sup>36</sup>

### *Regulatory Takings Law and the Fifth Amendment*

The Fifth Amendment of the U.S. Constitution states: "nor shall private property be taken for public use without just compensation."<sup>37</sup> Since 1922, this clause has been interpreted to apply to certain

regulatory actions of the government that go "too far."<sup>38</sup> In *Pennsylvania Coal v. Mahon*, the United States Supreme Court recognized that a government restriction or regulation could deny an owner of distinct property rights such that the government would be required to compensate the owner for "inverse

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condemnation" or a "regulatory taking." Thus, the Court has expressed that the Takings Clause serves "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."<sup>39</sup> Since this recognition, "the rivers of ink spilled and forests of trees felled in the effort to understand the field of regulatory takings [has become] legendary."<sup>40</sup>

The Supreme Court has chosen an essentially *ad hoc* procedure to determine if a regulatory taking has occurred. Historically, the Court has concerned itself with three factors, which it delineated in *Penn Central Transportation Co. v. New York City*,<sup>41</sup> in reviewing a regulatory takings claim: (1) the economic impact of the regulation on the property owner, (2) the regulation's effect on distinct investment-backed expectations, and (3) the character of the governmental action.<sup>42</sup> If a government regulation interferes too greatly with the economic value of the property or with the expectations the owner had in purchasing the property, or if the government's action significantly interferes with an owner's rights to use



his property, then the Court is more likely to find that the government must compensate the owner.<sup>43</sup>

The Court has also created two discrete categories of regulatory takings claims that do not require an analysis of the three factors delineated in *Penn Central*. In *Loretto v. Teleprompter Manhattan CATV Corporation*,<sup>44</sup> the Court held that “permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.”<sup>45</sup> Thus, if a government action causes an object, in this case a cable wire, to be permanently affixed to an owners land, then compensation is required regardless of whether a diminution in value of the property has occurred and regardless of the degree to which the property can reasonably be considered to be “occupied.”<sup>46</sup> Similarly, when a regulation deprives an owner of “all economically beneficial or productive use” of her property, then the Court has held that a *per se* government takings has occurred.<sup>47</sup> In *Lucas v. South Carolina Coastal Council*, the Court held that the government had taken two beachfront parcels of land when it enacted a conservation statute that prohibited building on the beach.<sup>48</sup> “It appears, however, that in instances of less than total deprivation of value, the multi-factored analysis described in *Penn Central* still guides the courts.”<sup>49</sup> These developments, coupled with U.S. Supreme Court decisions like *Dolan v. City of Tigard*<sup>50</sup> and *Nollan v. California*,<sup>51</sup> have given champions of private property rights several recent victories to celebrate.

#### *Federal and State “Takings Bills”*

The election of Republican majorities in both the Senate and the House of Representatives, “impelled in part by public promises by party leaders to live up to the terms of the ‘Contract with America,’ has dramatically increased the chances for congressional

passage of legislation protecting landowners from the economic effects of a wide range of environmental and land-use regulations.”<sup>52</sup> Additionally, protective legislation proposals have become increasingly popular in state legislatures where agricultural lobbyists have been more successful at convincing state legislators of the federal “regulatory excess.”<sup>53</sup> Several states have passed bills requiring state governments to assess the environmental impact of their actions or to compensate land owners when a regulation diminishes the value of private land by a certain specified percentage of its value.<sup>54</sup> For example, at the same time North Carolina lawmakers

are considering more stringent regulation of hog farming operations, they are also considering a “Property Rights Act” which, in the words of the act, will “provide for payment of compensation to an owner when land-use regulation by a governmental entity causes an economic impact resulting in any diminution in the total value of the owner’s land.”<sup>55</sup>

This proposed act,

which is still in committee, is modeled after several similar state bills or proposed bills that have become increasingly popular over the past few years.<sup>56</sup>

Property Rights Bills usually come in one of two forms. They are either “assessment bills” or “compensation bills.”<sup>57</sup> Assessment bills are those bills which require “government to assess takings implications (or property rights implications) of its proposed actions in a formal process.”<sup>58</sup> In the past three years, more than sixty assessment bills have been introduced at the state level, often modeled after President Reagan’s Executive Order No. 12,630 requiring federal agencies to perform a takings analysis before acting.<sup>59</sup> Six states have enacted such provisions.<sup>60</sup> In support of these bills, many proponents argue that assessment of takings implications may lessen the extent to which state and federal regulations encroach on private property rights by requiring governmental agencies to “look before they leap.”<sup>61</sup> However, critics of the acts argue that

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assessment is “just another layer of red tape to thwart agencies from regulating, no matter how great the public need.”<sup>62</sup>

Compensation bills, on the other hand, are those bills that prescribe a “statutory standard for compensating property owners once agency action is taken” that causes a diminution in private property values.<sup>63</sup> Five compensation bills have been successfully enacted at the state level.<sup>64</sup> out of the fifteen proposed state compensation bills.<sup>65</sup> Similarly, the 104th Congress is considering a compensation bill at the federal level as part of the Contract With America.<sup>66</sup> These bills usually define a “takings” as an act which causes private property to decrease in value by a certain percentage, although some bills have used more flexible standards.<sup>67</sup> Proponents of these bills argue that constitutional remedies for takings are inadequate because pursuing a claim against the government requires too much time and money and takings precedent is extremely unclear.<sup>68</sup> Thus, “a single, unvarying value-loss threshold as a compensation trigger would afford greater certainty to both landowner and government agency.”<sup>69</sup> Detractors from this legislation argue that the “reality is that the state simply cannot afford to pay off every landowner for every land-use decision,” and that compensation bills are arbitrary in that they disparage the rights of property owners who just miss the threshold percentage to trigger compensation.<sup>70</sup>

### Applications of a Takings Bills in North Carolina

On a theoretical level, it is understandable that takings bills would have some popular support, especially when the debate is couched in terms of the competing interests of animals and human property owners. But a takings bill in North Carolina could have several detrimental effects on the state’s ability to regulate its environment and on the rights of property owners who live near or downstream from hog farmers. This section will demonstrate why passage of the proposed Property Rights Act in North Carolina is undesirable. Such a bill would tie the hands of state legislators who wish to prevent hog farmers from further damaging our state’s ecosystem. Additionally, the bill would prevent the state from protecting landowners who are harmed by the acts of hog farmers by not providing a remedy to property owners when the state’s *failure* to regulate has caused a diminution in value of their property and by using valuation techniques that allow hog farmers to spread

the cost of their operations to downstream property owners.

### *The Effect of Takings Bills on Needed Regulation of the States’ Environment*

In the earliest regulatory takings case before the Supreme Court, Justice Holmes argued that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law.”<sup>71</sup> In the case of takings bills, it is clear that government could “hardly go on” regulating the environment if it were obligated to compensate owners for all diminutions in value of land caused by a regulation. As one critic has argued, “[i]f the government labored under so severe an obligation, there would be, to say the least, much less regulation.”<sup>72</sup> A compensation bill like the one being proposed in North Carolina would leave state government officials with one of two options: bankruptcy or minimal regulation of the state’s environment. If “any diminution in value” of private property would trigger mandated governmental compensation, the *existing* statutory set-back requirements for hog farm lagoons and barns<sup>73</sup> could clear out the state treasury in an afternoon. Caught up in the rhetoric of “protecting property owners” from “arrogant bureaucratic environmentalists,” supporters of the Property Rights Act have failed to consider the practical implications of limiting the state’s ability to protect its environment. The passage of such an Act would leave the quality of our state’s rivers and streams in great peril.

### *No Remedy for Diminution in Value for Failure to Regulate*

Furthermore, supporters of the Act have forgotten about the property rights of the owners who live downstream from hog farm operators. As Professor Joseph Sax recently noted:

It has never been the law that one owns property without any obligation toward the public. . . . It is the obligation of every owner to try to find ways to accommodate the needs, principles and goals of the community in which he or she lives. It is the property owner’s obligation to try to adapt uses so that economic benefits to the individual owner flow from those uses, and at the same time the benefits of the community rich in amenities

as well as public health and safety can be maintained.<sup>74</sup>

North Carolina's proposed takings bill does not allow property owners to demand compensation for government's *failure* to regulate when that failure has deprived them of any enjoyable use of their land. In that respect, North Carolina's proposed Property Rights Act protects the rights of some property owners (those whose property is being regulated) at the expense of others (those whose property is harmed by the state's failure to regulate).

Clearly, the Act forgets that property law does more than "merely protect men [sic] in their possessions."<sup>75</sup> Imagine a society in which owners of property were not required to accommodate the needs of the community. It would be a society with no zoning laws, no nuisance laws, no limitations on water and air pollution, and no protection of endangered species. This is the type of society that takings bills envision, and practically would create, in the name of protecting a person's right to possess property. This vision departs from our most traditional understandings of the definition of property. As one critic has explained, "property, in the historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective."<sup>76</sup> This tension cannot be resolved through simplistic, bright-line legislation. The proper resolution of the tension must come after a careful weighing of the rights of individual owners and the rights of the community to use and enjoy land.

#### *Spreading the Costs to Those Already Harmed*

The manner in which compensation would be triggered by the proposed Act also fails to consider "downstream property owners." The Act would require the state to compensate a landowner (in this case a hog farm operator) when "an appraisal . . .

indicates any diminution of the total value of the property" (the hog farm).<sup>77</sup> A "market value" appraisal of a parcel of land, however, would not take into account the costs of harms from unregulated use of a particular parcel of land that would be spread to other land owners. By failing to incorporate these externalities into the "market value," the Act would compensate hog farm operators for harming the property values of other landowners. Hog farmers would be free to pass the cost of operating an agricultural operation in a manner that does not harm other landowners to the very owners who are being harmed under current practices.

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#### Conclusions


Takings bills are impractical and unfair. The North Carolina General Assembly, if it were to pass such legislation, would fail to balance the inherent tensions of the rights of property owners and the rights of the community as a whole. The proper bodies to perform this balancing of interests are the courts. While it is true that the current judicial procedure for resolving

regulatory takings claims is unpredictable:

[u]npredictability may be desirable in a society in which the governmental distribution of gain and loss in property values requires controversial policy choices. Courts may recognize that the political process is the preferred method for making these policy decisions. . . . [Current judicial theories of takings law] allow a court to invalidate land-use regulations it considers unacceptable and to uphold these regulations when it is willing to accept the political policy decisions. These political necessities suggest that a reformation of taking-clause theory to provide more predictability may be unwise.<sup>78</sup>

Reformation of takings law is especially unwise when takings bills foster predictability by so arbitrarily making controversial policy decisions that only favor certain property owners at the expense of



the rights of others. North Carolina's proposed Property Rights Act is one more shameful way that our state's public policy would openly favor agricultural interests at the expense of the state's environment. 

## Editors' Note

This article was written in April, 1995. Late in April, the Property Rights Act failed to pass the General Assembly. However, it is likely that new takings bills will be introduced in the 1997 Session.

## Endnotes

<sup>1</sup> Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at A-1.

<sup>2</sup> The hog farm industry in North Carolina has quadrupled in size in the past five years. *Id.* at 6A; see *infra* note 6 (noting this phenomenon).

<sup>3</sup> See *infra* notes 7-31 and accompanying text.

<sup>4</sup> See *infra* notes 32-71 and accompanying text.

<sup>5</sup> See *infra* notes 56-57 and accompanying text.

<sup>6</sup> See *infra* notes 72-79 and accompanying text.

<sup>7</sup> Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at 6A. In 1989, North Carolina had 2.3 million hogs statewide in hog farms. In 1995, that total reached 8.3 million. *Id.*

<sup>8</sup> Joby Warrick and J. Andrew Curliss, *Managers Get Blame For Spill*, RALEIGH NEWS & OBSERV., July 25, 1995, at A1.

<sup>9</sup> *Id.* The North Carolina Department of Environment, Health, and Natural Resources report stated that "the most probable scenario" was that wastewater overflowed near the point where the irrigation pipe was installed. Once the water began spilling over the side, the sandy soil in the lagoon's earthen walls eroded rapidly, allowing all of the sewage in the lagoon to gush out in less than an hour." *Id.*

<sup>10</sup> Joby Warrick, *State Finds 60 Farms Dump Waste*, RALEIGH NEWS & OBSERV., Sept. 15, 1995, at A1.

<sup>11</sup> Bill Broom, *Waste Spills Show the Need to Increase State's Regulation of Hog Farms*, GREENSBORO NEWS & REC., Aug. 13, 1995, at F3.

<sup>12</sup> Stuart Leavenworth, *State Goes Slow on Neuse*, RALEIGH NEWS & OBSERV., Dec. 14, 1995, at A1.

<sup>13</sup> *Id.*

<sup>14</sup> Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at A-1.

<sup>15</sup> *Id.*

<sup>16</sup> Randall Chase, *Rain Threatens Life in Neuse River*, GREENSBORO NEWS & REC., July 8, 1995, at B6. Recently,

a national environmental group, American Rivers, named the Neuse River as "one of the nation's 20 most threatened rivers" listing nitrogen and algae as "major threats to the river's health." *Id.*

<sup>17</sup> Randall Chase, *Cape Fear River Basin in Danger*, GREENSBORO NEWS & REC., Aug. 25, 1995, at B3.

<sup>18</sup> Joby Warrick, *A Bumper Crop of Waste*, RALEIGH NEWS & OBSERV., Mar. 5, 1996, at A-1.

<sup>19</sup> *Id.*

<sup>20</sup> Several bills were introduced between 1993-95 which failed. See, e.g., H. 524, N.C. General Assembly, Sess. 1996, draft of March 22, 1995, at 5-23 (A Bill To Be Entitled An Act to Protect the Public Health by Regulating the Management and Disposal of Animal Waste by Intensive Hog Operations); H. 845, N.C. General Assembly, Sess. 1996, draft of April 12, 1995, at 1-2 (an act proposing to declare that agricultural operations that continually violate environmental laws are nuisances); S. 394, N.C. General Assembly, Sess. 1996, draft of March, 1995, at 1-2 (proposing to eliminate the exemption of bona fide farms from the county zoning enabling act). One of the only regulations that has passed the General Assembly is a weak setback regulation with no enforcement mechanism that requires swine farms or lagoons to be sited at least 1,500 feet from any occupied residen, 2,500 feet from any school, hospital, or church, and 100 feet from any property boundary. N.C. GEN. STAT. § 106-803 (1995).

<sup>21</sup> See, e.g., N.C. GEN. STAT. § 106-700 (1979), stating:

It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations. . . . It is the purpose of this Article to reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance.

*Id.* The act, for example, declares that an agricultural operation cannot be the subject of a nuisance suit when an entity "moves to" the agricultural area. N.C. GEN. STAT. § 106-701 (1979). Prior to the enactment of this provision, North Carolina courts were also reluctant to allow nuisance suits against agricultural operations. See, e.g., *Moody v. Packing Co.*, 7 N.C. App. 463, 465, 172 S.E.2d 905, 907 (1970) (holding that the "operation of a hog buying station is not a nuisance *per se*" and that "courts are reluctant to enjoin the operation of a legitimate business enterprise").

<sup>22</sup> John Wagner and Joby Warrick, *Hunt Signals Crackdown on Swine Pollution*, RALEIGH NEWS & OBSERV., Aug. 22,

- 1995, at A1.
- <sup>23</sup> *A Governor's Greening*, RALEIGH NEWS & OBSERV., Feb. 13, 1996, at A-10; *see also*, H. 524, N.C. General Assembly, Sess. 1996, March 22, 1995, at 2 (the bill creating the Blue Ribbon Study Commission on Agricultural Waste).
- <sup>24</sup> Shannon Buggs, *Environmentalists Pitch Their Hog Plan*, RALEIGH NEWS & OBSERV., Mar. 1, 1996, at A3; Estes Thompson, *Summit Seeks Answers to Hog Waste Problems*, GREENSBORO NEWS & REC., March 2, 1996, at B2; Joby Warrick, *Hog Study Urges Stronger Rules for Waste Lagoons*, RALEIGH NEWS & OBSERV., Feb. 8, 1996, at A3; *Hog Farm Regulations Suggested*, GREENSBORO NEWS & REC., March 1, 1996, at B2.
- <sup>25</sup> *See supra* notes 18-21 and accompanying text.
- <sup>26</sup> Personal interview with Richard Ducker, March 25, 1996.
- <sup>27</sup> *See infra* notes 32-57 and accompanying text.
- <sup>28</sup> *See infra* notes 72-74 and accompanying text.
- <sup>29</sup> *See Hunt Critical of Hog Panel*, RALEIGH NEWS & OBSERV., Feb. 3, 1996, at A-3.
- <sup>30</sup> Joby Warrick, *Hog Hearings Open with Praise for Pork, Critics Pan Study Panel's Industry Ties*, RALEIGH NEWS & OBSERV., Oct. 12, 1995, at A1.
- <sup>31</sup> *Id.*
- <sup>32</sup> Nancie Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 614 (1995).
- <sup>33</sup> Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 FORDHAM ENV. L. J. 637, 637 (1995). Wolf argues that "many of the most prominent legislative champions of expanded private property rights have, somewhat recklessly, targeted federal endangered species regulations as particularly unjustifiable and unnecessary." *Id.* at 640.
- <sup>34</sup> W.J. Tauzin, *'If You Take It, Pay For It': Something's Wrong When a Rat's Home is More Important than an American's Home*, Roll Call, July 25, 1994, available in LEXIS, Nexis library, CURNWS File.
- <sup>35</sup> Marianne Lavelle, *Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L. J., May 10, 1993.
- <sup>36</sup> Wolf, *supra* note 33, at 637.
- <sup>37</sup> U.S. CONST., Amend. V.
- <sup>38</sup> *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922).
- <sup>39</sup> *Nollan v. California*, 483 U.S. 827, 835-36 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).
- <sup>40</sup> Wolf, *supra* note 33, at 637 n.14 (1995).
- <sup>41</sup> 438 U.S. 104 (1978).
- <sup>42</sup> *Id.* at 124-25.
- <sup>43</sup> *Id.*
- <sup>44</sup> 458 U.S. 419 (1982).
- <sup>45</sup> *Id.* at 432.
- <sup>46</sup> *Id.* at 426-439.
- <sup>47</sup> *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992).
- <sup>48</sup> *Id.* at 2889. Although the District Court found that Lucas had been deprived of *all* of the economic value of his property, several Justices were skeptical of this finding, *see, e.g., id.* at 2908 (Blackmun, J. dissenting) ("This finding is almost certainly erroneous."); *id.* at 2919 n.3 (Stevens, J., dissenting) ("[H]is land is far from 'valueless.'"); *id.* at 2925 (Souter, J., dissenting) ("[T]he trial court's conclusion is highly questionable"); *see also* Recent Legislation, 108 HARV. L. REV. 519, 524 n. 19 (noting this same phenomenon).
- <sup>49</sup> James D. Smith, *Private Property Protection Legislation and Original Understandings of the Takings Clause: Can They Co-Exist?*, 21 J. LEGIS. 93, 97 (1995); *see also Lucas*, 112 S. Ct. at n.8 ("[T]he landowner whose deprivation is one step short of complete is . . . entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.")
- <sup>50</sup> 114 S. Ct. 2309 (1994) (chastising city governmental officials for an uncompensated taking of property when the unconstitutional development conditions placed on a commercial landowner were not "roughly proportional" to the city's goals of traffic regulation and floodplain protection).
- <sup>51</sup> 483 U.S. 827 (1987) (finding that the California Coastal Commission had unconstitutionally taken beachfront property by conditioning a building permit on the conveyance of a public easement). In *Nollan*, the Court noted that "unless a permit condition serves [a "legitimate state interest"], . . . [a] building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837.
- <sup>52</sup> *Id.* at 638.
- <sup>53</sup> Lavelle, *supra* note 35.
- <sup>54</sup> *See infra* notes 58-71 and accompanying text.
- <sup>55</sup> H. 597, N.C. General Assembly, Sess. 1995, draft of March 28, 1995, at 1 (emphasis added).
- <sup>56</sup> *See* Recent Legislation, *Land-Use Regulation—Compensation Statutes*, 109 HARV. L. REV. 542, 543 (1995).
- <sup>57</sup> *Id.* at 633-35.
- <sup>58</sup> Robert Meltz, *Property Rights Legislation: Analysis and Update*, 24 ALI-ABA 17, 20-21 (1996).
- <sup>59</sup> Marzulla, *supra* note 32, at 635.
- <sup>60</sup> *Id.*; *see, e.g.,* DELAWARE CODE ANN. tit. 29, § 605 (1995)



(mandating that no state regulation may take effect until the state Attorney General has informed the state agency whether its action may result in a takings); MONTANA CODE ANN. §§ 75-1-102, 103, 201 (1995) (declaring state policy to protect rights to use property free of undue regulation and requiring environmental impact statements as to regulatory impacts on private property); TENN. CODE ANN. §§ 12-1-201 to 203 (1995) (requiring state Attorney General to review and identify governmental actions that may effect a takings and prohibit regulations that do effect takings); UTAH CODE ANN. §§ 63-90-1 to 4, 63-90a-1 to 4 (1995) (mandating takings impact assessments from state agencies).

<sup>61</sup> Marzulla, *supra* note 32, at 164.

<sup>62</sup> Meltz, *supra* note 59, at 20.

<sup>63</sup> *Id.* at 22.

<sup>64</sup> See Recent Legislation, *supra* note 57, at 543 (“In the past year, five state legislatures have passed laws to protect individual property rights by creating a cause of action for landowners to obtain compensation or equitable relief when the fair market value of their property is significantly diminished as a result of government regulation.”) The five states are Florida (Fla. Laws ch. 95-181 §§ 1-3 (1995)); Louisiana (La. Rev. Stat. Ann. §§ 3: 3601, 3602, 3608, 3612, 3621, 3624 (1995)); Mississippi (Miss. Code Ann. §§ 49-22-1 to -19 (Supp. 1995); Texas (Tex. Gov’t Code Ann. ch. 517 § 2007 (1995)); and Washington (Wash. Legis. Serv. 261 (West) (repealed by referendum, Nov. 7, 1995).

<sup>65</sup> The 15 states in which compensation bills have been introduced are California, Delaware, Florida, Georgia, Iowa, Kentucky, Mississippi, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. Marzulla, *supra* note 32, at 635 n.135.

<sup>66</sup> The primary bills under consideration in Congress are H.R. 925, 104th Cong., 1st Sess. (1995) which passed the House of Representatives on March 3, 1995, and S. 605, 104th Cong., 1st Sess. (1995) which is Senate Majority Leader Bob Dole’s companion to the House bill. For a discussion of both bills, see 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, 203-206 (1995); see also James D. Smith, *Private Property Protection Legislation and Original Understanding of the Takings Clause: Can They Co-Exist?* 21 J. LEGIS. 93, 103-109 (1995) (examining whether legislative “attempts to protect private property comport with and further our commonly held notions of property while not unduly burdening government efforts to provide coherent guidance for regulatory agencies.”).

<sup>67</sup> The bill proposed in Congress, for example, requires the federal government to compensate owners of property

whose use of *any portion* of their property has been diminished by 20% or more by federal regulatory law. Peabody, *supra* note 67, at 203. President Clinton has threatened to veto the act describing it as “a requirement that Government pay property owners billions of dollars every time we act to defend our seashores or wetlands or open spaces.” Peabody, *supra* note 67, at 200. The state compensation acts set different percentages. For example, Louisiana has a 20% loss threshold, Texas a 25% loss threshold, and Mississippi a 40% loss threshold. See Recent Legislation, *supra* note 57, at n.7. Washington’s law (which was repealed by referendum), like the law proposed in North Carolina, required compensation for any diminution in value of private property. “That the Washington law was excessively ‘stringent’ was probably a primary factor behind its recent rejection by Washington voters.” Recent Legislation, *supra* note 57, at n.7 (citing David Postman, *Washington State Rejects Land Rights*, WASH. POST., Nov. 11, 1995, at E1). Florida’s bill does not set a percentage but requires the state government to compensate private property owners whenever a governmental regulation imposes an “inordinate burden” on the ability of the landowner to use her property. Recent Legislation, *supra* note 57, at n.9 and accompanying text.

<sup>68</sup> See, e.g., *Taking “Takings Rights” Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 267 (providing the comments of Roger Marzulla who criticizes the “vague and uncertain” jurisprudence of takings law).

<sup>69</sup> Meltz, *supra* note 59, at 22.

<sup>70</sup> Marzulla, *supra* note 32, at 635.

<sup>71</sup> *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>72</sup> LaVelle, *supra* note 35 (noting the comments of former Solicitor General, now Harvard Law professor, Charles Fried who calls compensation bills “radical project[s]”).

<sup>73</sup> See N.C. GEN. STAT. § 106-803 (1995) (requiring swine farms and lagoons to be sited away from certain protected neighboring properties like churches, schools and occupied residents).

<sup>74</sup> *Taking “Takings Rights” Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 262 (1995).

<sup>75</sup> Morris R. Cohen, *Property and Sovereignty*, 15 CORNELL L. Q. 8, 13 (1927).

<sup>76</sup> Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128 (1990). Professor Underkuffler also argues that the framers of the American Constitution did not believe in an individualistic approach to property law.

<sup>77</sup> H. 597, N.C. General Assembly, Sess. 1995, draft of March 28, 1995, at 4.

<sup>78</sup> D. MANDELKER, ENVIRONMENT AND EQUITY 40 (1981).