# Understanding State and Federal Property Rights Legislation

by

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# UNDERSTANDING STATE AND FEDERAL PROPERTY RIGHTS LEGISLATION

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*Introduction*

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[1] The United States Supreme Court clearly and consistently has held that when the state physically takes someone's property for a public purpose, the Fifth Amendment requires that the state compensate the property owner for the value of the property taken, even if the state takes only a portion of the property owner's "bundle of sticks."[2] The Supreme Court has been much less clear and consistent, however, in deciding when the Fifth Amendment requires the state to compensate a property owner whose land the state has not physically taken, but merely has regulated to such an extent that the property owner has lost the opportunity to enjoy much of the "economic value" associated with her property.[3]

In *Pennsylvania Coal Company v. Mahon*,[4] Justice Holmes provided the now famous narrative description of the framework within which such regulatory takings must be evaluated. On the one hand, he noted that "[g]overnment 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."[5] On the other hand, he stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6] Over the years the Supreme Court has done little to refine Holmes' equation for regulatory takings, generally applying an ad hoc balancing test which provides little in the way of predictable rules to help private

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1. U.S. CONST. amend. V.

2. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (easement for cable wires); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (public navigation access).

3. *Compare* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that taking occurred when coastal zone regulations prohibiting residential construction rendered property valueless), *with* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (holding that no taking occurred when regulations preventing operation of quarry in residential district significantly reduced value of property), *and* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (holding that no taking occurred when regulation preventing operation of brick mill in residential area diminished value of property by over 90%).

4. 260 U.S. 393 (1922).

5. *Id.* at 413.

6. *Id.* at 415.

property owners and governmental entities understand when the government has enacted a regulation that "goes too far."[7] Indeed, to the extent that one can extract some guidance from the Supreme Court's regulatory takings cases, the cases appear to suggest property owners can have some confidence that they will succeed with a regulatory takings argument only when they can show that the challenged regulation deprives them of all or virtually all of the economically viable use of their property.[8]

Needless to say, the current state of Constitutional jurisprudence regarding regulatory takings issues has left many individuals frustrated and dissatisfied, particularly given that our judicial system imposes on individual property owners the costs associated with pursuing a judicial challenge to regulations which they believe result in an uncompensated taking of their property. As a result, many people have shifted the forum in which they assert their grievances from the courts to the legislatures, with nearly twenty states enacting some type of "property rights" legislation in the last few years.[9] The state legislative enactments generally have taken one of two forms — assessment statutes and compensation statutes.[10] In addition, Congress currently is considering several pieces of "property rights" legislation.[11] This article describes and evaluates these various legislative efforts to solve the regulatory takings riddle.

To provide a framework for analyzing the state and federal legislative efforts, section I of the article summarizes the Supreme Court's regulatory takings jurisprudence and highlights some of the problems and unanswered questions that plague the Court's regulatory takings jurisprudence. Section II of the article outlines the general structure of the state assessment and compensation statutes and evaluates the benefits and shortcomings of the various assessment and compensation statutes. Section III of the article outlines the provisions of the most widely accepted Congressional "property rights" proposal and highlights some of the benefits and shortcomings of this proposal. Section IV concludes with some reflections on why the regulatory takings riddle likely will continue to remain unsolved in spite of all these legislative efforts.

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7. The Court articulated the *ad hoc* balancing test in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

8. The "categorical rule" the Supreme Court adopted in *Lucas*, one of the few cases in which the Supreme Court has found that a regulatory taking had occurred, applies only when a regulation destroys all economically viable use of property such that the property is rendered valueless. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992).

9. *See infra* notes 46, 59 and accompanying text.

10. The difference between assessment statutes and compensation statutes is discussed *infra* at notes 46-109 and accompanying text.

11. In March, the House of Representatives passed the Private Property Protection Act of 1995, H.R. 925, 104th Cong., 1st Sess. (1994); *see* 141 CONG. REC. H2629 (daily ed. Mar. 3, 1995). The Senate has several different bills addressing the protection of property rights under consideration. House Bill 925 is discussed *infra* at notes 110-20 and accompanying text.

### *I. The Supreme Court's Regulatory Takings Jurisprudence*

Any effort to summarize the Supreme Court's regulatory takings jurisprudence in a few short paragraphs results in over-simplification. For the purposes of providing an analytical framework against which to evaluate the extent to which the various legislative proposals discussed below provide a meaningful adjustment to the balance of power between the government and private property owners, however, an over-simplified summary of the Supreme Court's regulatory takings jurisprudence should suffice.

When determining whether a regulation results in a taking, the Supreme Court generally has applied an ad hoc balancing test in which it focuses its attention on whether the regulation serves a legitimate state interest and whether it interferes with a property owner's reasonable investment-backed expectations regarding the lawful uses of the property.[12] Accordingly, the Supreme Court has held that regulations that preclude a noxious use, which could have been prohibited under common law nuisance, do not result in a taking.[13] The Supreme Court also has held that regulations that generally restrict use of land for the general benefit of the public, with all affected property owners enjoying an "average reciprocity of advantage," do not result in a taking because they do not impose on a few property owners burdens that should be borne by the public at large.[14] Because the Supreme Court generally has used the property owner's entire parcel of property as the denominator in calculating the extent to which a regulation impacts a property owner's reasonable investment-backed expectations, the Supreme Court generally has held that regulations that affect only a portion of property do not significantly interfere with the property owner's reasonable investment-backed expectations.[15]

As the composition of the Supreme Court became more conservative under the Reagan and Bush Administrations, some expected that the Supreme Court finally would begin to decide regulatory takings cases in a way that offered property owners greater protection against government intrusion.[16] The Supreme Court did make some effort to balance the scales slightly more in favor of the landowner in its decision in *First English Evangelical Lutheran Church v. County of Los Angeles*.[17] In *First English*, the Court ruled that, even when a state rescinds a regulation found to accomplish a taking, the state nonetheless must compensate the

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12. *See, e.g.*, Agins v. Town of Tiburon, 447 U.S. 255, 260 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

13. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (prohibiting excavation in residential area); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibiting brick manufacturing in residential area).

14. *See, e.g.*, *Penn Cent.*, 438 U.S. at 134-35.

15. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987); *Agins*, 447 U.S. at 261; *Penn Cent.*, 438 U.S. at 123-24.

16. *See, e.g.*, David Sive, *High Court is at a Crossroads on Takings*, NAT'L L.J., Apr. 13, 1992, at 20.

17. 482 U.S. 304 (1987).

property owner for the diminishment in value suffered during the period in which the regulation was in effect.[18]

The Supreme Court's most recent opportunity to rebalance the scales in favor of property owners by providing a clearer definition of when a regulation results in a taking came with its decision in *Lucas v. South Carolina Coastal Council.*[19] *Lucas* concerned a challenge to South Carolina's Beachfront Management Act ("the Act"), which prevented Lucas from constructing any permanent habitable structures on his lots. The South Carolina trial court concluded that a taking had occurred requiring the state to compensate Lucas because the Act deprived Lucas of "any reasonable economic use of the lots" and rendered Lucas's property valueless.[20] The South Carolina Supreme Court reversed the trial court's decision. Applying what it understood to be the applicable law with respect to regulatory takings, the South Carolina Supreme Court held that because Lucas conceded that the Act constituted a lawful exercise of the state's police power, designed "to prevent serious public harm," the state need not compensate Lucas, regardless of the Act's impact on the value of Lucas's property.[21]

Subsequently, the United States Supreme Court reversed the holding of the South Carolina Supreme Court, rejecting the argument that a regulation will not trigger the need for compensation whenever the legislature has determined that the regulation serves a valid public purpose. Instead, the Court created a new "categorical rule," holding that a regulation that prohibits all economically beneficial use of land will require compensation unless the "background principles of the State's law of property and nuisance already" constrain the rights attendant to land ownership, such that the property owner had no reasonable expectation to use the property in the manner prohibited under the regulation.[22]

### *A. Unanswered Questions*

Although many expected that the *Lucas* decision would provide the Supreme Court with an opportunity to solve the regulatory takings riddle, the Supreme Court's *Lucas* decision provided property owners and governmental entities alike

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18. *Id.* at 318-21. Prior to the Supreme Court's decision in *First English*, a property owner who succeeded in challenging a regulation as a taking was not guaranteed any compensation as the governmental entity simply could rescind the regulation in question. The government thus had little economic incentive to avoid overreaching in promulgating and enforcing regulations prior to *First English*, because the only "cost" associated with excessive regulation was the possible transaction cost involved in litigating the regulatory takings issue (which the government was likely to win anyway).

19. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

20. *Id.* at 1009.

21. *Id.* at 1010.

22. *Id.* at 1029. The Supreme Court remanded the case to allow the South Carolina Supreme Court to determine whether the Act's restrictions were inherent in Lucas's title by virtue of background principles of South Carolina's law of property and nuisance. The South Carolina Supreme Court concluded that the Act resulted in a taking because the constraints on land use encompassed in the Act were not grounded in background principles of South Carolina's property and nuisance law. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

little in the way of additional guidance regarding when regulations "go too far." As a result, many questions remain unanswered.

*1. How Does the Court Define the Affected Property?*

Several scholars have noted that *Lucas* raises a question regarding the definition of the property affected by a regulation.[23] These scholars note that prior to *Lucas*, the Court traditionally viewed the entire parcel as the denominator in evaluating whether a regulation resulted in a taking by depriving the owner of reasonable investment-backed expectations.[24] Because *Lucas* involved the somewhat unique factual situation in which the Act was held to render all of Lucas's property completely valueless, the *Lucas* decision did not provide the Court with a significant opportunity to stray from this traditional approach. Nonetheless, these scholars have highlighted Justice Scalia's statement in *Lucas* that the "'deprivation of all economically feasible use' rule does not make clear the 'property interest' against which the loss of value is to be measured."[25] Since deciding *Lucas*, however, the Supreme Court reiterated its focus on the whole parcel in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust.*[26] One cannot overstate the importance of the "denominator" in the regulatory takings equation. If a regulation's impact on the economic value of a parcel of property always is measured against the value of the whole parcel, including that portion of the parcel not impacted by the regulation, there will be few instances in which property owners will be able to demonstrate that a regulation has "gone too far" in diminishing the property owner's reasonable investment-backed expectations.[27]

*2. Does Lucas's "Background Principles" Concept Apply Only as an Exception to the Categorical Rule (In Complete Loss of Value Cases) or as a More General Basis for Understanding a Property Owner's Reasonable Investment-Backed Expectations?*

Even if the Court does not alter its approach to defining the "affected parcel," Justice Scalia's "background principles" exception to the categorical rule arguably could be used to support a taking claim even when a regulation only diminishes

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23. *See, e.g.*, William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393 (1993); William Funk, *Revolution or Restatement? Awaiting Answers to Lucas' Unanswered Questions*, 23 ENVTL. L. 891 (1993); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1 (1993) [hereinafter *Evolving Thresholds*]; John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771 (1993) [hereinafter *"Taking" the Imperial Judiciary Seriously*].

24. *See, e.g.*, *"Taking" the Imperial Judiciary Seriously*, *supra* note 23, at 796 (citing Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 497-502 (1987)).

25. *Lucas*, 505 U.S. at 1016 n.7, *cited in* Fisher, *supra* note 23, at 1402-03; Funk, *supra* note 23, at 894-95; *Evolving Thresholds*, *supra* note 23, at 22.

26. 113 S. Ct. 2264, 2291 (1993).

27. *See, e.g.*, *Keystone Bituminous*, 480 U.S. at 491; Agins v. Town of Tiburon, 447 U.S. 255, 261 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

the value of a parcel of property, rather than completely negating the economically viable uses of the parcel of property. The Supreme Court held in *Lucas* that even when its categorical rule applies because a regulation precludes all economically beneficial use, compensation may not be required if the constraint on property use contained in a challenged regulation is encompassed within "background principles of the State's law of property and nuisance."[28]

The "background principles" exception is premised on the notion that a regulation that renders property valueless cannot result in a taking if it merely precludes uses of the property that the property owner could not have reasonably expected to enjoy under "background principles of the State's law of property and nuisance."[29] Although the Court discussed the "background principles" concept as an exception to the categorical rule it set forth in *Lucas*, there is no reason why the Court could not turn the "background principles" concept around and incorporate it into its general framework for evaluating a property owner's reasonable investment-backed expectations in situations in which the Court applies *Penn Central's* ad hoc balancing test, rather than *Lucas's* categorical rule. Thus, even under *Penn Central's* ad hoc balancing test, the Court could view a regulation as a taking of some portion of the owner's "bundle of rights," and could require compensation, even though the regulation does not destroy all economically beneficial use of the property, if the regulation precludes uses of property that the property owner reasonably could have expected to enjoy because the uses were not prohibited under the "background principles of the State's law of property and nuisance."[30]

*3. What Should be Included within the "Background Principles" Concept?*

The "background principles" concept, according to Justice Scalia, finds its roots in the traditional notion of takings jurisprudence that property owners reasonably should expect that the state may impose some limitation on the "'bundle of rights' that they acquire when they obtain title to property."[31] Some scholars suggest that the "background principles" concept encompasses the common law of property and nuisance, taken together with statutes, regulations and ordinances that constrain land use, because all these things impose inherent limits on a property owner's reasonable expectations regarding her "bundle of rights."[32] These scholars take the view that a property owner should not "reasonably expect" to make use of her property in a manner prohibited by nuisance law, or by statutes, regulations and ordinances in existence when she

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28. *Lucas*, 505 U.S. at 1029.

29. *Id.*

30. *See* Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387-89 (1993).

31. *Lucas*, 505 U.S. at 1027.

32. Stephen P. Chinn & Neil R. Shortlidge, *Regulatory Takings After Lucas: The Missouri Nuisance Exception*, 50 J. MO. BAR 213, 216-17 (1994); Funk, *supra* note 23, at 896-98; *Evolving Thresholds*, *supra* note 23, at 17-20.

receives her property.[33] This understanding of the "background principles" that limit a property owner's "bundle of rights" suggests that a regulation will result in a taking only if 1) it is enacted after someone acquires title, and 2) it impairs the economic value of the property by imposing restrictions on land use that did not inhere in the property owner's title at the time she received the property in question by virtue of the common law of property and nuisance and existing statutes, regulations, and ordinances.

These same scholars and others have noted, however, that the language the Court used in defining the "background principles" concept suggests that the Court may view the inherent limits on a property owner's "bundle of rights" more narrowly, focusing solely on the extent to which the common law of nuisance restricts the "bundle of rights."[34] This narrower interpretation of the "background principles" concept finds its roots both in Justice Scalia's specific reference to "background principles of the State's law of *property and nuisance*," and in his distrust of state legislatures, which he assumes will identify some public purpose to justify any regulation.[35] More importantly, because this narrower interpretation of the "background principles" concept focuses solely on judicial interpretations of what constitutes a nuisance, legislative efforts to "correct" or "supplement" the common law of nuisance through statutes, regulations and ordinances may not be protected under the "background principles" concept.[36] This narrower understanding of the "background principles" concept, therefore, suggests that a regulation will result in a taking whenever it imposes restrictions on land use that 1) impair the value of property and 2) do not inhere in the property owner's title at the time she received the property in question by virtue of the common law of nuisance.

Some scholars have noted, however, that even the narrower interpretation of the "background principles" concept may be broader than the above discussion suggests because common law public nuisance claims include claims arising when a property owner's conduct violates a statute or ordinance enacted pursuant to a state's police powers.[37] Moreover, the "background principles" of property law may include the public trust doctrine, which may place inherent limits on a property owner's "bundle of rights" such that a challenged regulation that merely expands on restrictions imposed under the public trust doctrine would not result in a taking.[38]

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33. Funk, *supra* note 23, at 896-98; *Evolving Thresholds*, *supra* note 23, at 17-20.

34. Chinn & Shortlidge, *supra* note 31, at 216; Epstein, *supra* note 30, at 1389; Funk, *supra* note 23, at 898-99; *Evolving Thresholds*, *supra* note 23, at 23-28.

35. *Lucas*, 505 U.S. at 1025-26 n.12 (emphasis added); *see* Fisher, *supra* note 23, at 1407-09; Funk, *supra* note 23, at 897-99; *Evolving Thresholds*, *supra* note 23, at 23-28.

36. *Evolving Thresholds*, *supra* note 23, at 23-28.

37. Funk, *supra* note 23, at 897-99; *Evolving Thresholds*, *supra* note 23, at 11-22.

38. Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537 (1994); Funk, *supra* note 23, at 899.

*B. Takings and Transaction Cost Problems*

One of the major problems associated with regulatory takings concerns the government's ability to take advantage of its superior bargaining position given the "balance of power" between the government and the owner of land impacted by a regulation. Recognizing that bargaining occurs within the shadow of the law,[39] and that our legal system imposes on the landowner seeking to assert a compensation claim or to challenge a compensation award the transaction costs associated with such a lawsuit, the government has the power and ability with respect to physical takings claims to offer a slightly discounted compensation award, because the transaction costs associated with challenging such an award likely will exceed the amount of any additional recovery, even if the challenger is successful.

In the context of regulatory takings this "balance of power" concern manifests itself slightly differently, and possibly even more perversely. Affected property owners not only have to incur and absorb the transactions costs associated with contesting legislation or regulations which they believe result in a regulatory taking, they also have little likelihood of success on the merits given the rare circumstances in which the Supreme Court has found that regulatory takings occur.[40] As a result, federal and state legislatures and agencies arguably do not face a significant "check" against efforts to regulate land use in a way that may significantly impair property values.

Indeed, over the last couple of decades, while environmental statutes and regulations increasingly have resulted in significant constraints on the ways in which property owners may use their land, sometimes requiring that property owners leave some portion of their land in its natural state,[41] the courts generally have provided little relief for affected property owners seeking compensation through a regulatory takings challenge.[42]

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39. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

40. *Compare* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (finding no taking); Agins v. Town of Tiburon, 447 U.S. 255, 261 (1980) (same); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) (same); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (same) *with* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that taking occurred when regulation rendered property valueless).

41. *See, e.g.*, Leslie Salt Co. v. United States, 896 F.2d 354, 360-61 (9th Cir. 1990), *aff'd on remand*, 55 F.3d 1388 (9th Cir.), *cert. denied*, 116 S. Ct. 407 (1995) (holding that because the Clean Water Act's section 404 dredge and fill permit program applies to adjacent and isolated wetlands, the landowner may not alter wetlands without complying with permit requirements); Communities for a Greater Or. v. Babbitt, 115 S. Ct. 2407, 2416-18 (1995) (holding that the Endangered Species Act prohibits significant habitat modification that could harm a listed species).

42. *See, e.g.*, Marks v. United States, 34 Cl. Ct. 387 (1995); Tabb Lakes, Inc. v. United States, 10 F.3d 796 (Fed. Cir. 1993) (finding that application of wetlands regulations did not result in a taking). *But see* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (finding a taking where wetland regulation deprived owner of all economically beneficial use of land).

It should not come as a great surprise, therefore, that the "property rights" movement has shifted much of its focus onto the state legislatures and Congress in its effort to find a fair resolution to the regulatory takings riddle and to establish a new balance between the power of government and the rights of property owners.[43] This effort has resulted in "property rights" legislation being debated in the halls of virtually every statehouse and in the halls of Congress. In the last three years, approximately twenty state legislatures have enacted some type of "property rights" legislation, which generally takes one of two forms — an assessment statute or a compensation statute.[44] In the last year, Congress has had several "property rights" bills offered for debate.[45] The following sections of the article discuss the various state assessment and compensation statutes, as well as the most noteworthy of the Congressional proposals, placing specific emphasis on evaluating the benefits and shortcomings of the statutes and proposals in light of the unanswered questions and transaction cost problems associated with the current state of regulatory takings jurisprudence.

## *II. State Property Rights Legislation*

### *A. Assessment Statutes*

Assessment statutes represent the most common form of "property rights" legislation states have enacted to date.[46] In general, assessment statutes direct the

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43. In his seminal article of almost 30 years ago, Professor Michelman suggested that legislatures may need to be involved in the compensation problem because of institutional inadequacies that hamper the ability of courts to promote fair results. Frank I. Michelman, *Property, Utility, Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1245-55 (1967).

44. *See infra* notes 46-58 and accompanying text (discussing assessment statutes). *See infra* notes 59-109 and accompanying text (discussing compensation statutes).

45. For example, several Senators introduced property rights bills in the 104th Congress, including Sen. Bob Dole (R.-Kan.), Senate Bill 22, Sen. Orrin Hatch (R.-Utah), Senate Bill 135 and Senate Bill 605, Sen. Phil Gramm (R.-Tex.), Senate Bill 145, and Sen. Don Nickles (R.-Okla.) and Sen. Richard Shelby (R.-Ala.), Senate Bill 239. They subsequently consolidated their efforts into cosponsorship of an omnibus property rights bill, Senate Bill 605. *Republican Senators Release Far Reaching Property Rights Bill*, INSIDE EPA'S ENVTL. POL'Y ALERT, Mar. 29, 1995, at 46-47. In addition, Representative Canady introduced House Bill 925, which is discussed *infra* at notes 110-20 and accompanying text.

46. Eleven states have enacted assessment statutes: DEL. CODE ANN. tit. 29, § 605 (1994); IDAHO CODE § 67-8001 to -8003 (1995); IND. CODE § 4-22-2-32 (1994); Private Property Protection Act of 1995, ch. 170, 1995 Kan. Sess. Laws 563; MO. REV. STAT. § 536.017 (1994); Private Property Assessment Act of 1995, ch. 462, 1995 Mont. Laws 2230; Act of Apr. 4, 1995, ch. 312, 1995 N.D. Laws 916; Act of May 9, 1994, ch. 924, 1994 Tenn. Pub. Acts 846; UTAH CODE ANN. § 78-34a-1 to -4 (1994); W. VA. CODE § 22-1A-3 (1995); WYO. STAT. § 9-5-302 (1995). In addition, three states have passed bills or resolutions calling for study of the regulatory takings problem. Arizona passed a bill creating a "joint legislative study committee on the constitutional regulation of private real property" to study "potential legal and administrative procedures necessary to secure the constitutional rights of real property owners against governmental intrusion." ARIZ. REV. STAT. ANN. § 9-500.13 (1995). Arizona previously had enacted an assessment statute, but the statute was defeated in a referendum vote in 1994. *See* Dennis Wagner, *'War' In Wings As Voters Reject Property-Rights Issue*, PHOENIX GAZETTE, Nov. 9, 1994, at A1 (reporting that Arizona voters shot down Proposition 300, a referendum on the Arizona assessment statute). Virginia passed a joint resolution calling for a legislative study of the "property

state attorney general, or agencies generally, to evaluate whether proposed rules or regulations result in a taking before the rules or regulations can take effect.[47]

*1. The Impact of Assessment Statutes on Unanswered Questions*

Notably, with the exception of the North Dakota statute, which is discussed below, none of the assessment statutes address any of the unanswered questions relating to regulatory takings jurisprudence, because each of the statutes defines a taking by reference to the Fifth and Fourteenth Amendments to the United States Constitution.[48] Thus, the legislatures in states with "assessment" statutes generally have incorporated into their statutes the United States Supreme Court's much-maligned takings formula with all the unanswered questions that come with it.

One notable exception arises with respect to North Dakota's statute, which provides as follows:

> 'Regulatory taking' means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.[49]

At first blush this statutory language seems to diverge from the Constitutional jurisprudence regarding regulatory takings by creating a threshold of fifty percent diminution in value for determining whether a regulation accomplishes a taking. Because the legislature framed the exceptions in the disjunctive, however, it arguably created a set of exceptions that swallow the rule. So few regulations would appear to be subject to the fifty percent threshold that it is hard to imagine that the fifty percent threshold has any continuing relevance.[50]

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rights" issue as it relates to state legislation and regulation. 1994 Va. H.J.R. 526, 1994-95 Reg. Sess. South Dakota similarly passed a concurrent resolution calling for a rebalancing of "the need to protect the environment and to protect the rights of landowners." S.D. Sen. Conc. Res. 10, 70th Leg., 1995 Reg. Sess. Only five states have enacted compensation statutes. *See infra* notes 59-109 and accompanying text.

47. The Delaware, Indiana, Montana and Tennessee statutes direct the attorney general to assess whether proposed rules or regulations will result in a taking. The Idaho, Kansas, Missouri, North Dakota, Utah, West Virginia and Wyoming statutes direct agencies to assess whether proposed rules or regulations will result in a taking, with some states specifically directing that the attorney general provide the guidelines for agencies to use in conducting the assessments.

48. *See, e.g.*, DEL. CODE ANN. tit. 29, § 605 (1994); IDAHO CODE § 67-8001 to -8003 (1995); Private Property Protection Act of 1995, ch. 170, 1995 Kan. Sess. Laws 563.

49. Act of Apr. 4, 1995, § 3, ch. 312, 1995 N.D. Laws 916, 917.

50. Based on a conversation with Commissioner Sarah Vogel of the North Dakota Department of Agriculture, this language appears to be the result of a political compromise designed to allow both sides of the property rights battle to claim victory. Conversation with Commissioner Sarah Vogel at American Agricultural Law Association Conference, in Kansas City, Mo. (Nov. 3, 1995).

*2. Impact of Assessment Statutes on Balance of Power Problems*

*a) Public Awareness*

Even though the assessment statutes may contribute little to the resolution of the unanswered questions of regulatory takings jurisprudence, the assessment statutes generally do make some contribution toward rectifying the "abuse of power" problem which tempts federal and state legislatures and agencies considering proposed legislation or regulations that may benefit the community at large at the expense of a handful of adversely affected property owners. By forcing state attorneys general or state agencies to consider whether proposed rules or regulations result in a taking, frequently through a process that invites public awareness, the legislatures enacting assessment statutes have imposed at least a small check on the state agencies' ability to promulgate regulations that significantly impair property rights without providing compensation.[51]

How much of a check? Given that the assessment statutes generally require agencies to perform assessments based on the Constitutional jurisprudence regarding regulatory takings, for all the reasons discussed previously, the assessment statutes are unlikely to generate assessments that indicate that a proposed regulation constitutes a taking. Moreover, when one takes into account 1) that one of the statutes expressly provides that citizens may not bring suit over non-compliance with the assessment process,[52] 2) that one statute makes it clear that the only issue for judicial review is whether the attorney general "reviewed the rule or regulation and has informed the issuing agency in writing,"[53] and 3) that most of the other statutes do not speak expressly to the question of the consequences of noncompliance with the assessment process,[54] it becomes clear that the assessment statutes provide property owners only a nominal shield to protect against regulatory takings and almost no sword with which to fight regulatory takings. In sum, the assessment statutes generally do not make it much more difficult for state agencies to promulgate regulations that significantly impair property rights. State agencies generally retain all of their preexisting ability to promulgate rules or regulations that significantly impair property rights with little risk that a court will require compensation. The assessment statutes simply make it more likely that state agencies may be less aggressive in pursuing regulatory excesses given the potential political pressure that may result from the public awareness of the assessment process.

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51. Although many of the assessment statutes require the attorney general or the agency to make a public report of some type, several statutes fail to provide any specific means for public dissemination of the results of the assessment.

52. IDAHO CODE § 67-8003(3) (1995) (stating that "[n]othing in this section grants a person a right to seek judicial relief requiring compliance with the provisions of this chapter").

53. DEL. CODE ANN. tit. 29, § 605(a) (1994).

54. *See, e.g.*, IND. CODE § 4-22-2-32 (1994); Private Property Protection Act of 1995, ch. 170, 1995 Kan. Sess. Laws 563; MO. REV. STAT. § 536.017 (1994); Act of Apr. 4, 1995, ch. 312, 1995 N.D. Laws 916; Act of May 9, 1994, ch. 924, 1994 Tenn. Pub. Acts 846; UTAH CODE ANN. § 78-34a-1 to -4 (1994); W. VA. CODE § 22-1A-3 (1995); WYO. STAT. § 9-5-302 (1995).

*b) Consideration of Alternatives*

Some statutes do contain specific language, however, that may provide some additional checks on abuse of power by state agencies. Several statutes specifically require that the assessment include a consideration of alternatives to the proposed action that would reduce the impact on property owners.[55] In addition, the North Dakota statute specifically requires that the agency "explain why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners" and "[c]ertify that the benefits of the proposed rule exceed the estimated compensation costs."[56]

*c) Fee-Shifting*

Two states have adjusted the "balance of power" by enacting "fee-shifting" statutes that authorize or require the payment of attorneys fees to an owner of private property who successfully establishes that a government action constitutes an unconstitutional taking of such owner's private property.[57] On the one hand, the fee-shifting language arguably provides some incentive for state agencies to proceed with caution when promulgating regulations that may significantly impair property rights because landowners have an added incentive to challenge regulations. On the other hand, the extent to which the fee-shifting language creates a meaningful incentive remains colored by the Constitutional jurisprudence regarding regulatory takings, under which few landowners are likely to be successful in their regulatory takings challenges.

*d) Conclusion*

In many respects, the assessment statutes provide a framework reminiscent of the National Environmental Policy Act.[58] The assessment statutes do impose procedural obligations which may influence agency decision-making, but because the assessments generally are based on existing regulatory takings jurisprudence and because the assessment statutes do not provide a party with an opportunity to seek judicial review on the merits of the assessment, the assessment statutes likely will not influence agency decision making to a significant degree.

*B. Compensation Statutes*

Five states have enacted "compensation" statutes — statutes that expressly describe circumstances in which state agencies must compensate property owners

55. Private Property Assessment Act of 1995, § 5(3), ch. 462, 1995 Mont. Laws 2230, 2232; UTAH CODE ANN. § 78-34a-1 to -4 (1994); W. VA. CODE § 22-1A-3 (1995); WYO. STAT. § 9-5-302 (1995). Montana also has an Environmental Policy Act which the legislature amended to require consideration of a regulation's impact on private property owners. Act of Apr. 11, 1995, ch. 352, 1995 Mont. Laws 1130.

56. Act of Apr. 4, 1995, §§ 1(c), (f), 1995 N.D. Laws 916, 916.

57. Private Property Protection Act of 1995, § 9, ch. 170, 1995 Kan. Sess. Laws 563, 566 (stating that court may award fees to successful owner); Act of May 9, 1994, § 6, ch. 924, 1994 Tenn. Pub. Acts 846, 847 (stating that court shall award fees to successful owner).

58. 42 U.S.C. §§ 4321-4370d (1995).

because of regulatory constraints that impair property values.[59] Three states, Louisiana, Mississippi and North Carolina, have enacted subject-specific statutes.[60] Two states, Florida and Texas, have compensation statutes of general application.[61]

*1. Subject-Specific Statutes*

*a) North Carolina*

The North Carolina statute[62] provides little in the way of new insights into regulatory takings. The statute simply provides that a property owner who believes that North Carolina's efforts to conserve the marine and estuarine resources of the State have deprived the property owner of her or his "rights in land under navigable waters" or her or his "right of fishery in navigable waters" may file a complaint seeking compensation for the "taking."[63] The statute makes little effort to answer the unanswered questions described previously. Although it arguably defines the affected property interest — rights in land under navigable waters or right of fishery in navigable waters — it does not define expressly the threshold for determining when such interests are taken. Accordingly, it would appear that the North Carolina courts should continue to use the Constitutional jurisprudence regarding regulatory takings, with all of its muddiness and uncertainty, as the framework for assessing whether compensation is required.

*b) Louisiana*

The Louisiana statute,[64] by contrast, does offer insights into ways in which a state legislature can try to answer some of the unanswered questions and readjust the balance of power between the government and property owners. As a first step toward adjusting the balance of power between the government and property owners, the statute contains an assessment component much like many of those

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59. Bert J. Harris, Jr. Private Property Rights Protection Act of 1995, ch. 95-181, 1995 Fla. Laws 1651; LA. REV. STAT. ANN. §§ 3:3602-3624 (West 1995); MISS. CODE ANN. §§ 49-33-1 to -17 (1995); N.C. GEN. STAT. § 113-206 (1994); Act of June 12, 1995, 1995 Tex. Gen. Laws ch. 517; Private Property Regulatory Fairness Act of 1995, ch. 98, 1995 Wash. Laws 360.

60. Louisiana Right to Farm Law, 1995 La. Acts ch. 302 (farming and forestry); MISS. CODE ANN. §§ 49-33-1 to -17 (1995) (farming and forestry); N.C. GEN. STAT. § 113-206 (1994) (land under navigable waters or fishing rights in navigable waters).

61. Bert J. Harris, Jr. Private Property Rights Protection Act of 1995, ch. 95-181, 1995 Fla. Laws 1651; Act of June 12, 1995, 1995 Tex. Gen. Laws ch. 517. In addition, Washington enacted a draconian compensation statute in 1995, the Private Property Regulatory Fairness Act of 1995, ch. 98, 1995 Wash. Laws 360, which essentially contained a zero loss compensation threshold — any regulation that results in any reduction in value regarding any portion of a parcel of property would have triggered a compensation obligation. The voters rejected the statute, however, by a 60%-40% margin in a referendum in November 1995. Rob Taylor, *The Voters Soundly Reject R-48*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1995, at A1 (reporting that Washington voters soundly rejected what would have been the nation's broadest law to force government to compensate for actions that diminish value of property).

62. N.C. GEN. STAT. § 113-206 (1994).

63. *Id.* § 113-206(e).

64. LA. REV. STAT. ANN. §§ 3:3601-3624 (West 1995).

discussed previously.[65] In addition, however, the statute expressly answers some of the questions left unanswered by the Constitutional jurisprudence regarding regulatory takings.

*(1) Affected Property and Threshold for Compensation*

For example, the statute expressly provides that in deciding whether a government action[66] results in a taking, the court must look at the impact of the action on the "affected portion of any parcel" of agricultural land or "any portion" of forest land,[67] a departure from the Supreme Court's general use of the entire parcel as the denominator for evaluating the impact of a regulation on a property owner.[68] Similarly, the statute establishes the takings threshold by requiring compensation any time government action diminishes the fair market value or the economically viable use of the affected portion of a parcel of property by twenty percent or more.[69]

*(2) Background Principles*

The Louisiana statute also makes some effort to answer the "background principles" question, as it provides that "[t]he owner of the affected private agricultural property shall show that the diminution in value did not result from a restriction or prohibition of a use of the private agricultural property that was not a use already prohibited by law."[70] How this language will be applied remains to be seen. Because the statute does not focus expressly on the common law, the statute would appear to recognize that statutes, regulations, and ordinances also inform a decision regarding whether a new regulation or government action diminishes value. But the statute offers no express guidance about whether "already prohibited by law" means at the time someone acquired property or at the time a given regulation was promulgated. Because the assess-

65. *Id.* §§ 3608-09, 3622.1. The assessment provisions require the consideration of alternatives to the proposed action "that would lessen or eliminate any adverse impact" on agricultural or forest land. *Id.* §§ 3609(7), 3622.1(7).

66. The statute defines government action to include "the issuance of a rule, regulation, policy, or guideline promulgated for or by any governmental entity, or an order or other legally binding directive." *Id.* §§ 3602(12), 3622(3). The statute expressly excludes legislative statutes and resolutions and court orders from the definition of government action. *Id.* §§ 3602(12)(b), (c), 3622(3)(d), (e). The statute further provides that it shall not apply "to any governmental action where the purpose of the said governmental action is the regulation of agriculture or the regulation of agricultural activity by a governmental entity charged with the responsibility of promotion, protection, and advancement of agriculture." *Id.* § 3612(C).

67. *Id.* §§ 3602(11), 3621(6).

68. *See supra* notes 23-27 and accompanying text.

69. *Id.* §§ 3602(11), 3622(6). Consistent with the Supreme Court's holding in First English Church v. County of Los Angeles, 482 U.S. 304 (1987), the statute provides the governmental entity a choice of compensating the landowner or rescinding the regulation and compensating the landowner solely for the diminishment in value during the period in which the regulation was in effect. LA. REV. STAT. ANN. § 3610.F (West 1995).

70. *Id.* § 3610(A). As noted *supra* at note 66, however, the statute also does not apply to certain agricultural regulations. There is no comparable provision applicable to owners of affected forest land.

ment provision requires an analysis of "[w]hether the proposed governmental action restricts or prohibits a use which is already prohibited by existing law,"[71] however, one could infer that "already prohibited by law" means at the time an agency promulgates or implements a given regulation rather than at the time the property owner acquired title to the property.

*(3) Other Efforts to Adjust Balance of Power*

In addition to these adjustments to the balance of power, the Louisiana statute also imposes two other checks on government action. First, it gives the impacted agricultural property owner, but not the owner of forest land, the choice of retaining title and receiving compensation for the diminishment in value, or transferring the land to the government for its preregulation fair market value.[72] Second, it authorizes the court to award attorneys fees to the prevailing party.[73]

*c) Mississippi*

The Mississippi statute[74] likewise offers insights into ways in which a state legislature can try to answer some of the unanswered questions and readjust the balance of power between the government and property owners. The Mississippi statute mirrors the Louisiana statute in that it applies only to agriculture and forest land.[75] Unlike the Louisiana statute, it does not contain any language requiring that agencies perform takings assessments prior to promulgating rules and regulations. Like the Louisiana statute, however, the Mississippi statute does contain language that answers expressly some of the questions left unanswered by the Constitutional jurisprudence regarding regulatory takings.

*(1) Affected Property and Threshold for Compensation*

For example, the Mississippi statute, like the Louisiana statute, departs from the Supreme Court's general use of the entire parcel as the denominator for evaluating the impact of a regulation on a property owner by providing that in determining whether an action of the State of Mississippi[76] requires compensation, the court

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71. *Id.* § 3609(B)(6).

72. *Id.* § 3610(D). The statute also expressly encourages parties to disputes regarding agricultural land, but not regarding forest land, to pursue mediation, and even authorizes the court to order the parties to attempt mediation "at any point in the proceedings prior to trial." *Id.* § 3610(C).

73. *Id.* §§ 3610(E), 3623(D)-(E). Notably, this attorneys fees language is something of a double-edged sword for landowners and governmental entities alike. This may serve to minimize the extent to which the statute prompts litigation because both landowners and governmental entities may be more willing to resolve disputes without litigation in cases in which their arguments are questionable rather than risk incurring the other party's attorneys fees should the other party prevail in litigation.

74. MISS. CODE ANN. §§ 49-33-1 to -17 (1995).

75. *Id.* § 49-33-3. Notably, as originally enacted in 1994, the statute applied only to forest land. Mississippi Forestry Activity Act, ch. 647, 1994 Miss. Laws 1308. The statute was amended in 1995 to incorporate agricultural land as well. Mississippi Agricultural and Forestry Activity Act, ch. 379, 1995 Miss. Laws 200.

76. The statute defines the State of Mississippi to include the state and any political subdivision of the state. MISS. CODE ANN. § 49-33-7(j) (1995).

must look at the impact of the action on the "fair market value of forest or agricultural land (or any part or parcel thereof)."[77] Similarly, the statute expressly establishes the takings threshold by requiring compensation any time action by the State of Mississippi reduces the fair market value of the affected portion of a parcel of property "by more than forty percent (40%) of [its] value before the action."[78]

*(2) Background Principles*

The Mississippi statute also makes some effort to answer the "background principles" question, as it provides that compensation is not required with respect to an action under the state's police power "to prohibit activities that are noxious in fact or are harmful to the public health and safety."[79] Similarly, the statute does not require compensation with respect to an order issued as a result of a violation of any existing statute, rule, regulation, ordinance, resolution, or similar action, "as interpreted on the effective date of the act."[80] This language suggests that action taken to abate a nuisance or to enforce a rule or regulation in effect as of the effective date of the statute will not trigger a regulatory taking, but actions to enforce subsequently promulgated rules or regulations, or actions that implement a changed interpretation of an existing rule or regulation may trigger a taking. Thus, an owner's reasonable investment-backed expectations are based on the state of the common, statutory, and regulatory law on the effective date of the compensation statute, not simply on the state of the common law at the time the property owner received title.

*(3) Other Efforts to Adjust Balance of Power*

In addition to these adjustments to the balance of power, the Mississippi statute also imposes one other check on government action, as it authorizes the court to award to the landowner the costs of litigation, including attorneys fees, if the governmental entity rescinds the regulation subsequent to the filing of the action and prior to a decision becoming final.[81]

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77. *Id.* § 49-33-7(h).

78. *Id.* Consistent with the Supreme Court's holding in First English Church v. County of Los Angeles, 482 U.S. 304 (1987), the statute provides the governmental entity a choice of compensating the landowner or rescinding the regulation and compensating the landowner only for the diminishment in value during the period in which the regulation was in effect provided that the rescission occurs before a decision in an action becomes final. MISS. CODE ANN. § 49-33-9(2) (1995). Notably, however, if the governmental entity fails to rescind the regulation until after a decision becomes final the rescission will not affect the state's obligation to compensate the affected property owner pursuant to the decision.

79. *Id.* § 49-33-7(e)(ii). The statute specifically provides that public health and safety regulations that prohibit or severely restrict agricultural or forestry activities must (1) respond "to real and substantial threats to public health and safety," (2) be designed "to significantly advance the health and safety purpose," and (3) be "[n]o greater than necessary to achieve the health and safety purpose." *Id.* § 49-33-7(i).

80. *Id.* §§ 49-33-7(e)(iii), -7(k).

81. *Id.* § 49-33-9(2). Oddly, although the statute expressly states that the landowner is entitled to recover the costs of litigation when the governmental entity rescinds the regulation prior to a decision

*2. Statutes of General Application*

*a) Texas*

The Texas statute[82] also offers many insights into ways in which a state legislature can try to answer some of the unanswered questions and readjust the balance of power between the government and property owners. The Texas statute contains an assessment provision which requires the attorney general to prepare guidelines to assist political subdivisions in evaluating actions that may result in a taking and requires political subdivisions to conduct such assessments prior to providing public notice of the proposed government action.[83] The assessment must include a consideration of alternatives. The statute also makes it clear that a political subdivision's failure to perform an assessment renders void any government action for which the statute requires a takings assessment.[84]

*(1) Affected Property and Threshold for Compensation*

Much like the Louisiana and Mississippi statutes, the Texas statute sets a precise threshold for determining when a regulation accomplishes a taking. It provides that a taking occurs when a government action "is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property."[85] Notably, however, unlike the Louisiana and Mississippi statutes, the Texas statute does not clearly depart from the Supreme Court's general use of the entire parcel as the denominator for evaluating the impact of a regulation on a property owner.[86] It is not clear whether "affected private real property" means the portion of property affected by the regulation or the affected property taken as a whole.[87]

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becoming final, it does not clearly provide that the landowner generally is entitled to recover the costs of litigation, including attorneys fees, if the landowner prevails in an action.

82. TEX. GOV'T CODE ANN. § 2007 (1995).

83. *Id.* § 2007.041-.043. The statute defines a government action to include, among other things, "(1) . . . an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure; [and] (2) an action that imposes a physical invasion or requires a dedication or exaction of private real property." *Id.* § 2007.003. The statute contains several express exclusions from the definition of government action, including most municipal regulations and "action taken to prohibit or restrict a condition or use of private real property if the government entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state." *Id.* § 2007.003(b)(1), (6).

84. *Id.* § 2007.044.

85. *Id.* § 2007.002(5). The statute specifically entitles a prevailing landowner only to have the governmental action invalidated, *id.* § 2007.023(b), although it provides the governmental entity the option of compensating the landowner rather than invalidating the action in question. *Id.* § 2007.024(c)-(d). Notably, the statute does not follow the logic of the Supreme Court's *First English* decision, as it does not require the governmental entity to compensate for the diminution in value during the period in which an invalidated governmental action was in effect.

86. *See supra* notes 67, 77 and accompanying text.

87. *Id.* § 2007.002(5).

*(2) Background Principles*

The Texas statute also makes some effort to answer the "background principles" question, as it excludes from the definition of government action efforts to preclude nuisances,[88] and further provides that a property owner may not pursue a lawsuit or an administrative hearing with respect "to the enforcement or implementation of a statute, ordinance, order, rule, regulation, requirement, resolution, policy, guideline, or similar measure that was in effect on September 1, 1995," and that prevents the pollution of a sole source aquifer.[89]

*(3) Other Efforts to Adjust Balance of Power*

The Texas statute also imposes an additional check on government action by requiring the court to award attorneys fees to prevailing parties.[90]

*b) Florida*

In the Bert J. Harris Private Property Rights Protection Act,[91] the Florida legislature recognized "that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution."[92] Believing that protecting private property owners from such inordinate burdens constitutes an important state interest, the Florida legislature created "a separate and distinct cause of action from the law of takings," to provide "relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."[93] Specifically, the Florida statute provides that a property owner is entitled to relief "[w]hen a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property."[94]

*(1) Affected Property and Threshold for Compensation*

Notably, the Florida statute does not define the threshold for compensation with the same exactitude as the Louisiana statute, for example. Instead, the statute

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88. *Id.* § 2007.003(b).
89. *Id.* § 2007.004(c).
90. *Id.* § 2007.026. *See supra* note 73.
91. Ch. 95-181, 1995 Fla. Laws 1651
92. *Id.* § (1).
93. *Id.*
94. *Id.* § (2). The statute defines an "existing use" as

> an actual, present use or activity on the real property, . . . or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the actual, present use or activity on the real property.

*Id.* § (3)(b). The statute provides that "vested rights" are defined "by applying the principles of equitable estoppel or substantive due process under the common law or by applying [Florida] statutory law." *Id.* § (3)(a).

contains a narrative description of the circumstances in which a property owner is entitled to relief.

> The terms 'inordinate burden' and 'inordinately burdened' mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.[95]

Although this language in many respects reflects some of the muddy language the Supreme Court has used in trying to define when regulations "go too far," the purpose clause of the statute makes it clear that the Florida legislature designed the "inordinate burden" threshold to facilitate relief for property owners in circumstances in which relief might not be available under the state and federal constitutions.[96] Nonetheless, because the Florida statute directs courts to consider the impact of the government action "with respect to the real property as a whole,"[97] it appears to follow the current Supreme Court approach of evaluating whether a taking has occurred by looking at the extent to which the regulation diminishes the value of the property owner's entire interest in land.[98]

*(2) Background Principles*

The statute also makes a fairly clear effort to address the "background principles" issue, as it does not apply to "impacts to real property occasioned by government" efforts to address a public nuisance at common law or a noxious use of private property.[99] In addition, it does not apply "to the application of any law enacted on or before the date of adjournment . . . of the 1995 Regular Session of the Legislature, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date."[100] Similar to the Mississippi statute, therefore, the Florida statute suggests that actions taken to enforce preexisting rules and regulations do not trigger regulatory takings, while actions taken to implement rules and regulations adopted subsequent to the conclusion of the 1995 legislative session may trigger a regulatory taking.

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95. *Id.* § (3)(e).

96. *See supra* notes 92-94 and accompanying text. The statute also expressly states that it "provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution." *Id.* § (9).

97. *Id.* § (3)(e).

98. *See supra* note 15 and accompanying text.

99. *Id.* § (3)(e).

100. *Id.* § (12).

*(3) Other Efforts to Adjust Balance of Power*

The most interesting and distinctive aspect of the Florida statute, however, concerns the innovative dispute resolution procedure the Florida legislature created to facilitate an equitable resolution of property rights disputes.[101] The statute requires that a property owner seeking compensation for allegedly inordinate burdens arising from some government action must present a claim to the agency(ies) responsible for the action more than 180 days prior to commencing suit. The claim must include "a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the property."[102] During the 180-day notice period, which the parties can agree to extend, the statute requires that "the government entity shall make a written settlement offer to effectuate" one or more of several approaches to resolving the differences between the property owner's interest in using her land and the government entity's interest in protecting the public interest reflected in the rule, regulation or ordinance that gave rise to the dispute.[103] The legislature specifically anticipated that this dispute resolution process may trigger creative results that exceed or contradict statutory authority. To address this possibility, the statute provides for the parties to bring an action in circuit court to obtain approval of an agreement that "would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property . . . to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."[104]

If the parties are unable to reach an agreement, the statute directs the government entity to "issue a written ripeness decision identifying the allowable uses to which the property may be put," which constitutes the last prerequisite to judicial review.[105] The statute further provides that "[i]f the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation."[106] The statute states: "The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed, and, if so, whether, considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property."[107]

If the court determines that the government entity has inordinately burdened the claimant's property, the statute directs the court to award compensation

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101. *Id.* §§ (4)-(6).

102. *Id.* § (4)(a).

103. *Id.* § (4)(c).

104. *Id.* § (4)(d)(2).

105. *Id.* § (5)(a). The statute provides that the dispute will be ripe for judicial action, regardless of the existence of other administrative remedies, following the issuance of the ripeness decision, or at the conclusion of the 180-day notice period if the government entity fails to issue a ripeness decision. *Id.*

106. *Id.* § (5)(b).

107. *Id.* § (6)(a).

> determined by calculating the difference in fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation, . . . and the fair market value of the real property, as it existed at the time of the government action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity.[108]

Notably, the statute provides that the court may award reasonable attorneys fees to the prevailing party, provided that such party can demonstrate that it acted in good faith in making a settlement offer (government entity) or in rejecting a settlement offer (property owner).[109]

### *III. Proposed Federal Legislation*

Although there have been a variety of legislative proposals offered in Congress regarding property rights issues,[110] this article will focus primarily on the Private Property Protection Act of 1995, as that is the only proposal that has been approved by one of the two houses of Congress.[111] House Bill 925 contains a very broad purpose statement in section 2(a), providing that "[i]t 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."[112] Section 2(b) provides that "[e]ach 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."[113]

House Bill 925 actually applies expressly to a much narrower range of government activity, however, as it applies only to agency action "under specified regulatory law." House Bill 925 defines specified regulatory law as follows:

> (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. § 3821 et seq.); or
>
> (D) with respect to an owner's right to use or receive water only [the Reclamation Acts, the Federal Land Policy Management Act, and section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974].[114]

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108. *Id.* § (6)(b).

109. *Id.* § (6)(c). *See supra* note 73.

110. *See supra* note 45.

111. H.R. 925, 104th Cong., 1st Sess. (1995). The House of Representatives passed the Private Property Protection Act of 1995 on March 3, 1995. 141 CONG. REC. H2629 (daily ed. Mar. 3, 1995).

112. H.R. 925, 104th Cong., 1st Sess., § 2(a) (1995).

113. *Id.* § 2(b).

114. *Id.* § 9(5).

In essence, therefore, House Bill 925 applies only (1) to wetlands regulations under the Clean Water Act and the Swampbuster provisions of the Food Security Act of 1985, (2) to habitat restrictions under the Endangered Species Act, and (3) to various restrictions on rights to use or receive water.

*A. Affected Property and Threshold for Compensation*

House Bill 925 answers both the affected property question and the threshold for compensation question. House Bill 925 provides as follows: "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."[115]

*B. Background Principles*

With respect to the background principles issue, House Bill 925 essentially adopts Justice Scalia's nuisance exception from *Lucas* with a slight gloss. House Bill 925 provides that "no compensation shall be made under this Act with respect to a limitation on" a use that is defined as a nuisance "by the law of a State or is already prohibited under a local zoning ordinance."[116] It further provides that action primarily intended to prevent a hazard to public health or safety or an action related to a navigation servitude will not trigger a compensation obligation except to the extent that the navigation servitude applies to wetlands.[117]

Notably, this language suggests that preexisting statutory or regulatory constraints relating to wetlands or endangered species habitat do not constitute part of the "background principles" that shape everyone's understanding of a property owner's reasonable investment-backed expectations, except to the extent that they are encompassed within a state's nuisance law or a municipality's zoning ordinance, neither of which is likely. This could mean that property owners who purchased property knowing that it was subject to wetlands restrictions nonetheless could receive compensation under House Bill 925, were it to become law, whenever agency action under the applicable wetlands restrictions diminishes the fair market value of the wetlands portion of their property by more than 20 percent. Although this certainly constitutes one way to adjust the "balance of power" between the government and private property owners, one could argue that it shifts the balance too much in favor of property owners (1) whose land may not be significantly impacted, and (2) who may not be able to assert in good faith that they had a reasonable expectation regarding their right to use the property in the manner restricted.

115. *Id.* § 3(a).
116. *Id.* § 4.
117. *Id.* § 5.

### C. Other Efforts to Adjust Balance of Power

House Bill 925 imposes on federal agencies a notice obligation. Specifically, House Bill 925 states that "[w]henever an agency takes an agency action limiting the use of private property, the agency shall give appropriate notice to the owners of that property explaining their rights under this Act and the procedures directly affected for obtaining any compensation that may be due to them under this Act."[118] House Bill 925 also imposes a notice obligation on property owners. "An owner seeking compensation under this Act shall make a written request for compensation to the agency whose agency action resulted in the limitation. No such request may be made later than 180 days after the owner receives actual notice of that agency action."[119] House Bill 925 also gives property owners a choice to pursue relief through arbitration or a lawsuit, and provides that property owners who prevail in an arbitration or a civil action "shall be entitled to . . . a reasonable attorney's fee and other litigation costs (including appraisal fees)."[120]

## IV. Conclusion

The regulatory takings riddle has puzzled courts, commentators, governments, and property owners for decades. Although many scholars have offered critiques of the Supreme Court's decisions and occasionally proposed solutions to the regulatory takings riddle,[121] the Court has not been quick to embrace the proposed solutions.

Justice Brandeis wrote that states should serve as laboratories in which social experimentation can occur for the good of the nation.[122] Many state legislatures have decided to take Justice Brandeis at his word by enacting an array of assessment and compensation statutes that will enable them to experiment in the search for the appropriate balance between government power to regulate land use and property owners' rights to enjoy the use of their land or receive compensation for significant restrictions on the use of their land.

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118. *Id.* § 8.

119. *Id.* § 6(a).

120. *Id.* § 6(e). Notably, because House Bill 925 does not allow the prevailing party to recover attorneys fees, the government would not be able to recover its attorneys fees were it to prevail in an action brought under House Bill 925.

121. *See, e.g.*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); John Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U.L. REV. 465 (1983); Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Carol Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

122. Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")).

Most of the assessment statutes provide little in the way of meaningful experimentation. Although the assessment requirement marks a small adjustment in the balance between government power and the rights of property owners, the adjustment is hardly significant given that the statutes generally direct agencies or attorneys general to base their assessments on the existing Constitutional jurisprudence regarding regulatory takings.

The compensation statutes on the other hand, show some significant experimentation, particularly with respect to the Florida and Texas statutes. Each of these statutes makes a concerted effort to adjust the balance of power between the government and private property owners by imposing compensation obligations in circumstances in which the Constitution, as presently interpreted, would not require compensation. Whether these statutes provide an appropriate balance remains to be seen. The Texas statute may provide a meaningful comparison with its twenty-five percent diminishment invalidation/compensation threshold, especially given that the diminishment in value appears to be judged against the value of the property as a whole. The Florida statute, even though it provides the least precision in terms of defining the compensation threshold, may provide the most meaningful lessons, as its dispute resolution procedures provide property owners with a great opportunity to have their concerns heard and addressed without negating the government's ability to develop an appropriate system of land use regulations to address legitimate public concerns.

As the Supreme Court continues to struggle to define when a given regulation "goes too far," you can anticipate that state legislatures and Congress will continue in their efforts to solve the regulatory takings riddle. These continuing efforts to find a workable balance between government power to regulate land use and the rights of private property owners to enjoy the use of their land should be the subject of fruitful analysis for years to come.