March 1997

Leapfrogging the Constitution: The Rise of State Takings Legislation

Mark W. Cordes

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38GC1F

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Introduction.................................................................................................................. 187
I. The Supreme Court Takings Doctrine................................................................. 192
   A. Development of Takings Doctrine............................................................. 192
   B. The Last Decade....................................................................................... 196
II. State Takings Legislation..................................................................................... 204
   A. Assessment Statutes.................................................................................. 204
      1. Assessment Process............................................................................. 205
      2. Scope.................................................................................................. 208
      3. Judicial Review.................................................................................... 210
   B. Compensation Statutes.............................................................................. 212
      1. Texas..................................................................................................... 215
      2. Florida.................................................................................................. 218
III. Critique of Takings Legislation........................................................................... 220
   A. Assessment Statutes.................................................................................. 221
   B. Compensation Statutes.............................................................................. 225
      1. The Percentage Statutes....................................................................... 226
         a. The Nature of the Property Interests............................................. 229
         b. Givings and Reciprocity................................................................... 234
      2. The Florida Alternative........................................................................... 238
Conclusion .................................................................................................................. 241

INTRODUCTION

The last decade has seen a growing property rights movement in this country.1 To a limited extent this has been supported by an in-

creased recognition of property rights by the United States Supreme Court. Four times in the past decade the Court has expanded property rights relative to government regulation, demonstrating an increased seriousness about reviewing restrictions on private property. In particular, the Court has clearly established that land use regulations that result in a total loss of economic viability or involve a physical invasion of land constitute a taking.

Beyond that, however, constitutional takings analysis remains less than clear and offers only limited hope to property rights advocates. Although the Court has indicated that takings are not limited to the above two categorical types, it has declined to provide clear guidance as to what other government actions might constitute takings. Moreover, except in the exceptional instances of physical invasion or loss of


3. In addition to striking down various land use regulations during this period, the Court has used a tone in its decisions that emphasizes the need to take property rights seriously. See, e.g., Dolan, 512 U.S. at 392 (property rights are not a "poor relation" to other constitutional safeguards); Nollan, 483 U.S. at 843 (Fifth Amendment's Property Clause is "more than a pleading requirement and compliance with it [is] to be more than an exercise in cleverness and imagination").

4. See Lucas, 505 U.S. at 1029.

5. See Dolan, 512 U.S. 385; Nollan, 483 U.S. at 831 (attributing the doctrine to Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982)).


7. See Lucas, 505 U.S. at 1019 n.8 (clarifying that takings are not limited to categorical takings, but can also be established with less than total loss of economic viability under Court's balancing test).

8. For takings challenges that involve a less than total denial of economic viability, the Court applies a relatively open-ended balancing test, examining the interference with investment-backed expectations, diminution in value, and character of the government action. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977).
all economic viability, the Supreme Court and lower courts typically reject takings challenges to government regulation. This has been true even where significant diminution in value occurs, often because important state interests support the regulations. Although several lower federal court decisions have recently applied a more expansive takings analysis, in most instances courts have been sensitive to the important concerns supporting regulations and have taken a deferential approach.

For these reasons property rights enthusiasts have recently shifted their attention to the legislative arena. At the federal level Congress recently considered several proposals that would have significantly expanded the range of federal land use controls that constitute takings. The House of Representatives passed H.R. 925, the Private Property Protection Act of 1995. That legislation would have provided compensation when limited types of federal agency action diminished property value by twenty percent or more. The Senate Judiciary Committee reported out S. 605, the Omnibus Property Rights Acts of 1995, which would, inter alia, have required compensation for diminution of value of thirty-three percent or more. Although these bills generated significant debate, no final legislation passed the 104th Congress.

9. See Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. REV. 77, 87-88 (1995) (noting, in wetlands context, courts almost always reject takings challenges if substantial uses remain, even if diminution in value is fifty percent or more).

10. See Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181-82 (Fed. Cir. 1994) (recognizing possibility of partial takings requiring just compensation); Florida Rock Indus. v. United States, 18 F.3d 1560, 1569-71 (Fed. Cir. 1994) (allowing for judicial balancing of competing values to distinguish between partial regulatory takings and the mere "diminution in value" that often accompanies otherwise valid regulatory impositions that are non-compensable). For a critique of these cases, see Michael C. Blumm, The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 ENVTL. L. 171 (1995).


12. H.R. 925 would have applied only to federal actions under the Clean Water Act, the Endangered Species Act, and provisions of the Food Security Act of 1985. For discussion and criticism of the bill, see Frank I. Michelman, A Skeptical View of "Property Rights" Legislation, 6 FORDHAM ENVTL. L.J. 409 (1995).

13. S. 605, 104th Cong. (1995). Although the Senate bill had a higher threshold to trigger a taking, it would have covered a much broader category of government actions and therefore was arguably the more far reaching legislation. Cf. Joseph L. Sax, Takings Legislation: Where It Stands and What Is Next, 23 ECOLOGY L.Q. 509, 515 (1996) (noting that the Office of Management and Budget estimated the cost of the Senate bill as being "several times" that of the House bill).

14. For general discussion about the debate surrounding the proposed federal legislation, see Barbara Moultan, Takings Legislation: Protection of Property Rights or Threat to the Public Interest?, ENV'T, Mar. 1995, at 44. For academic discussion of the legislation, see Sax, supra note 13; Michelman, supra note 12; Rose, supra note 1; Nancy G. Marzulla, State Private Property Rights Initiatives as a Response to "Environmental Takings", 46 S. CAL. L. REV. 613 (1995).
Perhaps even more significant has been a wide array of state takings legislation. In the past three years at least seventeen states have enacted some type of takings legislation. Moreover, proposed takings legislation has been introduced in almost every state, with legislation still pending in committee in a number of states.

Proposed and enacted state takings legislation fall into two general categories. Most are what are often called “assessment” or “red-tape” statutes. Often modeled on President Reagan’s Executive Order 12,630 for federal regulations, these statutes typically require that state agencies “assess” whether their actions would constitute a taking under current judicial standards, and, if so, refrain from the regulation or pay just compensation. As such, they do not impose substantive limits on regulation.


17. In the first two years of the takings legislation movement, 1992 and 1993, thirty-nine states considered takings legislation, with thirty-two states considering legislation in 1993 alone. See STATE TAKINGS LEGISLATION: A RESOURCE BOOK FOR ACTIVISTS 1993-1994 (National Audubon Society, 1993) [hereinafter RESOURCE BOOK]. See infra note 103 for states that have considered takings statutes in the past several years.

18. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), reprinted in 5 U.S.C. § 601. The order requires federal agencies to assess whether their actions or proposed actions constitute takings under standards promulgated by the Attorney General. The standards are to reflect the current takings standards of the Supreme Court. Id.

The second, and less frequent, form of legislation is statutes that require just compensation when regulations decrease the value of property beyond a certain point. Such legislation has been enacted in only four states, but has been introduced in more than twenty other states. Unlike the assessment bills, which potentially create administrative headaches but involve little substantive change, compensation legislation would significantly expand the scope of compensable takings.

These state takings initiatives have generated widespread and intense debate. Proponents of takings statutes praise them as necessary measures to protect a small number of landowners from being unfairly required to shoulder the costs of environmental regulation. In response, many environmental and government groups have united to resist takings statutes, criticizing them as creating new property rights to pollute, and as a costly, wholesale assault on the environmental agenda. The intensity of the debate is seen also in the political arena: in Arizona and Washington, takings legislation passed by legislatures was subsequently rejected by popular referendum, while in


22. See Michael M. Berger, Dollars and Damages: A Debate: Yes! It's the Fair Thing to Do, Planning, Mar. 1996, at 22; Marzulla, supra note 14, at 636; see also Lavelle, supra note 1, at 34 (discussing impetus for property rights movement).

23. See Moulton, supra note 14, at 45 (noting how opponents stress that such legislation would be expensive and would impede government's protection of public interest); Ed Carson, Property Frights; Property Rights, Reason, May 1996, at 27 (explaining that opponents raise concerns about the environment but focus on the tax and bureaucratic increases that would result from the statutes).

24. The Arizona legislature enacted an assessment takings statute in 1992, which was subsequently repealed by a three-to-two margin in a statewide referendum. See Lavelle, supra note 1, at 34. The Washington legislature passed an extreme form of compensation statute, requiring compensation to be paid for any diminution in value. It was subsequently submitted to a statewide referendum, where it lost by a similar margin. Douglass, supra note 15, at 1074; Rob Taylor, The Voters Soundly Reject R-48, Seattle-Post Intelligencer, Nov. 8, 1995, at A1.
Oregon and Colorado, governors vetoed previously passed takings legislation.25

This article will examine the recent and potentially significant trend in state takings legislation. Part I will describe the development and current state of Supreme Court takings law. Part II will then survey current takings legislation, examining first assessment statutes and then compensation statutes. Finally, Part III will critique the state takings statutes.

I. THE SUPREME COURT TAKINGS DOCTRINE

Supreme Court takings law has taken a long and tortuous path.26 Although the Court has carved out a few areas of clarity, for the most part takings analysis remains a difficult area to grasp.27 The Court has generally declined to apply bright line standards, instead choosing in most instances to apply an ad hoc balancing test. Even as the Court has attempted to recognize some clear categories of takings in recent years, it has not clarified critical terms in its categorical analysis. Moreover, since most government regulations fall outside the narrow confines of the categorical takings, courts are left to struggle with the difficult task of balancing interests to resolve takings claims.

A. Development of Takings Doctrine

Most early Supreme Court decisions refused to find takings, though at times the scope of the early decisions was unclear. Although the Court recognized early that the takings clause reached direct appropriations or physical invasions, in a series of early decisions the Court declined to find takings for regulations that served significant public purposes despite a significant impact on property value.28 For example, in its 1887 decision in Mugler v. Kansas,29 the Court upheld a Kansas statute that prohibited the manufacture of intoxicating liquors, noting that the state did not have to "compen-
sate... owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”

The Court further noted that prohibiting property use determined to be “injurious to the health, morals, or safety of the community” was not a constitutional taking of property. Similarly, in the 1915 case of Hadacheck v. Sebastian, the Court sustained an ordinance prohibiting the manufacture of bricks in a residential area even though the ordinance reduced the value of the plaintiff’s land from $800,000 to $60,000. The Court rejected an argument that the owner had a vested right to continue the brickyard because of prior use, stating that “there must be progress, and if in its march private interests are in the way, they must yield to the good of the community.”

The exact scope of these early decisions is unclear. At a minimum, they establish that substantial diminution in value or significant economic loss does not necessarily constitute a taking. The cases are also often interpreted as establishing that government regulation of nuisance-like activity does not constitute a taking. At the time, however, a third reading seemed possible: that the cases stood for the broader proposition that any government regulation serving legitimate public purposes was immune from a takings challenge.

The Court rejected the third reading in the seminal decision of Pennsylvania Coal v. Mahon, establishing for the first time that the mere regulation of property, even for valid purposes, might constitute a taking. In Pennsylvania Coal the Court reviewed a state statute, which prohibited the mining of anthracite coal when subsidence damage would result. The effect of the statute was to require coal com-

30. Id. at 669.
31. Id. at 668-69.
32. 239 U.S. 394 (1915).
33. Id. at 410.
35. The Supreme Court in Lucas interpreted these early nuisance cases in a third manner, stating that the harmful or noxious uses principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Taking Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.

panies to keep a portion of the coal in the ground. The Court acknowledged that government could not go on if it had to pay every time its regulations reduced the value of land, but stated that if a regulation "goes too far it will be recognized as a taking." The Court concluded that the regulation at issue had gone "too far" and constituted a taking, but failed to explain that conclusion other than by stating that the statute made the mining of anthracite coal "commercially impracticable."

Although establishing that regulatory takings occur when the government "goes too far," the Court gave little guidance as to when that point is reached. It did indicate that the extent of the diminution in value is a factor, but the Court did not clarify how that is determined other than by saying that when the diminution reaches a "certain magnitude" there is a taking. Nor did the Court clarify how its new regulatory takings doctrine fit in with its prior "noxious use" cases. The Court stated, however, that at bottom the question of whether a regulation is a taking is one of fairness and of where the burden of regulation should fall. Its analysis strongly suggested, however, that at least in some cases a regulation serving a valid government purpose can still be a taking if the economic impact is severe.

Despite the Court's recognition of regulatory takings in Pennsylvania Coal, it has consistently upheld most government acts against takings challenges. Indeed, from Pennsylvania Coal in 1922 until Lucas v. South Carolina Coastal Council in 1992, the Court did not invalidate a single government action as a regulatory taking. Although the Court found takings for physical invasions, it never held a restriction to be a taking on the basis of its regulatory impact alone.
Rather, in a number of cases the Court upheld land use restrictions on property use despite substantial economic loss.\(^{47}\)

The Court acknowledged the ad hoc nature of its takings jurisprudence in its 1977 decision in *Penn Central Transportation Co. v. New York City*.\(^{48}\) In rejecting a challenge to New York City's Landmark Preservation Law,\(^{49}\) the Court noted that it had eschewed any "set formula" for determining takings, but stated that it preferred instead to "engage in essentially ad hoc, factual inquiries."\(^{50}\) It proceeded to identify a number of factors that are relevant in determining whether a regulation is a taking, including the nature of the regulation, the purposes it serves, and perhaps most important, the interference with investment-backed expectations.\(^{51}\) On that basis, the Court upheld the Landmark Ordinance, noting that Penn Central could still use the property for its original purpose and that a reasonable return was available on the land.\(^{52}\)

*Penn Central* typifies much of the Court's takings jurisprudence this century. Though clearly acknowledging that at times "justice and fairness" require that compensation be paid for regulatory burdens,\(^{53}\) the Court intentionally avoided any set formula and instead suggested a variety of factors to be considered.\(^{54}\) It failed, however, to clarify how the factors relate to each other. It appeared to give significant weight to the degree of interference with investment-backed expectations but, typical of takings analysis, failed to clarify what the term means or how it should be applied.\(^{55}\) The Court also suggested, as it

\(^{47}\) See e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (seventy-five percent diminution in value); see also, *Penn Central*, 438 U.S. at 131 (stating that diminution in value, "standing alone, [cannot] establish a taking").


\(^{49}\) In *Penn Central* the City of New York, pursuant to its Landmark Preservation Law, designated Grand Central Terminal, owned by Penn Central, as a "landmark." As a consequence, Penn Central could not make any exterior changes to the terminal, even if consistent with applicable zoning regulations, without prior approval of a Landmarks Preservation Commission. Penn Central sought approval of two alternative plans to build either a fifty-three story or a fifty-five story addition on top of the terminal. The Commission rejected both plans, essentially on the basis that they would aesthetically denigrate the landmark. Penn Central challenged the application of the Landmark Preservation Law as a taking. *Id.* at 115-19.

\(^{50}\) *Id.* at 124.

\(^{51}\) *Id.*

\(^{52}\) *Id.* at 136.

\(^{53}\) *Id.* at 123-24.

\(^{54}\) Commentators have frequently characterized the Court's taking analysis during this period as a balancing test. See Frank I. Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1622 (1987).

\(^{55}\) The Court did note that the Landmark Law did not interfere with the original purpose for which Penn Central had purchased the property—use as a railroad terminal. *Penn Central*, 438 U.S. at 136. Penn Central also conceded that it was able to receive a
did in *Pennsylvania Coal*, that the fundamental inquiry in takings jurisprudence is fairness.56

### B. The Last Decade

The last ten years have seen an increased protection of property rights by the Supreme Court. Indeed, the Court on four occasions has recognized, and arguably expanded, takings claims in land use contexts. A close reading of those decisions, however, indicates that although they are significant, they fall far short of the hopes of the property rights movement. Moreover, only one of the four cases addressed the typical regulatory takings issue.

In one of the first decisions, the 1987 case of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,57 the Court held that just compensation was required for the period between the enactment of a regulation and the final judicial determination that a taking occurred.58 Prior to *First English*, courts often assumed that landowners were limited to invalidating the restriction, and could obtain compensation only if the government failed to repeal its regulation.59 The Court found the language of the Fifth Amendment self-executing, however, and held that if a regulation was eventually found to be a taking, just compensation was required for the period from enactment to repeal.60 Though significantly expanding landowner rights, the case did not address the thorny issue of when a taking occurs;61 rather, it clarified the scope of potential compensation once a taking has been established.

In another decision the same year, *Nollan v. California Coastal Commission*,62 the Court addressed whether a taking occurs when development approval is conditioned on a landowner first providing a physical dedication of land, where that dedication is unrelated to any development impact.63 Emphasizing the Court's longstanding concept of investment-backed expectations in a takings case. *Id.* The concept of investment-backed expectations has emerged as a significant one in takings analysis. For an in-depth exploration of the concept and its application since *Penn Central*, see Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215 (1995); see also Oswald, *supra* note 6, at 99-118.

---

58. *Id.* at 321.
59. *See Cunningham et al., supra* note 6, at 522-23.
60. *First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 319.
61. *Id.* at 313.
63. In *Nollan*, the owners of a small house on the Pacific coast sought a "coastal development permit" from the California Coastal Commission in order to demolish the house and replace it with a larger one. The Commission approved the permit contingent on the Nollans granting a public easement across their property between the high tide mark and a seawall. *Id.* at 827-28. After an administrative hearing upheld the grant of the
cern for physical invasions of property, the Court held that such ex-
actions would be valid only if there is an "essential nexus" between
the required dedication and the asserted state interest that would jus-
tify denial of development in the first instance. Seven years later, in
Dolan v. City of Tigard, the Court further clarified the required rela-
tionship, stating that there had to be "rough proportionality" between
the required exaction and the adverse effects of development.

Together, Nollan and Dolan are certainly significant land use de-
cisions that have clarified and expanded landowner rights. Although
affirming the right of local government to seek reasonable exactions,
the Court made clear that the exactions must relate to and flow from
the development itself. This made unconstitutional the common prac-
tice of using the development permit process as an excuse to capture
interests the government does not want to pay for. As important as
these cases are, however, they are predicated upon the Court's con-
cern for physical invasions of property, and thus do not address the
broader issue of when regulations constitute takings.

The only recent Supreme Court decision addressing the regula-
tory takings issue is the 1992 decision of Lucas v. South Carolina

_1997_ [LEAPFROGGING THE CONSTITUTION] 197
easement as a prerequisite to permit approval, the Nollans challenged the easement re-
requirement as a taking. _Id._ at 828-29.

64. _Id._ at 831. For examples of cases in which the Court has found physical invasions
of property, see _supra_ note 45, and _infra_ note 77.

65. _Id._ at 837. The Court in Nollan held that there was no nexus between the required
 easement in that case and any asserted justifications for denying the owner's request to
build a larger house. The Commission had tried to defend the easement requirement on
the basis that the larger house would interfere with "visual access" to the beach for people
on the road and in turn create a "psychological barrier" to use of the beach for those on
the road. _Id._ at 838. The Court found no nexus at all between these problems and the
required easement stating that "[i]t is quite impossible to understand how a requirement
that people already on the public beaches be able to walk across the Nollans' property
reduces any obstacles to viewing the beach created by the new house." _Id._

66. 512 U.S. 374 (1994). In Dolan, the owner in question sought a building permit to
more than double the size of her plumbing store and add a paved parking lot. The Plan-
ning Commission granted the permit subject to two conditions: that she dedicate a portion
of her property as greenway within the city's floodplain and that she dedicate a fifteen foot
strip of land next to the floodplain for use as part of a path for pedestrians and bicycles. _Id._
at 380.

67. _Id._ at 391.

68. Both Nollan and Dolan have generated significant commentary. See _Takings: Land-

69. See _Dolan_, 512 U.S. at 385; Nollan, 483 U.S. at 831.
Coastal Council.\textsuperscript{70} There the Court brought some analytical clarity to the regulatory takings doctrine. In perhaps the most significant takings decision since \emph{Pennsylvania Coal}, the Court held that a land use regulation that deprives an owner of all "economically viable" use of the land constitutes a taking.\textsuperscript{71} It further recognized a nuisance exception to this standard, but limited it to only common law nuisances.\textsuperscript{72}

In \emph{Lucas} the plaintiff, David Lucas, had purchased two residential beach front lots for $975,000, planning to build single-family units as then allowed under applicable law. After his purchase, however, the South Carolina legislature passed legislation designed to preserve critical areas along the South Carolina coast. As applied to his land, the legislation barred the building of any permanent habitable structure on his property, in essence requiring that the property be kept in its natural state.\textsuperscript{73} The state trial court found that the property was made "valueless," and held this constituted a taking under \emph{Pennsylvania Coal}.\textsuperscript{74} The South Carolina Supreme Court reversed, stating that however great the economic impact might be, it was not a taking because it was enacted "to prevent serious public harm."\textsuperscript{75}

Justice Scalia, writing for the majority, began his analysis by pointing out that the Court had generally avoided any "set formula" in deciding taking cases, instead engaging in "essentially ad hoc, factual inquiries."\textsuperscript{76} Nevertheless, he noted that the Court had previously recognized two types of categorical takings, in which a taking is found once certain facts are established. First is where the government "physically invades" or requires that another be permitted to invade the property. In such situations a compensable taking is near automatic, "no matter how minute the intrusion, and no matter how

\begin{itemize}
\item \textsuperscript{70} 505 U.S. 1003 (1992).
\item \textsuperscript{72} \textit{Lucas}, 505 U.S. at 1027-32. The Court thus clarified that a legislative body cannot merely declare a nuisance rationale to justify a restriction, but that any nuisance justification must be based on common law standards.
\item \textsuperscript{73} \textit{Id.} at 1008-09.
\item \textsuperscript{74} \textit{Id.} at 1009.
\item \textsuperscript{75} \textit{Lucas v. South Carolina Coastal Council}, 304 S.C. 376, 383, 404 S.E.2d 895, 899 (1991). The South Carolina Supreme Court relied upon what it perceived to be the U.S. Supreme Court's "nuisance" line of cases, such as \textit{Mugler v. Kansas}, 123 U.S. 623 (1887), which arguably held that there is no taking when government regulates noxious activity, no matter how great the economic loss to the landowner.
\item \textsuperscript{76} \textit{Lucas}, 505 U.S. at 1015 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977)).
\end{itemize}
weighty the public purpose behind it.”

The second type of categorical takings recognized in Lucas is “where regulation denies all economically beneficial or productive use of land.” In recognizing this category of takings, the Court pointed to a number of cases in which it had stated, albeit in dicta, that a taking occurs when a regulation “denies an owner economically viable use of his land.” The Court supported the reasonableness of such a categorical taking by noting that “in the extraordinary circumstance” when the land has lost all economic viability “it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life.”

The Court further noted that loss of all economic viability cannot be justified merely by asserting important public interests, as the Coastal Council had attempted to do. Rather, the loss of all economic viability can be justified only where the regulation is preventing what would amount to a common law nuisance. Thus, the effect of Lucas was to recognize a “nuisance” exception to the “no economic viability” categorical taking, but to limit it to the narrow category of common law nuisances. The Court remanded Lucas on this basis, noting that although there was no economic viability, the issue of whether the statute was preventing a common law nuisance was a question of state law. In dictum, however, the Court expressed doubt that the

---

77. Id. The Court cited several examples of this type of categorical taking, including Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (law requiring landlords to allow cable companies to place cables in rental properties) and United States v. Causby, 328 U.S. 256 (1946) (physical invasion of airspace).

78. Lucas, 505 U.S. at 1015.

79. Id. at 1015-16. The phrase “economically viable” had first been used in a footnote in Penn Central. See Penn Central, 438 U.S. at 138 n.36. The Court then used the phrase in Agins v. City of Tiburon, 447 U.S. 255 (1980), as part of a two-prong test for takings, stating that a zoning law will be a taking if it “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” Id. at 260 (citing Penn Central) (citations omitted). The Court used that same articulation of the standard in a series of decisions in the 1980s to begin discussion of takings. See, e.g., Nollan, 483 U.S. at 834; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981). In none of the decisions was there a finding of “no economic viability.”

80. Lucas, 505 U.S. at 1017-18. The Court also noted that the functional reason for not requiring compensation any time a government regulation affects the value of land—that government could not go on that way—does not apply when the regulation denies all economic viability. Id. at 1018.

81. See id. at 1029-31. The Court reasoned that since under common law concepts of property a landowner cannot cause a nuisance to his or her neighbor, the activity being regulated would not “inhere in the title” to begin with. Id.
harms justifying the statute would qualify as a common law nuisance. 82

Although Lucas was an important victory for property rights proponents, it did not radically alter the landscape of takings law. As the Court itself acknowledged, the loss of all economic viability is a relatively rare occurrence. 83 Indeed, the Court had stated in dictum on at least five previous occasions that loss of all economic viability was a taking, 84 but had not until Lucas been able actually to apply that standard, since in each of those earlier cases some economic viability had remained. The finding of no economic viability in Lucas itself was arguably only the result of a questionable finding by the trial court. 85

Because of its reliance on the finding of "no economic viability," Lucas did little to clarify the more common scenario where a land use restriction reduces, but does not altogether eliminate, economic viability of land. It stated, however, that although such a restriction would not constitute a categorical taking, it might still constitute a taking under the Court's ad hoc balancing. The Court did not elaborate on the precise structure such a determination would take, but did state that "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant" to its general takings analysis. 86 The Court further indicated that in the noncategorical setting it is necessary to consider the public interest served by the regulation. 87

82. Id. at 1031. On remand the South Carolina Supreme Court held that there was no common law basis for prohibiting development of the land in question. It then remanded the case to a lower court to determine damages. Lucas, 309 S.C. 424, 427, 424 S.E. 2d 484, 486 (1992). The Coastal Commission eventually settled with Lucas by agreeing to purchase his property for $1,575,000, which reflected both the value of the property and various costs associated with the litigation. Id. See Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy, 1018 (2d ed. 1996).

83. Lucas, 505 U.S. at 1017.

84. See Nollan, 483 U.S. at 834; Keystone Bituminous Coal Ass'n, 480 U.S. at 495; United States v. Riverside Bayview Homes, 474 U.S. 121, 126 (1985); Hodel, 452 U.S. at 295-96; Agins, 447 U.S. at 260.

85. See, e.g., Lucas, 505 U.S. at 1033-34 (Kennedy, J., concurring) (curious finding that beach lot has no economic value); id. at 1043-44 (Blackman, J., dissenting); id. at 1065 n.3 (Stevens, J., dissenting); but see, Fischel, supra note 36, at 60 (stating that "the trial judge's conclusion seems correct").

86. Lucas, 505 U.S. at 1019 n.8 (quoting Penn Central, 438 U.S. at 124). Justice Stevens' dissent criticized the majority for adopting a rule that provides relief for a total loss of economic viability, but no relief when the diminution in value is ninety-five percent. In response, the majority emphasized that the "no economic viability" standard was a categorical taking, but in other circumstances a taking still might be found under the Court's balancing test previously articulated in Penn Central. Id.

87. See id. at 1015 (stating that physical invasions constitute a categorical taking no matter how weighty the state interest, suggesting that for noncategorical taking analysis the significance of the state interest is a factor to be considered).
Finally, in establishing a categorical takings for denials of all economic viability, the Court in *Lucas* also discussed and implicitly endorsed several of the Court's prior rationales for not automatically compensating for any loss in value but instead requiring a balancing of interests. First, it noted that in the normal instance where land value is reduced but not altogether eliminated, the Court can fairly assume that government "is simply 'adjusting the benefits and burdens of economic life' ... in a manner that secures an 'average reciprocity of advantage' ... to everyone concerned." 88 The notion of reciprocity has been important in takings jurisprudence, with both the Court and commentators noting that land use restrictions can be justified in part because of the reciprocal benefits landowners receive from similar land use regulations and broader economic regulations. 89 Thus, even though a particular regulation might harm a particular landowner, that same landowner gains in numerous ways from regulations affecting others.

*Lucas* gives a second and related rationale as well, one first noted by Justice Holmes in *Pennsylvania Coal*: government could not function if it had to pay every time its regulations harmed a landowner. 90 Although largely a pragmatic consideration, this also reinforces considerations of reciprocity. Government regulation is essential to an ordered society and to any land use system. Property itself is a social construct created and maintained by government. Some regulation is therefore both expected and necessary to protect property.

After *Lucas* the current state of Supreme Court takings jurisprudence can be summarized as follows. The Court recognizes two types of categorical takings, meaning that once the plaintiff establishes facts placing the government regulation in that category a taking conclusion follows, without any need to balance various interests. The first type of categorical taking is a physical invasion, either by the government itself or where the government permits third parties to invade the property. A special subcategory here is the coercive exaction problem addressed in *Dolan* and *Nollan*, where necessary development approval is conditioned on dedication of land. 91 Such exactions are valid

88. *Id.* at 1017-18 (quoting *Penn Central*, 438 U.S. at 124 and *Pennsylvania Coal*, 260 U.S. at 415).


90. *Lucas*, 505 U.S. at 1018; *Pennsylvania Coal*, 260 U.S. at 413.

91. Some commentators have suggested that the coercive exaction problem of *Nollan* and *Dolan* is a distinct and third type of taking problem. See Freilich & Bushek, *supra* note 68, at 201-04 (identifying three types of takings: physical takings; title takings (*Nollan* and *Dolan*); and economic takings).
only if there is "rough proportionality" between the requested exaction and development impacts. 92

The second type of categorical taking is where the effect of a government regulation is to deny a landowner all economically viable use of the land, 93 unless it is regulating a common law nuisance. As noted by numerous commentators, critical to this determination is how the property is defined, and in particular whether the property can be segmented to create, in effect, partial takings. 94 Although in a footnote in Lucas the Court suggested the issue was not yet resolved, 95 as a practical matter the Court has consistently resisted attempts to segment property for purposes of analyzing economic impact. Instead, the Court has used the entire contiguous parcel as the appropriate unit of property for analyzing economic impact, even where the regulation affects only a portion of the parcel. 96 Not only does this com-

92. See Dolan, 512 U.S. at 391.
93. See Lucas, 505 U.S. at 1015-16.
94. Professor Frank Michelman discussed this issue in his seminal article on takings, in which he noted that since the Court's takings analysis requires a comparison of what has been taken to what is left, a critical question is what is the property "whose value is to furnish the denominator of the fraction." Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1192 (1967). A number of commentators since then have discussed the critical role this question plays in any takings analysis, often calling it the "denominator" issue. See, e.g., Blumm, supra note 10, at 184; Carol Rose, Mahon Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. CAL. L. REV. 561, 566-69 (1984); Oswald, supra note 6, at 126-127.
95. Lucas, 505 U.S. at 1016-17 n.7. The Court stated:
Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id.
96. In two cases prior to Lucas, the Court seemed to have rejected segmentation arguments and instead defined the property broadly. In Penn Central the property owner had argued that the relevant unit of property for analysis was only the restricted air rights, which arguably could have led to a finding of significant economic impact. The Court rejected the argument, however, instead treating the relevant unit of property for analysis as the air rights together with the underlying currently developed parcel. The Court stated that 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

Penn Central, 438 U.S. at 130-31.
The Court similarly rejected an attempt to segment the property in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), where it reviewed a statute, similar to that in Pennsylvania Coal, which required that coal be kept in the ground to avoid subsidence problems. Although the regulated coal companies attempted to segment the
port with typical views of land ownership, but it also avoids the problem of potentially turning all regulations into takings by narrowing the definition of the property. Indeed, after raising the question in *Lucas* the Court suggested that the issue is best resolved by resort to property owners' reasonable expectations of how their property is defined,\(^97\) an approach that in most instances would result in a broad definition of the unit of property.

Apart from these two categorical takings, the Court continues to eschew any "set formula" and instead proceeds on an ad hoc basis, reviewing a variety of factors. Particularly significant are the economic impact of the regulation, its interference with investment-backed expectations, and the purposes the regulation serves.\(^98\) The Court has failed to clarify how these factors work together, or even how key terms are defined. The Court has made clear, however, that diminution in value alone does not establish a taking under the ad hoc approach, but must be evaluated in the context of the other factors.\(^99\) As a practical matter, it is quite difficult to establish a taking under this ad hoc approach, in part reflecting the sensitivity of courts to the important purposes of government regulation and the reciprocal advantages of economic regulation.

The Court's current takings jurisprudence therefore falls far short of the aggressive agenda of the property rights movement. Although it has made modest advances in the last decade, the Court has declined to adopt bright line standards and require compensation for most land use restrictions. In particular, the Court has never held that diminution in value requires compensation per se. For these reasons property rights advocates have turned to the legislative arena, both federal and state, to advance their agenda. The next part of this article will examine state takings legislation proposed and enacted over the last several years.

---

\(^97\) See *Lucas*, 505 U.S. at 1016-17 n.7, stating

'[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.

\(^98\) See id. at 1019 n.8; *Penn Central*, 438 U.S. at 124; Mandelker, *supra* note 55.

\(^99\) See *Penn Central*, 438 U.S. at 131.
II. STATE TAKINGS LEGISLATION

Proposed and enacted state takings legislation falls into two broad categories: assessment statutes and compensation statutes. Although the two kinds of statutes are usually proposed and enacted separately, some statutes contain elements of each category. This part of the article will examine first assessment statutes and then compensation statutes. It will also briefly review statutes recently enacted in Texas and Florida, the most far-reaching compensation statutes to date.

A. Assessment Statutes

The most common type of takings legislation is what are commonly known as assessment or "look before you leap" statutes. To date at least fifteen states have enacted some type of assessment statute and assessment legislation has been introduced in numerous other states in the last several years. Such statutes typically require state agencies, and sometimes local governments, to assess whether their actions might constitute unconstitutional takings under either federal or state supreme court decisions.


101. For discussions of assessment legislation, see Freilich & Doyle, supra note 15, at 3-6; Organ supra, note 15, at 199-202; Marzulla, supra note 14, at 633; Thomas, supra note 15.


The model for most state assessment legislation is an Executive Order issued in 1988 by President Reagan. Executive Order No. 12,630 requires federal agencies to perform "Takings Impact Analyses" to evaluate whether proposed regulations constitute takings of private property. The order requires the Attorney General to promulgate "Takings Guidelines" to assist agencies in their evaluations. The order specifically provides that it does not enlarge or change the scope of takings law, but instead requires assessments according to current Supreme Court principles. Like Executive Order 12,630, most assessment statutes state that they do not enlarge or change substantive takings law, but rather are designed to facilitate compliance with existing constitutional norms. Accordingly, they specifically define takings according to current law as established by the United States and respective state supreme courts.

Despite this common ground, the details of assessment legislation vary considerably. Although generalizations are difficult, differences can be grouped into three general categories. First are differences in the assessment process itself; second are differences in the scope of coverage; third are differences regarding judicial review.

1. Assessment Process

The first area of difference among states is the assessment process used and the degree of administrative burden imposed on state agencies. Two states, Indiana and Delaware, merely require the state's Attorney General to assess whether proposed state rules constitute a

105. See Marzulla, supra note 14, at 629.
107. Id.
108. Enacted or proposed assessment statutes frequently state that they do not intend to enlarge or reduce the scope of private property protections provided by the federal or state constitutions. See, e.g., TENN. CODE ANN. § 12-1-201 (Supp. 1996); IDAHO CODE § 67-8001 (1995); W. VA. CODE § 22-1A-2 (1994). One possible exception is the North Dakota statute, which defines a regulatory taking in its assessment statute as exercise of the police power "which reduces the value of the real property by more than fifty percent." N. D. CENT. CODE § 28-32-02.5 (Supp. 1995). This would represent a substantial change from current judicial standards. The statute then immediately provides, however, that there is no taking if the exercise of the police power "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." Id. As noted by Professor Organ, the exception is so broad—in effect mirroring current judicial standards—that the fifty percent standard will have no relevance. See Organ, supra note 15, at 200.
109. See, e.g., KAN. STAT. ANN. § 77-704 (Supp. 1995) ("guidelines shall be based on current law as articulated by the United States Supreme Court and the supreme court of Kansas"); MONT. CODE ANN. § 2-10-103(4) (1995) (taking defined as deprivation of property "in a manner requiring compensation" under the federal or state constitution); see also Thomas, supra note 15, at 244-46 (summarizing how statutes define a taking).
These relatively watered down statutes are unlikely to impose a significant burden on the attorneys general, who are skilled at making legal judgments and who typically must already make other legal determinations about the rules; the Indiana statute, for example, is simply a one sentence insertion into a broader statute requiring the attorney general to review administrative rules. Also, because the assessment process does not take place at the agency, it is less likely to impact the ultimate decision.

Most assessment statutes go beyond these minimum obligations and require the state’s attorney general to publish guidelines to aid government agencies in their own assessments of proposed rules and regulations. For example, Idaho’s statute requires the attorney general to establish a checklist that “better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking.” Statutes typically require that the guidelines be updated at least annually and reflect the current law as established by the United States and respective state supreme courts. Several proposed statutes also identify principles, reflecting general takings principles, that the attorney general is to follow in establishing the guidelines.

Statutes fall into two general categories regarding the duty imposed on state agencies in following the guidelines. First, some statutes do not explicitly require any formal assessment in writing by the agencies. Idaho’s statute, for example, states that all state agencies and local governments “shall follow the guidelines” but does not specify any compliance mechanism. As a practical matter, these informal assessment statutes do not impose a significant burden on

---

111. See Ind. Code Ann. § 4-22-2-32(b)(3) (West Supp. 1996) (“In the review [of a proposed rule] the attorney general shall consider whether the adopted rule may constitute the taking of property without just compensation to an owner.”).
115. For example, the proposed Illinois statute states that the attorney general’s guidelines shall be based on current law as articulated by the United States Supreme Court and the Illinois Supreme Court, and that the attorney general should update the guidelines on at least an annual basis. It then proceeds to list a set of principles the attorney general must follow in setting the guidelines, including that government action may constitute a taking even short of a complete deprivation of use or value, that “the mere assertion of a public purpose is insufficient to avoid a taking,” and that recovery may occur for temporary takings. See S.B. 1433, 89th Gen. Assembly (Ill. 1995-96). These principles, of course, reflect basic principles established by the United States Supreme Court.
agencies. Although they shift the assessment process from the attorney general to the agency, they do not require that agencies perform their review in any particular way.

Second, several statutes go significantly further and require that agencies or local governments prepare formal takings assessments as a means of assuring compliance.\footnote{117} Utah, Kansas, West Virginia, Louisiana, Montana, North Dakota, and Texas all have passed statutes requiring this more rigorous assessment. Although varying slightly in structure and language, each statute requires subject entities to prepare a written analysis that examines the likelihood that an unconstitutional taking has occurred.\footnote{118} Each further requires assessment of alternatives to the proposed regulation that would reduce the impact on property rights and reduce the risk of unconstitutional takings.\footnote{119} Several statutes also require that the assessment estimate the potential cost if compensation must be paid and identify the source for payment of the compensation.\footnote{120} Finally, several statutes require that assessments justify in some manner the reason for the intrusion on private property. For example, the Kansas, Utah, and West Virginia statutes require that the assessment identify the public risk created by the property use and how the government action addresses the risk.\footnote{121} Similarly, Louisiana and North Dakota require assessments to specify the purpose of the government action.\footnote{122}


\footnote{118} See, e.g., Utah Code Ann. \$ 63-90-4 (Supp. 1996), which provides that the assessment is to analyze "the likelihood that the action may result in a constitutional taking, including a description of how the taking affects the use or value of private property." See also Kan. Stat. Ann. \$ 77-706 (Supp. 1995); Tex. Gov't Code Ann. \$ 2007.43(a)(b) (West 1996); W. Va. Code \$ 22-1A-3 (1994).


Although requiring a written analysis, most of the statutes fail to specify what is to be done with the assessment after it is prepared. The Kansas statute is an exception, stating that the written assessment shall be available for public inspection and that copies of the assessment must be submitted to the governor and attorney general before implementing the government action in question. Similarly, Montana requires that a copy of the assessment be provided to the governor before action is taken.

2. Scope

Assessment statutes also vary in regard to their scope, in terms of both the range of government bodies subject to the assessment requirement and the types of actions that must be assessed. The types of government bodies subject to the assessment requirement vary considerably but fall into three general groups. First, two states limit the assessment process to only select state agencies. The more limited state in this regard is West Virginia, which imposes its assessment process only on its division of environmental protection. Michigan's assessment statute is slightly broader, imposing the requirement only on the state departments of natural resources, environmental quality, and transportation. Second, about one-half of the states impose the assessment requirement on all state agencies but not on political subdivisions. Finally, four states require assessments by both state agencies and political subdivisions, most notably local governments. Washington imposes the assessment process on all local governments required to plan by state statute, while Idaho and Texas impose the requirement on all local governments. Louisiana imposes the assessment requirement on all local governments below a certain population.

Assessment statutes also vary in terms of the government actions subject to the assessment requirements. Although using different lan-
guage, all states indicate that assessments must be done for the promulgation of agency rules and regulations. Indeed, in several states that is the only type of government action specified as requiring assessments. Several states also include other types of broad based actions, such as proposed legislation, proposed guidelines, or procedures. Thus, a primary focus of the assessment process is government actions of broad applicability, apparently on the assumption that it is at that level of decisionmaking that property rights are best protected.

Less clear is the extent to which assessments are required for adjudicatory actions, such as the issuance, denial, or conditioning of permits that might affect land use. Two statutes apparently require assessments for such decisions. Montana, for example, includes within the category of government actions needing assessments a “proposed state agency... permit condition or denial pertaining to land or water management or to some other environmental matter...” Similarly, Michigan includes within the term “government action” “[a] decision on an application for a permit or license” and any “[r]equired dedications or exactions of private property.” Two other states, Washington and Idaho, require assessments for “regulatory or administrative actions,” terms broad enough to include not only regulations of general applicability, but also adjudicatory decisions.

On the other hand, several states specifically exclude such permit decisions from assessments. For example, although the West Virginia statute provides that “any action within [t]he statutory authority” of the Division of Environmental Protection is subject to the assessment requirement, it specifically states that the assessment requirement does not apply to “[l]icensing or permitting conditions... pursuant to any applicable state or federal statutes.” The Utah statute requires assessments for licensing or permitting conditions, requirements, or limitations to the use of private property unless their provisions are in accordance with applicable state or federal statutes, rules, or regulations. As a practical matter, this will exempt many permitting decisions from the assessment process, since permits are typically issued

---

134. See KAN. STAT. ANN. § 77-703 (Supp. 1995).
pursuant to a statutory program. Utah does, however, require assessments for any "required dedications or exactions."¹⁴⁰

A number of statutes, however, simply state that assessments are required for rules and regulations, with no specific reference to permitting decisions.¹⁴¹ Since these statutes do not mention permitting, it makes most sense to read them as applying only to the promulgation of general rules.

3. Judicial Review

A major issue posed by assessment statutes is whether they create any duties subject to judicial review. Although the statutes clearly impose duties upon both state attorneys general and state agencies, the precise nature of the duties and how they are to be enforced is not always clear. This is particularly true with regard to assessment statutes that do not require a written assessment, but only require that agencies consider the guidelines. Even with regard to statutes that require a more formal assessment, the extent to which judicial review might be available is unclear.

Several statutes do expressly address the issue of judicial review. Three statutes preclude any judicial review of actions required by the statutes, suggesting that they are limited to self-enforcement.¹⁴² On the other hand, two statutes do provide for some form of judicial review. Delaware's statute, which only obligates the attorney general to review state rules, provides that any judicial review is limited to whether the attorney general has reviewed the rule and informed the agency in writing.¹⁴³ The Texas statute also provides for judicial review, stating that a government action requiring a taking assessment is void if an assessment is not prepared, and provides that an affected property owner can bring suit to invalidate government actions lacking an assessment.¹⁴⁴ The statute is unclear, however, regarding whether the adequacy of a prepared assessment can be challenged. Several proposed but yet to be enacted statutes also provide for some judicial review. For example, legislation introduced in Illinois pro-

¹⁴⁰ See id.
¹⁴² See Idaho Code § 67-8003 (1995) ("nothing in this section grants a person the right to seek judicial relief requiring compliance with the provisions of this chapter"); Kan. Stat. Ann. § 77-706(2) (Supp. 1995) ("nothing in this act shall be construed to... create a private cause of action or limit any right of action pursuant to other statutes or at common law"); Wash. Rev. Code § 36.70A.370(4) (West Supp. 1997) ("[n]othing in this section grants a private party the right to seek judicial relief requiring compliance with the provisions of this section").
vides that "an aggrieved owner may bring an action against a state agency that violates this act."145

The majority of enacted and proposed assessment statutes, however, are silent regarding the availability of judicial review to enforce each statute's provisions.146 Judicial review is probably unavailable in those states requiring only an informal assessment. Although it might be argued that a written assessment is implicitly required by such statutes in order to facilitate review, the lack of a specific writing requirement suggests self-enforcement was intended.

More problematic is the availability of judicial review under those statutes that require a formal written assessment. As noted above, statutes requiring a written assessment often require not only a determination of whether a taking has occurred, but also an examination of alternatives and justifications for the action.147 This suggests two possible grounds for review: first, whether an assessment was done at all; second, whether the assessment was adequate.

It might be argued that judicial review is necessary in order to make the assessment statutes effective, the same reason why judicial review has been recognized under the National Environmental Policy Act (NEPA). That statute, which requires a written analysis of environmental impacts and of alternatives, is silent on the subject of judicial review. In several early decisions, however, courts recognized that judicial review was necessary to make the Act enforceable.148 This review includes not only whether an impact statement has been prepared, but also whether it is adequate, including whether it contains a proper discussion of all potential impacts on the environment and alternatives to the proposed action.149

A similar approach is arguably justified for takings statutes that require written assessments. Although it might be argued that such obligations are still limited to self-enforcement, the requirement of a writing strongly suggests the need for judicial review of whether the assessment has actually occurred. Thus, at a minimum, it would make sense to interpret these statutes as providing for judicial review of whether the written assessment has occurred, and for invalidation of government actions that were not assessed.

Whether a court should review the adequacy of the assessment is more problematic. On one level, of course, a court would need to do

146. See Thomas, supra note 15, at 249-51 (summarizing statutes and noting that most fail to specify availability of judicial review).
149. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, 800-1023 (2d ed. 1994).
so to ensure that a good faith effort was made. Beyond that, however, it is questionable whether courts should review for adequacy. Unlike NEPA, the Fifth Amendment itself provides a backdrop that encourages compliance with constitutional norms. Though not necessarily making assessments meaningless, potential constitutional liability provides an incentive for adequate assessments, especially once the agency is prodded into doing the assessment in the first place.

Moreover, the extremely confusing and fact-specific nature of current takings analysis makes takings assessments a poor candidate for adequacy challenges. Although this complexity does not negate the obligation to consider the constitutional consequences of actions, it does make it difficult for courts to second guess the fine points of assessment. The better view, therefore, is to limit review to whether the assessment has been done in a good faith manner.

B. Compensation Statutes

The second type of state takings statute to emerge in recent years is compensation statutes. These go significantly beyond assessment statutes by essentially defining what constitutes a taking. In most instances, the statutes set a point at which a percentage diminution in value triggers a requirement that compensation, either for the lost value or in some cases for the entire value of the land, must be paid.

Compensation bills have been introduced in more than twenty-five states, but with limited success.\(^{150}\) As with assessment statutes, proposed compensation statutes vary not only in when compensation is triggered, but also in the types of government action covered. Proposed and enacted compensation statutes, however, generally share several common features. First, almost all enacted and proposed compensation statutes, with the exception of Florida,\(^ {151}\) trigger the payment of just compensation when the diminution in value reaches a certain point. The actual percentage triggering compensation varies considerably. Some extreme versions of proposed legislation would require compensation for any diminution value at all.\(^ {152}\) Others

---

150. See supra note 16 (listing states where compensation statutes enacted) and note 21 (listing states where compensation legislation introduced).


152. The following states have had legislation introduced that would require payment of some compensation when government action results in any diminished value: Alabama (S.B. 436, Reg. Sess. (Ala. 1996)) (recovery permitted for any diminution in value; recovery for total value of the land when diminution in value fifty percent or more); Georgia (H.B. 1297, 143rd Gen. Assembly, Reg. Sess. (Ga. 1995-96)); Massachusetts (H.B. 5384, 179th Gen. Ct., 1st Annual Sess. (Mass. 1995)) (compensation for reduced value required). The Washington legislature passed a bill that required payment for any diminution in value, but it was subsequently rejected by a popular statewide referendum.
would find a taking for losses ranging from five percent\textsuperscript{153} or ten percent\textsuperscript{154} to fifty percent.\textsuperscript{155} In calculating diminution in value, all the legislation compares the fair market value of the property before and after the government regulation.\textsuperscript{156}

Second, almost all proposed and enacted compensation statutes make an exception for regulations of common law nuisances, stating that diminution in value resulting from what would constitute a common law nuisance does not require compensation.\textsuperscript{157} This is an obvious nod to the Court’s analysis in \textit{Lucas}, which indicated that such uses are not part of the bundle of protectable property interests to begin with.\textsuperscript{158} Several statutes also state that compensation is not required when the government regulation is addressing a clear threat to the public health or safety.\textsuperscript{159}

As might be expected, resistance to compensation legislation has been intense,\textsuperscript{160} leading to only limited success for property rights proponents. Environmental groups have mounted significant lobbying efforts in a number of states.\textsuperscript{161} In two instances rather extreme forms of compensation legislation passed state legislatures but were later overturned. In Oregon, the governor vetoed a statute that would have triggered payment of compensation for only a ten percent diminution in value.\textsuperscript{162} The Washington legislature passed an even more extreme compensation statute, which required compensation for any diminution in value. A petition forced the measure onto a statewide referendum, however, and after a significant campaign by environmental groups, voters rejected the bill by a sixty to forty margin.\textsuperscript{163}

\textsuperscript{155} See \textit{Resource Book}, supra note 17, 20-33 (listing several proposed fifty percent compensation statutes).
\textsuperscript{160} For discussion of the intense debate surrounding compensation statutes, see Patricia Byrnes, \textit{Are We Being Taken by Takings?}, \textit{Wilderness}, Mar. 22, 1995, at 4; Lavelle, \textit{supra} note 1, at 34.
\textsuperscript{161} See Byrnes, \textit{supra} note 160, stating that nearly one hundred national organizations are opposed to takings legislation.
\textsuperscript{162} See \textit{State Takings Laws}, \textit{supra} note 25 (discussing veto of Oregon bill).
Despite the opposition, four states have enacted some type of compensation statute.\textsuperscript{164} Mississippi and Louisiana have each passed compensation legislation that applies only to agricultural land and forestland. The Mississippi statute requires that just compensation be paid for a forty percent or greater loss in value due to government regulation of such land.\textsuperscript{165} Louisiana has a similar statute that requires government to compensate for losses of twenty percent or more.\textsuperscript{166} Both statutes apply to regulations, statutes, rules, ordinances and other actions at both the state and local level,\textsuperscript{167} but exempt, \textit{inter alia}, actions to prevent "real and substantial threats to the public health and safety."\textsuperscript{168}

One significant feature of both the Louisiana and Mississippi statutes is the unusual way in which they narrowly construe the unit of property for analyzing economic impact. Although not entirely clear, the statutes seem to suggest that only that portion of the property actually regulated is the relevant unit of property for determining diminution in value. For example, the Louisiana statute states that a taking of farmland occurs when there is at least a twenty percent reduction in value of "the affected portion of any parcel" of farmland.\textsuperscript{169} Similarly, the Mississippi statute also looks to "any part or parcel" of the property in calculating reduction in fair market value.\textsuperscript{170} This suggests that only the area regulated is considered in the analysis, rather than the parcel as a whole.\textsuperscript{171}

This narrow definition of the relevant unit of property is significantly different from current takings jurisprudence. As noted in Part I, the Supreme Court, despite the \textit{Lucas} footnote, has consistently analyzed the entire parcel as the relevant unit of property.\textsuperscript{172} By narrowly focusing on only the portion affected, the Louisiana and


\textsuperscript{170} See \textit{Miss. Code Ann.} § 49-33-7(h) (Supp. 1996).

\textsuperscript{171} See Organ, \textit{supra} note 15, at 204-06.

\textsuperscript{172} See \textit{supra} 93-97.
Mississippi statutes significantly increase the likelihood that government actions will be found to be takings, especially when combined with the twenty or forty percent diminution in value standards. Thus, even though the Louisiana and Mississippi statutes apply only to farmland and forestland, they narrowly define the relevant unit of property so as to make it likely that almost any environmental regulation will amount to a taking.173

The two most extensive compensation statutes enacted to date are those in Texas and Florida.174 Both not only impose significant restrictions on a broad range of government activities, but also create a process to resolve takings issues. Because of the extensive reach and potential impact of the statutes, this article will briefly examine each of the statutes separately.

1. Texas

In 1995, Texas passed legislation that some have labeled as the most rigorous takings bill in the country.175 The statute is a combined assessment and compensation statute. The assessment provision is similar to those in other states that require formal, written assessments. The Act requires the Attorney General to promulgate takings guidelines reflecting current federal and state supreme court analysis.176 State agencies are then required to write “Taking Impact Assessments” (TIAs) for almost any rule that might affect property interests.177 As with other states requiring written assessments, the TIAs must evaluate the regulation’s effect on property values, its benefit to society, and alternatives to the proposed action.178 The Act specifically provides that the failure to prepare an assessment provides a basis for judicial relief to set aside the regulation.179

---

173. For example, if a property owner has a 200 acre tract and is required to keep one acre in its natural state, to define the relevant unit of property as only the one acre would likely result in finding a taking as to the one acre, a very extreme result.


177. See id. § 2007.043(a). Government actions that are subject to the assessment requirement include "the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure" as well as dedications and exactions. Id. §§ 2007.003(a)(1), (2).

178. See id. § 2007.043(b).

179. See id. § 2007.044.
The heart of the statute is its compensation provision. The Act provides that a taking occurs when governmental action reduces the value of property by twenty-five percent or more. The governmental entity can then choose to invalidate the action or pay the landowner damages for the reduced value of the land. Limiting relief in this way, rather than making compensation automatic, lessens the otherwise severe reach of the statute. Although the twenty-five percent threshold clearly has the potential to invalidate some environmental controls, the chilling effect on government action will be less because compensation is not mandatory. Also, as with other takings statutes, the statute applies only prospectively to government actions undertaken after its enactment.

The compensation requirements apply to both state agencies and political subdivisions. However, the statute specifically exempts cities from its obligations, and postpones county liability until 1997. Like other takings statutes, the Act also exempts certain types of government actions from coverage, such as the lawful forfeiture of property, the formal exercise of eminent domain power, and regulation of activities that would constitute a common law nuisance. Importantly, the statute also creates two emergency exceptions: it does not apply to actions taken in "reasonably good faith," where the action is necessary to prevent a grave and immediate threat to life or property, or to actions taken in response to a real and substantial threat to public health and safety, provided that the action does not impose a greater burden than necessary to protect the public health and safety.

One question raised in the statute's compensation section is how the property is to be defined for determining the diminution in value. The statute provides that a taking occurs when a government action

---

180. See id. § 2007.002 (defining taking as government action that reduces value of property by at least twenty-five percent of market value).
181. See id. § 2007.024. In this sense the statute differs from Supreme Court analysis, in which under First English Evangelical Lutheran Church, 482 U.S. 304, compensation is required for the period between when the taking first occurred and rescission of the action. The Texas statute does not appear to require compensation even for this interim period, which arguably can be viewed as a trade-off for setting the threshold for a taking much higher than it would be under constitutional standards. Of course, for government action that would also constitute a taking under the federal Constitution, interim compensation is still required under First English Evangelical Lutheran Church.
182. Id. § 2007.003.
183. Id. § 2007.002(1).
187. Id. § 2007.003(b)(7).
188. Id. § 2007.003(b)(13).
“affects an owner’s private real property . . . in whole or in part or temporarily or permanently . . . and is the producing cause of a reduction of at least 25 percent in the market value of the affected real property.” 189 By using the phrase “in whole or in part” the statute might suggest that affected property can be conceptually severed for purposes of analyzing twenty-five percent diminution, similar to the approach taken in Louisiana and Mississippi. As noted earlier, such an interpretation would be contrary to the Supreme Court’s current approach to defining the relevant unit of property and would potentially turn almost any environmental regulation into a taking.

An alternative reading of the statute, however, is not to permit such a segmentation of the property in determining whether the twenty-five percent threshold has been met. Under this construction the “in part” language simply clarifies that regulations need not affect an entire parcel to bring an action, and does not mandate segmenting the property in assessing diminution in value. Such a construction is arguably within the ambiguous structure of the statute190 and would comport with current Supreme Court analysis of how the property is defined.191 More importantly, it better reflects the central concern of interference with landowner expectations, very much the touchstone of takings analysis. Since landowners commonly view property ownership as a whole, any analysis of diminution in value should similarly treat it as a whole. It also avoids the problem of turning almost any regulation into a taking when a portion of property must be left undeveloped,192 an unlikely intention of even a far reaching statute like Texas’.

In sum, the Texas taking statute is, in one sense, the most rigorous enacted to date. Not only is the twenty-five percent trigger a lower taking threshold than is found in other enacted statutes, but the statute also applies to a far wider range of activities and government bodies than do the Mississippi and Louisiana statutes. Moreover, the assessment provisions are also rigorous, clearly creating a cause of ac-

189. Id. § 2007.002.
190. See Organ, supra note 15, at 207 (suggesting the Texas statute “does not clearly depart” from the Supreme Court’s notion).
191. Although the Court in Lucas noted in a footnote the difficulty and yet significance of the conceptual severance issue, it proceeded to suggest that determining how the property is defined is best done by resort to “how the owner’s reasonable expectations have been shaped by the State’s law of property.” 505 U.S. at 1016 n.7. Thus, if the law would commonly view a parcel as a whole, which it would, it should be so treated in takings analysis. This is consistent with other Supreme Court takings cases, in which the Court has declined to sever property in its takings analyses. See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 497-502 (1987) (declining to sever coal necessary for support from all coal in ground); Penn Central, 438 U.S. at 130-31 (declining to sever air rights from underlying real estate).
192. For an example, see supra note 173.
tion for failing to prepare the taking assessment and arguably opening the door to challenges to their adequacy. At the same time, giving governmental entities the option of rescission instead of paying compensation lessens the Act's severity.

2. Florida

Several months after enactment of the Texas statute, Florida passed the Bert J. Harris, Jr., Private Property Rights Protection Act.\textsuperscript{193} Whereas the Texas statute might be viewed as the strongest legislation to date, the Florida statute is the most unusual and complex. Rather than define takings as a percentage diminution in value, the statute requires compensation when a government action ""inordinately burden[s]"" real property use.\textsuperscript{194} The statute also establishes various procedural mechanisms for the settlement of takings claims.

The heart of the Florida statute is its provision that landowners are entitled to relief when a government action ""inordinately burden[s]"" property use.\textsuperscript{195} The statute defines ""inordinately burdened"" to mean either that the landowner is ""permanently unable to attain the reasonable, investment-backed expectation[s]"" for the property, or that an 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.""\textsuperscript{196} As with other compensation statutes, the statute does not apply to regulations of common law nuisances.\textsuperscript{197}

By adopting the above standard, Florida has eschewed the brightline formulations of other compensation statutes in favor of a more flexible standard that will be responsive to the facts of any given situation. Moreover, the statute's definition of ""inordinate burden"" largely reflects current Supreme Court takings principles. Indeed, by focusing the ""inordinate burden"" standard on interference with ""investment-backed expectations"" and ""disproportionate burdens,"" the statute focuses on some of the basic fairness issues underlying the Court's takings jurisprudence.\textsuperscript{198}


\textsuperscript{195} See id. § 70.001(2).

\textsuperscript{196} See id. § 70.001(3)(e). For a comparison between the Florida statute and the Supreme Court's evolving takings doctrine, see supra Part I.A-B.

\textsuperscript{197} See id. § 70.001(3)(e).

\textsuperscript{198} See, e.g., Penn Central, 438 U.S. at 124 (stating that the Court has been unable to develop any set formula for determining when justice and fairness require compensation and instead engages in ad hoc factual inquiries); see also Douglass, supra note 15, at 1091-92 (noting that ""inordinate burden"" definition codifies Supreme Court factors).
Despite this similarity to current Supreme Court takings doctrine, the statute specifically states that it is creating “a separate and distinct cause of action from the law of takings”\(^{199}\) and that a cause of action might exist for “governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution.”\(^{200}\) While the statute does not specify standards or factors distinct from those identified by the Supreme Court, it does at least indicate that determinations of “disproportionate share,” “fairness,” and interference with “investment-backed expectations” can be made free of reference to caselaw. This unmooring of the analysis from existing doctrine might lead to a broader class of compensable takings than has been previously recognized by state or federal courts.

Unlike the Texas statute, the Florida statute clearly provides for compensation in the event that property has been “inordinately burdened.” The statute provides that a jury is to determine the amount of compensation due, comparing the difference between the fair market value of the property if the owner could obtain reasonable investment-backed expectations and the fair market value as inordinately burdened, considering any settlement offer and ripeness decision.\(^{201}\)

The second and more innovative aspect of the Florida law is various procedural steps provided to landowners for resolving takings claims. The law requires that a property owner seeking compensation against a government entity must first present a claim to the responsible government entity, including a bona fide appraisal that demonstrates the loss in fair market value.\(^{202}\) The government entity must then make a settlement offer, which might include various mitigation proposals, transfer of development rights, land exchanges, or no change to the proposed action.\(^{203}\)

Assuming the settlement offer is not accepted by the landowner, the governmental entity must, within 180 days of being presented with a claim, issue a written “ripeness decision” that identifies the allowable uses on the property.\(^{204}\) The ripeness decision “constitutes the last prerequisite to judicial review.”\(^{205}\) This is true even if other administrative remedies might be available.\(^{206}\)

---

200. Id. § 70.001(9).
201. Id. § 70.001(6)(b).
202. Id. § 70.001(4)(a). The statute requires the property owner to present the claim in writing to the head of the governmental entity at least 180 days prior to filing an action.
203. Id. § 70.001(4)(c).
204. Id. § 70.001(5)(a).
205. Id.
206. Id.
the settlement offer and options under the ripeness decision, then the owner can file a claim for compensation in state circuit court.\textsuperscript{207}

The above procedure for resolving takings claims under the Florida statute is apparently designed to address several problems under current takings law. One purpose of informing the property owner of what can and cannot be done on the land is that it might lead to an early resolution of the dispute. But the greatest significance of the provision for a "ripeness decision" is that it finalizes the government action, enabling judicial review. Currently, a large number of takings claims are denied as unripe since the record often fails to establish what economically viable uses might remain on the property.\textsuperscript{208} This can lead to significant landowner frustration since permissible uses are often established by a discretionary permit process and denial for one possible use does not clarify what remaining uses might be permitted. By requiring a ripeness decision, the statute ensures a decision on the merits.

In summary, both assessment statutes and compensation statutes attempt to increase protection of private property interest in the face of what is often perceived as growing government regulation. Whereas assessment statutes primarily seek compliance with current court standards, compensation statutes expand the scope of compensable takings. Although they signify victories for the property rights movement, the wisdom of these statutes has been hotly debated. The next part of this article will critique the desirability of both the assessment and compensation statutes.

III.

CRITIQUE OF TAKINGS LEGISLATION

The recent push for state takings legislation reflects property rights proponents' dissatisfaction with the current state of constitutional takings law. The proposed and enacted laws attempt to force compliance with constitutional norms that do exist, and, in the case of compensation statutes, establish a standard more protective of property rights. This part of the article will evaluate the desirability of first the assessment statutes and then the compensation statutes.

\textsuperscript{207} Id. § 70.001(5)(b).

\textsuperscript{208} The Supreme Court has often rejected takings claims for ripeness reasons. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). In \textit{Hamilton Bank} the Court stated that an "as applied" taking challenge is not ripe until a final decision has been sought from local land-use decision makers. \textit{Id.} at 186. For a general discussion of the ripeness issue in takings analysis, see Thomas E. Roberts, \textit{Ripeness and Forum Selection in Fifth Amendment Takings Litigation}, 11 J. LAND USE & ENVT'L. L. 37 (1995); Gregory M. Stein, \textit{Regulatory Takings and Ripeness in the Federal Courts}, 48 VAND. L. REV. 1 (1995).
A. Assessment Statutes

At first glance assessment statutes might appear to have a quite reasonable and sensible purpose. By requiring compliance with current constitutional obligations, rather than substantively changing what those obligations are, the statutes merely require government to play by the rules. They generally do not attempt to upset the current standards for land use restrictions and government planning efforts. Thus, in the same way that NEPA and comparable state statutes force government to consider environmental factors in decisionmaking, so too takings assessment statutes simply force government to consider the impact its actions have on property rights and whether those actions violate the Constitution. This is not necessarily a bad thing since without the prodding of the assessment statutes, government is likely to be as insensitive to private property considerations as it was to environmental considerations before NEPA.

There are, however, some potential criticisms of such assessment mandates. One initial criticism of assessment statutes is that they are unnecessary since state agencies and local government already have a pre-existing obligation, imposed by the Fifth Amendment, to consider whether a taking occurs. In this way the takings statutes are unlike NEPA, which created an independent duty to consider the environment together with a process to enforce that duty. Thus assessment statutes might be considered much ado about nothing, since state and local decisionmakers are already required by the Constitution to engage in such assessments.

In theory this might be true, but few people would seriously argue that state and local governments give full attention to constitutional takings norms when imposing land use and environmental controls. Lack of attention might at times reflect indifference to property rights, with decisionmakers assuming that protecting property rights is less important than protecting the environment. More likely, inattention might simply result from time pressures and from a lack of understanding of what the constitutional norms are. In any event, at-

209. See National Environmental Policy Act of 1969, §§ 2-209, 42 U.S.C. §§ 4321-47, 4361-70 (1988). NEPA imposes a general duty on federal agencies to consider environmental impacts in agency decisionmaking. This is primarily enforced through the requirement that agencies prepare an Environmental Impact Statement for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Id. § 4323(c). The Impact Statement must include an assessment of the environmental impact and alternatives to the proposed action. Id.

210. Although NEPA is often viewed as only a procedural statute, it does impose a duty on government agencies to consider environmental impacts in agency decisionmaking, a duty that previous to the statute had often not been part of many agencies' mandates. See id. For a general discussion of NEPA, see Rodgers, supra note 149, at 800-31.
tention to constitutional norms cannot be assumed, and therefore as-
essment statutes, by forcing consideration of constitutional issues, do
serve some purpose.

A second, and somewhat opposite, criticism of assessment stat-
utes is that they will have a chilling effect on efforts at environmental
protection and land-use planning. In particular, opponents are con-
cerned that forcing assessments might deter government from more
rigorous efforts at land use and environmental controls. Property
rights proponents, of course, would say that is precisely the point.
Since assessment provisions do not create additional government lia-
ibility but only require compliance with constitutional provisions, they
do not in themselves set a standard that would chill government.
Rather, any chilling effect would only come from greater cognizance
of constitutional duties. And the Bill of Rights is designed to do ex-
actly that—restrain extreme government action. Thus, one could ar-
gue that any chilling effect would in fact be a good thing since it would
be deterring unconstitutional behavior.²¹¹

Concerns about a chilling effect are more valid, however, if as-
sessments are subject to judicial review for adequacy. In such an in-
stance, the governmental entity is not being chilled by the
constitutional norm itself, which is desirable, but by the specter of re-
view of the document and the costs of litigation. This is particularly
true if a court scrutinizes the assessment for adequacy and consider-
ation of alternatives. In such circumstances it might be easier to modify
or even drop a proposal than be subjected to second guessing on tak-
ings related issues. This might well deter pursuit of important envi-
ronmental goals, even where government officials in good faith
believe they are within constitutional norms.

As suggested in Part II.A. of this article, however, the better view
is that assessment documents should not be subject to judicial review
other than good faith compliance. Even this will undoubtedly have
some chilling effect since even a good faith standard subjects the as-
essment to some review. Yet if review is limited to an honest effort
to follow the statute, the chilling effect will only be that of doing the
analysis itself. Since the Fifth Amendment requires consideration of

(Brennan, J., dissenting), where Justice Brennan, in response to an argument that imposing
financial liability on local governments might deter planners, suggested that was not neces-
sarily bad. He wrote:

Such liability might also encourage municipalities to err on the constitutional side
of police power regulations, and to develop internal rules and operating proce-
dures to minimize overzealous regulatory attempts . . . . After all, a policeman
must know the Constitution, then why not a planner? (citations omitted).

Id.
these same issues, the chilling effect should not be significantly greater than that already imposed by the Constitution.212

Thus, neither the supposed duplicative nature of assessment statutes nor their chilling effect are significant criticisms of assessment statutes. The more important question is whether the statutes serve any truly useful purpose, and more particularly, whether the purported benefits of such statutes justify the burdens they impose on government. Although it is hard to oppose measures aimed at constitutional compliance, such efforts must be evaluated both in terms of their utility and burden.

It is here, in terms of their efficacy, that assessment statutes are most subject to criticism. First is the obvious problem that the open-ended state of current takings jurisprudence makes meaningful assessment quite difficult. As discussed in Part I, the Court has given no clear guidance on deciding takings claims outside those qualifying as categorical takings, instead relying on ad hoc balancing.213 Although this approach has the substantial benefit of enabling courts to grant compensation only when "fairness and justice" require payment, the open-ended nature of the inquiry makes analysis difficult even for seasoned judges. It is all the more difficult for government officials.214

A second and more significant problem with assessment statutes is that most challenged regulations must be assessed facially (that is, in terms of whether they will cause takings in all circumstances), rather than as they are applied to a particular piece of property.215 The Supreme Court's takings jurisprudence, by contrast, is highly fact sensitive, with the Court frequently noting that its takings analysis essentially involves "ad hoc, factual inquiries"216 that "must be conducted with respect to specific property."217 The Court has accordingly em-

212. Cf. Organ, supra note 15, at 202 (suggesting assessment statutes will have limited effect because they do not provide an opportunity for judicial review on the merits); Thomas, supra note 15, at 256 (suggesting statutes will not generally restrain takings).

213. Even the ability to identify a categorical taking is far from clear since the court has not clearly delineated the means of determining the lack of economic viability. See Oswald, supra note 6, at 120-126.

214. This is not to say that public officials should not be cognizant of taking concerns when pursuing environmental objectives. Indeed, one benefit of assessment statutes is to ensure some attention to constitutional obligations and provide some guidance through attorney general guidelines. Yet it is questionable how beneficial the creation of formal assessment documents are in light of the absence of clarity surrounding current takings jurisprudence.

215. For an excellent discussion of this particular problem with assessment statutes, see Freilich & Doyle, supra note 15, at 4-6.


phasized the difficulty of facial taking challenges, \textsuperscript{218} which are usually doomed to fail.

The reason for this is clear. A critical component of the Court’s current takings analysis is the economic impact of a regulation and, in particular, its interference with investment-backed expectations. This, of course, cannot be analyzed in the abstract but only as applied to a specific set of facts. \textsuperscript{219} Thus, a regulation as applied to a given landowner might have so severe an impact as to constitute a taking, but rarely will it have such an impact in all instances. This need for specific factual contexts in which to analyze takings applies to categorical takings as well as to challenges subject to the ad hoc balancing test. Although categorical takings are not subject to balancing considerations, they are still premised on a set of underlying facts. Thus, to determine whether a restriction denies an owner of all economic viability will usually require knowledge of how the restriction affects the particular property in question.

Assessment statutes, however, typically require government entities to assess whether regulations of general applicability constitute a taking. \textsuperscript{220} This is usually a “nearly impossible task,” since the assessment occurs outside a concrete factual context. \textsuperscript{221} Only if the regulation would always deny all economic viability, which is rare, could the assessment safely conclude there is a taking. Under current Supreme Court standards, therefore, facial assessments will almost never result in takings determinations.

The very limited utility of most assessments must be balanced against their potential burden and cost. There is little doubt that assessment statutes add some cost \textsuperscript{222} and a significant administrative burden to governmental entities subject to the requirement. The attorney general guidelines are manageable to establish and do serve some benefit in clarifying to decisionmakers the scope of their constitutional obligations, but agency preparation of assessments is potentially time consuming and expensive. Considering the questionable

\begin{footnotesize}
\begin{itemize}
  \item 218. See Keystone Bituminous Coal Ass’n, 480 U.S. at 495-96 (stressing the difficulty of a facial taking challenge because of the lack of a specific factual setting in which to evaluate statute’s impact).
  \item 219. See Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 190-91 (1985) (factors of economic impact and interference with investment-backed expectations cannot be evaluated without knowing how regulations will apply to particular land).
  \item 220. See, e.g., KAN. STAT. ANN. §§ 77-701 to 77-707 (Supp. 1995) (this statute is typical of the language used to describe the Attorney General’s role and duties).
  \item 221. See Freilich & Doyle, supra note 15, at 4 (stating that assessment statutes require the “nearly impossible task of determining if a regulation, on its face, constitutes a taking”).
  \item 222. See Martinez, supra note 15, at 342 (noting that “costs of implementing state takings statutes vary widely,” but some estimates are quite high).
\end{itemize}
\end{footnotesize}
utility of facially reviewing rules and regulations, which is the heart of most assessment statutes, the burden of such assessments might well outweigh their benefits.

Not all assessments suffer from this problem. As mentioned earlier, two states, Michigan and Utah, specifically require assessments for required dedications and exactions of land and for permit applications.\(^ \text{223} \) Considering the need to establish "rough proportionality" under *Dolan*,\(^ \text{224} \) it is sensible to require a written assessment of how "rough proportionality" exists. Although preparing such a document will be a burden, the fact-specific nature of such decisions together with past government proclivity to use exactions in a coercive manner suggest that the benefits of assessment would outweigh any imposition. Similarly, assessments for fact-specific permit decisions could be meaningfully done since the economic impact could be factually determined. To require assessments for all permit decisions would be a significant burden, but arguably it would serve the useful purpose of apprising decisionmakers of the economic impact of their actions.

In sum, the overall value of assessment requirements is highly questionable in light of both the open-ended nature of most takings analysis and the need for a concrete factual setting for meaningful assessment to occur. Since most assessment statutes primarily focus on assessments of broadly applicable government actions such as the promulgation of regulations, assessments will be of little utility. Although sensitivity to constitutional obligations is worthwhile even when promulgating regulations, that is outweighed by the difficulty of meaningfully assessing whether a taking occurs and the significant administrative costs of such a requirement. Written assessments of some fact-specific decisions, however, such as exaction and dedication requirements, would be of some benefit.

### B. Compensation Statutes

Compensation statutes are certainly the more radical and controversial type of takings statute. Rather than simply requiring assessment of and compliance with current judicial standards, most substantively change the way takings are defined.\(^ \text{225} \) For this reason they have generated substantial debate and controversy. This section will first discuss percentage compensation statutes and then briefly examine the Florida alternative.

---

223. *See supra* 136,139,140
225. For a comparison of assessment and compensation statutes, see *supra* Part II.A-B.
Percentage compensation statutes differ sharply from current Supreme Court takings jurisprudence in two respects. First is the apparent clarity of the bright line test. Except in the exceptional instance of total denial of economic viability, the current judicial standard is ad hoc and ambiguous, turning on several factors which themselves lack clarity. In contrast, most percentage compensation statutes draw a relatively clear line on when diminution in value requires compensation. To some extent this clarity is illusory, since different appraisals are inevitable. Moreover, some of the statutes themselves lack clarity in certain respects. Even conceding these problems, however, the test is certainly clearer and easier to apply than the current balancing required by judicial standards.

Second, and more significantly, by providing compensation for mere diminution in value such statutes significantly expand the range of government actions that constitute compensable takings. The degree to which any particular statute expands the scope of takings depends, of course, on the percentage that triggers a taking. Those statutes that recognize any diminution or diminution by a small percentage as being compensable radically enlarge the scope of compensable takings. Even those that require a higher taking threshold, such as fifty percent, constitute a significant expansion of current takings law. Although such a diminution in value might constitute a taking under traditional analysis, it often would not.

As might be expected, both environmental groups and governmental bodies have severely criticized compensation statutes. One frequent criticism is that compensation statutes upset long-settled standards of takings jurisprudence. This charge, though true, is arguably beside the point. It is precisely because the judicial takings standard fails to provide the level of protection sought by property right groups that they have resorted to the legislative arena. The Constitution is a floor for the protection of individual liberties, upon

---

226. See Mandelker, supra note 55, at 219-37 (discussing the current confusing state of the investment-backed expectations factor in takings jurisprudence); see also Oswald, supra note 6, at 106-18.

227. See, e.g., supra text accompanying notes 189-191 (discussing lack of clarity in how Texas statute defines relevant unit of property).

228. See Freyfogle, supra note 9, at 87-88 (in wetlands context courts almost always reject takings challenges if substantial uses remain, even if diminution in value exceeds fifty percent).

229. See supra note 160. For academic criticism of compensation statutes, primarily focusing on the proposed federal legislation, see generally Michelman, supra note 12; Rose, supra note 1.

230. See, e.g., RESOURCE BOOK, supra note 17, at 15.

231. The Supreme Court has often noted that constitutional protections do not guarantee the best or correct government decisions but only guard against certain types of gov-
which legislatures might often build. Thus, in areas such as fair housing, federal and state legislatures have moved beyond the more minimal protections afforded by the Constitution.232

This is not to say that takings jurisprudence cannot still inform the debate surrounding compensation statutes. The rationales and insights offered by the Court for its current takings law might be quite relevant in discerning when compensation is justly deserved. Further, existing takings law has helped determine what are reasonable landowner expectations regarding property use, certainly an important consideration in compensation issues. But the mere fact that legislation takes several steps beyond where the Supreme Court has drawn the constitutional line is hardly a criticism in and of itself.

A second frequent, and more significant, criticism of compensation statutes is that they will have a significant cost, largely from the payment of just compensation. For example, a study done by the University of Washington’s Institute for Public Policy estimated that the Washington compensation statute, ultimately defeated in a state-wide referendum, could cost local governments as much as $11 billion.233 Indeed, the potentially staggering costs of compensation statutes might well be their undoing.234 Although some citizens may initially

232. The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment as requiring proof of intent in racial discrimination cases, not just disparate impact. See Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977). However, the 1968 Fair Housing Act has been interpreted as requiring only, under some circumstances, “a showing of discriminatory effect without a showing of discriminatory intent,” see Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (a significant expansion of protection). See also Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2nd Cir. 1988) (stating that “a prima facie case is established by showing that the challenged practice of the defendant ‘... has a discriminatory effect’... [t]he plaintiff need not show that the decision complained of was made with discriminatory intent.” (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) and United States v. Yonkers Bd. Of Ed., 837 F.2d 1181, 1217 (2d. Cir. 1987)). Moreover, the Fair Housing Act extends protection to a wide class of people, based on characteristics such as gender, disability, age, and familial status, many of which would be protected under only very deferential standards of constitutional review. See 42 U.S.C. §§ 3601-3619 (1994).


234. Cf. Sax, supra note 13, at 515-16 (stating that “the single factor that has most diminished the prospects of [federal] property rights bills ... [is] the prospect of stunning fiscal obligations.”).
favor compensation statutes, when they realize the cost, their sympathy will likely disappear.

A related criticism is that compensation statutes will devastate environmental protection. When government must choose between paying enormous amounts of compensation for pursuing environmental protection and modifying their environmental goals, it is not difficult to predict what government will do. State environmental law as we know it will be dramatically chilled. Indeed, opponents of compensation statutes have often viewed the statutes' true objective as being an assault on environmental protection.

Compensation statutes can thus be strongly criticized both for being costly and for downscaling environmental protection. It might well be argued, however, that the true issue is not whether there are costs, but who should pay for them. Property rights proponents argue that the government regulations themselves create the cost by diminishing the value of affected lands. The compensation statutes just shift the cost from a few landowners back to the public as a whole. At bottom, therefore, the debate is posed simply as one of fundamental fairness regarding who should bear the costs of regulation.

Focusing the debate on the issue of who should bear the cost of regulation is appropriate. As early as Pennsylvania Coal the Supreme Court stated that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way for paying for the change." In more recent years the Court has often stated that the takings clause is "designed 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."

These statements by the Court indicate that concerns about fairness and who should pay for government action are not only relevant but central to the debate. If it is unfair for property owners to bear the cost of regulation, then compensation statutes make sense despite their enormous cost and adverse impact on environmental protection. Conversely, if fairness does not necessitate such a result, then com-

235. See Byrnes, supra note 160, at 4; see also Resource Book, supra note 17, at 9 (real purpose of takings bills "is to hobble reasonable regulation that protects public health and welfare").

236. See Marzulla, supra note 14, at 636; Berger, supra note 22, at 22.

237. See Berger, supra note 22, at 22.

238. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

239. See Armstrong v. United States, 364 U.S. 40, 49 (1960); see also Dolan, 512 U.S. at 384 (quoting Armstrong); Penn Central, 438 U.S. at 123-24 (quoting Armstrong).

240. Scholars have often suggested that "fairness" is very much at the center of the takings issue. See, e.g., Fischel, supra note 36, at 6; Michelman, supra note 94, at 1171-72.
Compensation statutes are bad policy in light of their significant social and environmental costs.

This article will not attempt an in-depth analysis of whether compensation statutes can be justified on fairness grounds. It will, however, discuss two basic criticisms of compensation statutes that suggest that fairness concerns do not support such statutes. First is the distorted view of property rights implicit in such statutes, and second is their inattention to the issue of "givings" and reciprocity. These concepts relate to each other and broadly speak to the issue of why diminution in value should not automatically necessitate compensation.

a. The Nature of Property Interests

The first and most important criticism of compensation statutes is that they are based on an ill-conceived view of property rights. Percentage compensation statutes are predicated on a view of property rights in which a landowner has a right to engage in any activity short of a nuisance. The essence of this argument is that property ownership involves an established set of property rights, including various use and developmental rights, which clearly belong to the owner. Government regulations that restrict use of property in effect take these pre-existing property rights, requiring compensation.


242. The leading contemporary academic proponent of such a view of property rights is Professor Richard Epstein of the University of Chicago Law School. In his influential book, Takings: Private Property and the Power of Eminent Domain, Professor Epstein argues for a near absolute view of private property interests. He views property ownership as a bundle of rights or entitlements, centering around "three separate incidents: possession, use and disposition" and that the protection of the eminent domain clause applies to each individual stick or entitlement in the bundle as much as to the whole. Epstein, Private Property and the Power of Eminent Domain 58-59 (1985). On that basis, he argues for the concept of "partial takings," meaning that when the state takes any stick or entitlement from the bundle, just compensation is required. Id. at 57-62. As a result, any land use restriction, including all zoning, constitutes a taking, because certain use or development rights are being removed from the bundle of rights. Id. at 130-34. More broadly speaking, Epstein declares that "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state." Id. at 95 (emphasis in original). Epstein recognizes an exception to this for regulations designed to stop a common law nuisance because those rights were never in the bundle of sticks or rights to begin with. Id. at 126-30. Epstein would also recognize that a regulation might sometimes generate "implicit in-kind compensation" so as to avoid a takings conclusion, where the reciprocal benefits of a regulation are greater than the loss imposed on the property owner. Id. at 195-97.

Epstein has often been viewed as the intellectual father of the current property rights movement. See, e.g., Torres, supra note 1, at 6; Jacobs & Ohm, supra note 15, at 181; Carson, supra note 23, at 27 (work of Epstein "provided the intellectual framework for the property rights movement"); David Helvarg, supra note 1, at 128.

Professor Epstein's book and ideas have generated substantial commentary, much of it quite critical of his position. See, e.g., Margaret Jane Radin, The Liberal Conception of
Although such a perspective admittedly has some intuitive appeal, it is certainly not the only way, or even the traditional way, to view private property interests. Rather, as noted by numerous scholars, property is a social construct whereby society in essence recognizes and maintains property rights. For this reason, inherent in the state’s creation of property is its ability to limit the extent of property interests for broader social purposes. Indeed, property would not exist without the state and is thus subject to certain implied limitations.

Taken to an extreme this would mean that all property is merely a privilege granted by government and subject to complete revocation, a position never seriously considered in our law. Neither, however, has American property law ever viewed property rights in the near absolute fashion envisioned by the current property rights movement. Rather, American property law has generally recognized that private property rights are subject to a broader public interest.

---


243. The fact that property is a social creation of the state has frequently been noted in legal literature. See, e.g., Coletta, supra note 89, at 361-63; Blumm, supra note 10, at 182; John A. Humbach, Law and New Land Ethic, 74 MICH. L. REV. 339, 344-45 (1989); Daniel W. Bromley, Regulatory Takings: Coherent Concept or Logical Contradiction?, 17 VT. L. REV. 647, 653-55 (1993).

244. Commentators frequently cite to Jeremy Bentham’s classic statement that “[b]efore laws were made there was no property; take away laws, and property ceases.” JEREMY BENTHAM, THEORY OF LEGISLATION 113 (R. Hildreth trans., Trubner 1864).

245. See A. Dan Tarlock, Local Government Protection of Biodiversity: What is its Niche, 60 U. CHI. L. REV. 555, 588 (1993) (noting two competing theories of property in American law, the federalist-natural law theory and republicain-positivist view, neither one of which being fully accepted); see also Torres, supra note 1, at 5 (“[t]he absolutism at the heart of the popular expression of the modern property rights movement was never part of the jural relations described by the law of property”).

246. The concept and development of “public rights” and how they work to limit private property in some instances was recently explored in Rose, supra note 1. Professor Rose notes that even though protection of private property rights is well ingrained in our legal system. American property law has also long recognized public rights in shared resources. These typically were resources that “could not easily be privatized . . . [but were] nevertheless valuable to many people and subject to a kind of easement for public use, including passive uses such as simple enjoyment of clean air and quiet surroundings.” Id. at 271. She further states that these public rights have co-evolved with private rights, with courts seeking a balance between the two. Importantly, Professor Rose notes that, although judicial nuisance standards played an important role in striking this balance, legislatures have also played an important role in protecting public interests. Id. at 281. In relating the legislative role in protecting public rights today, she states:

We are much aware today of the impact of human uses on common environmental resources, but modern environmental laws are the successors to traditional legislative protections of public rights—the London prohibitions on coal burning, the early American restrictions on navigable waterways, the late nineteenth century public assertion of responsibility for protecting fish and wildlife stocks, and the whole panoply of public efforts to protect health, safety, and welfare from
reflected not only in the long-recognized *sic utere* principle\(^{247}\) but also in the government's ability to limit property use for the public good.

The Massachusetts Supreme Court considered this view of property, in which private property rights are subject to public rights, to be settled as long ago as 1851, when in *Commonwealth v. Alger* it said:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others ... nor injurious to the rights of the community. All property in this commonwealth ... is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare.\(^{248}\)

In this century the widespread growth and general acceptance of land use restrictions similarly evidences that private property interests are subject to some public limitations.\(^{249}\) Drawing an analogy to nuisance law, but clearly exceeding the confines of nuisance doctrine, courts early on accepted the idea that public restrictions on land did not necessarily infringe private property interests.\(^{250}\) In doing so, they recognized that property rights are not absolute, but necessarily lim-

---

\(^{247}\) The *sic utere* principle states that no one may use his property in a way that injures the property of another. *Black's Law Dictionary* 1380 (6th ed. 1990).

\(^{248}\) *Commonwealth v. Alger*, 7 Cush. 53, 84-85 (Mass. 1851). For a short and interesting commentary on *Alger* in the context of the regulatory taking issue, see Myrl Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 Env'l. L. 1095, 1148-53. Professor Duncan states that *Commonwealth v. Alger* became "the most frequently cited police power case in the nineteenth century" and was relied on by the U.S. Supreme Court in numerous regulatory decisions. *Id*.

\(^{249}\) See Humbach, *supra* note 243, at 344-48 (stating that "legal property rights are shaped and limited by the many competing needs of the general welfare"); Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1457 (1996) (faulting the classical conception of property because it fails to adequately take into account the frequent limitations on property rights for the benefit of "other property owners or the public at large"); *see also* Joseph Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 150-51 (1970) (arguing that many actions formerly viewed as takings are actually the "exercise of the police power in vindication of 'public rights.'").

ited by broader public interests. Indeed, though recognizing a regulatory taking in *Pennsylvania Coal*, the Court stated, "[a]s long recognized some values are enjoyed under an implied limitation and must yield to the police power."251

The reasons for viewing private property as subject to public interests are both pragmatic and conceptual. As noted by Justice Holmes in *Pennsylvania Coal*, "government hardly could go on" if it had to pay every time a regulation had an adverse economic impact on someone.252 As a practical matter, therefore, if we want government to be able to regulate for the public good, which we occasionally do, it is necessary to limit our concept of private property. Otherwise, we permit the interests of select landowners to hold public welfare hostage.

Beyond pragmatism, however, is the recognition that since property is a social creation, society can legitimately define the extent of private property rights to be limited by certain public interests. Private and public interests will at times conflict, and a reasonable accommodation must be drawn between the two. Concern for fairness and justice, as well as for encouraging reasonable investment in property, at times requires that the accommodation be drawn in favor of private property. At the same time, it is certainly legitimate for the state to view private rights as ending where they inflict harm on the broader public.

It is important to emphasize that this accommodation between private and public rights is an inherent limitation in the bundle of private rights to begin with, rather than a deprivation of interests. Moreover, as recently noted by Carol Rose,253 the balance between private and public rights necessarily evolves as society changes and our understanding of shared resources grows, yet the basic principle remains the same: private property rights are limited to a certain degree by the broader public interest.

251. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Supreme Court expressed a similar sentiment on various other occasions during the late nineteenth and early twentieth century, suggesting that the principle that private property was subject to certain public interests was well established. *See*, e.g., *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (private property limited by other public interests, including exercise of police power "to protect the atmosphere, the water and the forests"); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (private property interests must at times "yield to the good of the community" for the sake of "progress").


253. *See* Rose, *supra* note 1, at 274-84. Other commentators have similarly discussed the need for the balance between private and public rights to change over time. *See* Freyfogle, *supra* note 9, at 100-02 (discussing how the *sic utere* principle, which prohibits harming neighboring land uses, has changed in response to societal conditions).
For these reasons the underlying assumption of compensation statutes—that pre-existing property rights are being taken from landowners and deserve compensation—is faulty. Rather, private property has traditionally, and appropriately, been viewed as subject to certain public interests that necessarily change over time.\textsuperscript{254} This does not permit the state to redefine property at will; clearly some regulatory action might violate private property rights and require compensation. But this view of property does indicate that not all diminutions in property value deserve compensation.

For similar reasons compensation statutes cannot be viewed as merely protecting landowner expectations in property. Although protection of reasonable expectations is a central consideration in takings analysis,\textsuperscript{255} expectations themselves are necessarily shaped by common understandings of property rights. As noted by various commentators, to the extent that people perceive that property is subject to certain public interests, then reasonable expectations must take into account the possibility of regulation.\textsuperscript{256} The Supreme Court recognized this in \textit{Lucas} where, in describing a landowner's "bundle of rights," it stated "[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."\textsuperscript{257} Thus, as noted by Professor Frank Michelman, "regulation [is] an ordinary part of background risk and opportunity against which we all take our chances ... as investors in property."\textsuperscript{258}

This is not to say that environmental regulations might not at times so interfere with legitimate landowner expectations as to require compensation. As noted in Part I, interference with investment-backed expectations is a central focus of the Court's ad hoc balancing test for noncategorical takings. The problem with percentage compensation statutes, however, is that they assume that in all instances when diminution in value reaches a certain point, fairness dictates compensation because of deprivation of property rights and interfer-

\textsuperscript{254} See \textit{Rose}, \textit{supra} note 1, at 268-70, 276-82 (discussing how content of both private property and public rights can change over time).

\textsuperscript{255} See \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1019 n.8 (1992) and \textit{Penn Central}, 438 U.S. at 124 (noting importance of interference with investment-backed expectations in Court's ad hoc balancing).


\textsuperscript{257} \textit{Lucas}, 505 U.S. at 1027.

\textsuperscript{258} Michelman, \textit{supra} note 12, at 415. Other commentators have similarly observed that reasonable expectations on property use might include the possibility of regulation. See \textit{Humbach} \textit{supra} note 243, at 367 (characterizing purchase of undeveloped land as "gamble," part of which "is the inherent risk that the government may tighten the applicable regulations").
ence with expectations. Such a view is both historically and conceptually unsound.

Of course, society can decide to reorder the nature of property interests through legislation, which is what the compensation statutes in effect do. But it is important to realize what is happening: the compensation statute is creating a property interest, rather than protecting against a taking. This, of course, changes the rhetoric of the debate. Although it is arguably unfair to take clearly defined rights, it is a different matter if the statute is creating the right itself. Creating new entitlements in this manner might be wise or unwise policy, but it is hardly necessitated by fairness.

b. Givings and Reciprocity

A second and related criticism of percentage compensation statutes is that they fail to account for government givings as well as takings. Givings are instances where government action adds to, rather than takes away from, the value of land. Any serious attempt to address the economic consequences of government regulations on land needs to look in both directions. Yet compensation statutes completely ignore the givings side of the equation.

Numerous government actions can be considered givings, such as home mortgage deductions and farm subsidies, both of which indirectly enhance property values. Two of the most obvious types of givings in the context of land, however, are infrastructure support and land use restrictions. The building of sewer lines and public facilities adds to land values. Although property owners today often pay for some infrastructure through exactions, such exactions reflect the cost of the infrastructure and not the value it adds to the property. More

---


260. Even such an extreme property rights proponent as Richard Epstein recognizes the need to consider the giving side of the issue, stating that "[s]o long as government action constitutes a taking and a giving to the same individuals in the same proportions, all is well." Epstein, *supra* note 242, at 211. His taking theory thus provides that once it has been established that government action constitutes a taking, it must be asked "to what extent the restrictions imposed by the general legislation upon the rights of others serve as compensation for the property taken," what he designates as "implicit in-kind compensation." Id. at 195. He would limit consideration of in-kind compensation to only that flowing from the regulation in question, and would require clear proof that there is no disproportionate impact in a particular instance. Id. at 195-215. Thus, Epstein would appear to take a narrow view of the ways in which government might "give" value to land.

261. See C. Ford Runge & Tim Searchinger, *Who's Really Getting Taken? The Last Thing We Need is a Vast New Entitlement Program for Landowners*, NEW DEMOCRAT, Sept./Oct. 1995, at 27, 28 (noting that the United States Department of Agriculture estimates that farm subsidy programs have increased farmland values ten to twenty percent over previous nine years).

significantly, exactions do not attempt to recover the broader infrastructure support, such as roads, that makes land developable at all.

Government land use restrictions can also increase property values in several different ways. First, such government regulations can increase property values by minimizing the harms that might otherwise affect landowners, especially those arising from incompatible land uses. That is particularly true where surrounding property is downzoned but a particular landowner retains more intensive uses. Moreover, use restrictions can enhance land value by limiting the supply of land for particular uses. All else being equal, when the supply of a commodity is reduced its value increases.

Any argument for compensation predicated on fairness must account in some fashion for government givings to property owners. Yet percentage compensation statutes make no effort to do so. Instead, they simply compare the value of land before and after regulation to determine whether compensation is required. Although any value added by the specific regulation in question would be reflected in the comparison, the numerous other forms of government givings that might have enhanced land value are ignored. In particular, basic infrastructure support that makes land developable at all, such as road and highway systems, is not taken into account.

The potential impact of government givings on land values can be illustrated by a simple example. Assume a property owner has a tract of remote land worth $10,000. The government then puts in a major highway near the property, creating new commercial opportunities and raising the total value to $60,000 over several years. A short time

263. See Donald G. Hagman and Julian C. Juergensmeyer, Urban Planning and Land Development Control Law 328-29 (2d ed. 1986) (discussing ways that government action might create an increase in the value of property, designated “windfalls”).

264. William Fischel has recently noted that the benefit-offset doctrine, developed in the nineteenth century to facilitate railroad expansion, is premised on the recognition that in paying “just compensation” to landowners under eminent domain the government could deduct the increased value of the land due to the government action. As an example, Fischel states:

Thus a railroad, to which states usually gave eminent domain powers, might take 20 acres of McDonald’s 160-acre farm. Suppose the 20 acres were valued at $1,000. The appraisers might find that the remaining 140 acres of the farm increased in value by $800 because of improved access to markets, so that on balance the railroad owed McDonald only $200. Thus the benefit of the $800 gain partly offset the $1,000 loss.

Fischel, supra note 36, at 81. Fischel goes on to note, citing a study by legal historian Harry Scheiber, that in some cases only a one dollar award was given because the overall value of the property actually increased. Id. at 81.

265. I am not necessarily suggesting that compensation statutes be rewritten to incorporate calculation of givings, since that would inevitably involve complex calculations. Rather, my point is that fairness does not necessitate that landowners always be compensated for diminution in value resulting from government regulation, since much of that value would not exist in the first instance without government givings.

later the government imposes an environmental restriction on the property, decreasing its value to $30,000. Compensation statutes would simply compare the $60,000 value before regulation and $30,000 value after regulation and require compensation, even though without the previous government action the property would be worth even less.

Closely related to givings is the notion of reciprocity. Although the Supreme Court has never fully explained the concept, it has long emphasized that a reason for not requiring compensation whenever regulation decreases land value is that regulations will result in an "average reciprocity of advantage." Noted first in Pennsylvania Coal, the notion of reciprocity was also used in both Lucas and Penn Central as one rationale supporting land use restrictions.

The concept of reciprocity has two aspects, which I will call specific and general. Specific reciprocity flows from the actual regulation in question. For example, a broadly applicable land use restriction to single-family use will limit previously existing development opportunities on a particular parcel of land, but will also impose similar limitations on surrounding parcels. Thus, each owner loses something (the previous opportunity to develop) and gains something (the benefits of similar restrictions on other nearby property). As noted above, the gains and losses of specific reciprocity can be taken into account by the before and after valuation approach of compensation statutes.

General reciprocity, on the other hand, acknowledges the reciprocal benefits of economic regulation in general, as opposed to only those flowing from the challenged regulation. The Court is arguably alluding to general reciprocity when it says that it is usually fair to assume that legislation is simply "adjusting the benefits and burdens of economic life" that secure an "average reciprocity of advantage" to

---

267. For a general discussion of the Court's use of the "average reciprocity of advantage" concept in its takings jurisprudence, see Coletta, supra note 89. Coletta states that "the term 'reciprocity of advantage' is subject to a wide range of definitions." He further states that depending upon the particular court or commentator in question, the term has meant: "(i) the existence of some benefit flowing to the burdened party; (ii) the existence of significant benefit flowing to the burdened party; (iii) some general balance between the benefits received and the burdens imposed; or (iv) true mutuality between the benefits received and the burdens imposed." Id. at 301 n.18. Coletta himself argues for what he calls an expansive reading of the term where "[r]eciprocity demands should be deemed to be met, and the regulation therefore deemed to be a legitimate exercise of the police power, in any case where the land use restrictions affirmatively enhance the community's welfare." Id. at 303.

everyone concerned. Thus, although a particular regulation might decrease the value of an owner's property, that same owner benefits from numerous other regulations that restrict other parties. For example, an owner whose property is subject to particular land use restrictions might in turn benefit from Clean Water Act restrictions on one neighbor, wetland controls on a second, and flood plain restrictions on a third. On a much broader level, various other types of economic and social regulations benefit the person economically.

Our tendency, however, is to accept the benefits of regulation as a given but complain about the burdens as an infringement of rights. That perspective distorts the true accounting of regulatory impacts by focusing on only half the equation. Moreover, it puts government in an untenable position, in which it is expected to pay for burdens but cannot account for benefits. Government cannot operate under such a system.

This discussion of general reciprocity is not meant to suggest that we are all financial winners based on overall regulatory impact. That is not necessarily the case. The notion of general reciprocity does demonstrate, however, as does the concept of givings, that diminution in value resulting from property restrictions is not necessarily unfair and does not automatically deserve compensation. Rather, the fairness or unfairness of the diminution in value must be decided in a broader perspective which also considers the many regulatory benefits that accrue to property owners.

271. *Lucas*, 505 U.S. at 1017-18; *Penn Central*, 438 U.S. at 1124. Professor Frank Michelman makes a similar point in his seminal article, *Property, Unity and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, supra note 94. He states that:

Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed "evenly" enough so that everyone will be a net gainer.

*Id.* at 1225.


*[w]hile individual owners may be burdened by the use restrictions which the regulations place on their parcels, they also benefit from the same system of regulations that is fostered by exercise of the police power. Most significantly, the benefits received and the burdens imposed need not originate from the same legislation.*

Coletta, *supra* note 89, at 338.

273. The ultimate reciprocity, of course, is that the state creates and maintains property in the first instance. Thus, in exchange for certain limitations on property, the state gives the means by which property itself is recognized.

In sum, the problem with percentage compensation statutes is that they assume that fairness dictates compensation whenever diminution reaches a certain point, usually set rather low. This is contrary to the longstanding view that private property is affected with a public interest and the realization that property owners receive substantial givings from government and reciprocal regulatory benefits. Certainly the economic impact of regulations sometimes deserves compensation, a fact that current Supreme Court takings jurisprudence recognizes. But to assume so in all instances is grossly overinclusive and, indeed, unfair to the public at large, who in effect end up subsidizing property owners. The substantial costs of percentage compensation statutes, together with their potentially devastating impact on environmental protection, make them poor policy.

2. The Florida Alternative

The Florida compensation statute stands in sharp contrast to the percentage compensation statutes. Instead of defining a taking as a certain percentage diminution in value, the Florida statute requires compensation when the government action “inordinately burden[s]” real property use.\(^{275}\) The statute further defines “inordinately burdened” to mean either that the landowner is “permanently unable to attain the reasonable, investment-backed expectations” for the property or that an 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.”\(^{276}\) The statute also establishes various procedural mechanisms for the settlement of takings claims.

By adopting this open-ended and flexible standard, the Florida statute avoids the primary criticisms of percentage statutes discussed above. Rather than adopting a definition of property similar to other compensation statutes, the statute implicitly recognizes that private property rights are subject to certain public interests.\(^{277}\) Moreover, the statute’s focus on “disproportionate share” and “fairness” recognizes that diminution in value does not automatically reflect unfair treatment. Most important, the statute’s open-ended nature, together with its focus on reasonable expectations and fairness, provides for a fine tuning assessment that in theory will find a taking only in deserving instances. This is its major advantage over percentage statutes.\(^{278}\)

---

276. Id. § 70.001(3)(e).
277. See Vargas, supra note 15, at 359-64 (stating that the Florida act did not adopt any particular theory of property).
278. But see Douglass, supra note 15, at 1092-94 (preferring Texas statute’s percentage approach “because it provides a more objective measure”).
Indeed, as noted earlier, the statute's definition of "inordinately burdened" largely reflects current takings principles as announced by the Supreme Court and on its face makes little substantive change. The statute makes clear, however, that it is creating distinct grounds for a taking that is not limited to judicial takings standards. As suggested earlier, this might create a broader class of compensable takings than previously recognized by courts.

To signal such an expansion of compensable takings is not necessarily bad. As a practical matter, by defining "inordinate burden" in the way it does, the statute will likely not expand the class of compensable takings much beyond what is currently judicially recognized. Moreover, it is certainly within the province of the legislature to make some adjustments to property rights and the circumstances under which landowners should be compensated. Although this will likely result in some increased compensation costs, they should be substantially less, and more likely deserved, than those produced by percentage compensation statutes.

Perhaps the greater cost of the "inordinate burden" standard will be its chilling effect on government regulation. Again, this is not all bad, since in theory only government actions that cause a property owner to be unable to attain reasonable investment-backed expectations or to bear a disproportionate cost of regulations would be chilled, arguably a desirable result. As a practical matter, however, the uncertainty of the new standard, together with the statute's implicit encouragement of taking challenges, will likely make government think twice before regulation. Nevertheless, the "inordinate burden" standard represents a reasonable legislative response to the takings issue and is superior to the percentage compensation statutes.

The more innovative dimension of the statute is its procedural mechanism for resolving takings claims. The statute creates a settlement process to resolve issues prior to litigation and requires issuance of a "ripeness decision" to establish the scope of permissible uses for judicial review. Together these procedures address several of the problems in current takings litigation. Perhaps most important, the ripeness decision corrects the frustrating situation, often experienced by property owners challenging land use restrictions, in which challenges are repeatedly dismissed because the permissible uses have not been established, thus prohibiting judicial determination whether a taking occurred. The settlement process also deserves praise for

280. See Libby, supra note 274, at 101 ("may be a tendency to avoid rule changes" because of additional litigation and transaction costs).
282. See id. § 70.001(5)(a).
seeking to identify ways to meet regulatory goals while addressing landowner concerns in a concrete, factual context. This might well lead to a more refined balance of private property interests and regulatory goals in which the public interest might be served in a manner imposing less of a burden on private property.

In her recent in-depth examination of the statute, however, Professor Sylvia R. Lazos Vargas identifies several problems with the procedures established in the statute.\textsuperscript{283} She notes the significant cost potentially imposed on government bodies by this process, since settlements will be done on an individualized basis. Government agencies will also be at what she calls a “transaction cost disadvantage” and an “information disadvantage” in addressing settlement offers, since their staffs will be spread thin in addressing numerous settlement claims and their information will be limited.\textsuperscript{284} Although this form of decentralized decisionmaking might result in a more fine tuning of land restrictions, it will be very costly to the affected agency.

Perhaps even more problematic is that the settlement process takes place outside the public view, with no opportunity for public input.\textsuperscript{285} Yet such settlements might well have an impact on broader public needs. The statute partially addresses this concern both by requiring that settlements that “have the effect of a modification, variance, or a special exception” to a general restriction “shall protect the public interest,”\textsuperscript{286} and by requiring that settlements that “have the effect of contravening the application of a statute” be approved by a court to ensure protection of the public interest.\textsuperscript{287} Although these provisions reflect sensitivity to the need to protect the broader public interest in the settlement process, there will certainly be some pressure on government to compromise the broader public interest if it is overwhelmed with settlement requests.

Both these concerns about the Act—the administrative burden imposed by the settlement process and the potential neglect of the public interest—are legitimate. Whether on balance they outweigh the Act’s understandable attempt to facilitate settlements that seek a more precise balance of private and public interests as applied to specific parcels of land is hard to predict. At a minimum, however, the provision for ripeness decisions should expedite final determination of landowner rights and help alleviate one of the more frustrating dimensions of current takings law.

\textsuperscript{283} See Vargas, supra note 15, at 380-96.
\textsuperscript{284} See id. at 387-91.
\textsuperscript{285} See id. at 382.
\textsuperscript{286} See FLA. STAT. ANN. § 70.001(4)(d)(1) (West Supp. 1997).
\textsuperscript{287} See id. § 70.001(4)(d)(2).
In sum, the Florida statute presents a distinct and in most respects superior alternative to enacted and proposed compensation legislation in other states. Importantly, the statute avoids the simplistic assumption about property rights found in other compensation legislation and instead seeks to provide compensation only in truly deserving cases. Yet it is questionable whether the administrative burdens of the new Act and potential for increased litigation will be worth these marginal improvements.

CONCLUSION

The last several years have seen a significant shift in the efforts of property rights proponents from the judicial to the legislative arena. Hoping to hold government more accountable for regulatory impacts on private property, such proponents have aggressively pushed a property rights agenda in statehouses across the country. This has resulted in proposed legislation in nearly every state and enacted statutes in more than one-third of the states.

The more common assessment statutes are in one sense rather innocuous, since they require compliance with current constitutional safeguards rather than impose new substantive standards. Moreover, they serve a useful purpose by encouraging greater sensitivity to takings concerns in environmental and land use regulations. Yet it is questionable whether the marginal benefits of such assessments will be worth the considerable effort of their preparation. This is particularly true where statutes require facial assessments, which for all practical purposes will be largely meaningless under current Supreme Court standards.

Far more problematic are percentage compensation statutes, which radically change current judicial standards to require compensation when property is diminished in value beyond a certain point. These statutes are predicated upon an ill-conceived view of property rights and fail to account for the significant value and benefits that government actions give to property. The result is a potentially budget-busting program that will chill environmental protection and subsidize private property owners. The Florida statute, though itself not without flaws, is a more reasonable attempt to accommodate the competing private and public interests at stake in environmental regulation.

The battle over takings bills will certainly continue over the next several years as property rights proponents continue to introduce both assessment and compensation legislation. There is some reason to believe, however, that the momentum towards takings legislation is beginning to wane. Whereas thirteen states enacted legislation in 1994
and 1995,288 only two states passed bills in 1996, and in one of those states the legislation was vetoed by the Governor.289 This is undoubtedly due partly to the widespread mobilization of environmental and government groups in opposition to takings legislation, and partly to the fundamental unsoundness of many proposals. Nevertheless, the vast array of proposed bills, combined with the ardent and often sincere efforts of property rights proponents, suggests the fight is far from over.