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THE STATE EXPERIENCE WITH PROPERTY RIGHTS LEGISLATION

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EXECUTIVE SUMMARY

The ownership of private property has been a cornerstone of our nation's system of government from its inception. As the Supreme Court declared in 1972, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

When the government regulates the use of private land for a public purpose and causes a diminution in the value of land due to the restrictions on use, the private land has been taken for public use. The increasing frequency of regulatory takings has generated a steadily growing concern among private property owners. As the federal, state, and local governments continue to expand their regulatory authority, the limitations imposed upon property uses increase as well. Citizens across the country are finding that they are unable to farm or ranch their land as a result of government regulation of endangered species and wetlands.

Although the Supreme Court has shown a growing willingness to protect property rights over the last decade, landowners still must confront excruciatingly vague judicial standards as to whether compensation for a taking is due. Given the limited relief available from the courts, these property owners are increasingly turning to their state legislatures for relief.

The primary purpose of state property rights legislation is to expand the scope of protection offered to private property owners. Litigation is far too time consuming and unpredictable, not to mention the fact that the diminution in value must be fairly substantial in order for the property owner to benefit from the remedies currently available. Compensation statutes, on the other hand, provide a clearer standard for determining what constitutes a regulatory taking and when compensation is due.

Texas and Florida have the most comprehensive regulatory takings compensation legislation enacted to date. In 1995, these two states became the first to expand current takings law to protect property owners within their borders. Both the Florida and Texas laws substantially extend the concept of a regulatory taking beyond the present boundaries established by the Supreme Court. Each statute not only imposes significant restrictions on a broad range of governmental activities, but also creates a process to resolve takings issues.

Efforts to enact further property rights protections at both the state and federal level have met with substantial resistance from federal regulators and a environmental activist groups. Property rights opponents allege that providing greater protection for property owners will necessarily impose substantial burdens on government agencies and inhibit environmental protection. Yet, the experience of states that have enacted property rights legislation, particularly Florida and Texas, suggests these claims are unfounded. The costs of providing greater protection have been greatly exaggerated. Property rights legislation, particularly

measures that facilitate legitimate takings claims against government regulators, can provide significant benefits for small landowners and force government officials to pay more attention to the human costs of their edicts. State experience to date suggests compensation legislation is a modest step that ensures greater protection of property rights without inhibiting essential government functions.

Property rights are essential to the preservation of individual liberty and a market economy. In recent years, states have rushed to the forefront of providing protection for private property rights by enacting much needed legislation. It is time for other states —and even the federal government, to follow suit.

AND JUSTICE FOR ALL

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INTRODUCTION

"What our generation has forgotten is that the system of private property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves."
—— F.A. Hayek[1]

A fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

The ownership of private property has been a cornerstone of our nation's system of government from its inception. As the Supreme Court declared in 1972, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."[2]

The Framers were fully aware of the importance of property rights as they drafted the Constitution and understood that the preservation of property was essential to the success of their government - a government founded upon notions of representative leadership and the protection of individual rights. James Madison declared, "[g]overnment is instituted to protect property of every sort; … This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[3] Alexander Hamilton clarified the intimate connection between the natural rights of life, liberty and estate when he stated, "Adieu to the security of property[,] adieu to the security of liberty."[4] Thus, the recognition of private property rights is not a recent phenomenon.

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[1] F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944, 1956 ed.), pp. 103-104.
[2] *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).
[3] James Madison, "Property, National Gazette, Mar. 29, 1792, *reprinted in* 14 *The Papers of James Madison* 266-68 (R. Rutland et al. eds., 1983)(emphasis in original).
[4] Steven J. Eagle, *Regulatory Takings* (Charlottesville, Virginia: Michie, 1996), p. 56.

Property rights are preserved in the takings clause of the Fifth Amendment of the U.S. Constitution which provides, " . . . nor shall private property be taken for public use without just compensation." This constitutional limit upon the government was extended to the states with the ratification and subsequent interpretation of the Fourteenth Amendment which states, in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

When the government regulates the use of private land for a public purpose and causes a diminution in the value of that land due to the restrictions on use, the private land has been taken for that public use. The increasing frequency of regulatory takings has generated a steadily growing concern among private property owners. As the federal, state, and local governments continue to expand their regulatory authority, the limitations imposed upon property uses increase as well. Citizens across the country are finding that they are unable to farm or ranch their land as a result of government regulations designed to protect endangered species and to preserve wetlands.

When a property owner is unable to develop or utilize her land in the manner in which he desires, can one really argue that the value of the land remains unaffected? According to Donald J. Kochan of the Mackinac Center for Public Policy, "After imposition of a regulation, it is often economically impossible for an owner to sell his land and move elsewhere to use another property in the way that satisfies his needs. When fair market value is affected by a governmental action, selling means imposing a financial loss on the property owner."[5] While the owner retains title to the property, he loses control over the permissible uses of his property and receives no compensation for the loss. "To prevent compensation for the element of usage is to prevent compensation for the greatest element of value in property."[6]

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As early as 1922, the Supreme Court recognized that the government was limited in the extent to which it could redefine a property owner's interest in his land. In *Pennsylvania Coal Co. v. Mahon*, Justice Oliver Wendell Holmes stated, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[7] In recent years, the Court has moved

While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

[5] Donald J. Kochan, "Reforming the Law of Takings in Michigan," *Mackinac Center Report*, April 1996, p.6. "When a regulation restricts certain uses of property, it not only prevents individuals from using their property in a way they desire, but it often has the effect of essentially stealing the worth of one's property." *Id.*

[6] *Id*. at 24. "It is the expectation for usage of property that gives it its value, for the right of usage is one of the most important "sticks" in each owner's bundle of property rights." *Id.*

[7] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This was the initial stage of the government declaring it had authority under the Constitution for regulatory powers. Prior to this point in time, the impacts of governmental actions on private property were minimal and therefore had not been addressed.

toward greater protection of private property rights. In the 1987 case, *Nollan v. California Coastal Commission*, the Court held that when an essential nexus does not exist between the permit condition and the purported state interest, the required exaction of property is to be considered a compensable taking.[8] Therefore, a property regulation which does not substantially advance its avowed governmental purpose constitutes a taking. Five years later, in the 1992 *Lucas v. South Carolina Coastal Council* decision, the Court found that a governmental action which leaves private property totally valueless or physically encroaches upon the property constitutes a per se taking.[9]

One of the principal purposes of the Takings Clause is 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.

Most recently, in the 1994 case of *Dolan v. City of Tigard*, the Court extended its *Nollan* holding when it determined that an exaction of property which is not proportional to the permit's purpose should be treated as a taking.[10] Writing for the majority, Chief Justice Rehnquist stated, "One of the principal purposes of the Takings Clause is 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."[11]

Despite these recent favorable rulings, the success of a regulatory takings claim is still largely dependent upon the facts of a particular case and the presiding judge which, in turn, provides for an uncertain outcome.[12] When the facts of a case do not fall into one of the two per se regulatory takings categories, total loss of economic viability or physical invasion of the land, the Supreme Court does not provide clear guidance. In such instances, the Court chooses to apply an ad hoc balancing test which results in unsettled constitutional law with regard to the takings analysis.[13]

In addition, financial and procedural hurdles for aggrieved property owners result in many choosing not to pursue their rights under the Fifth Amendment. Nancie G. Marzulla, President and Chief Legal Counsel for Defenders of Property Rights, a Washington, DC based non-profit organization,

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[8] 483 U.S. 825, 836-39 (1987).
[9] 505 U.S. 1003, 1015-16 (1992).
[10] 114 S. Ct. 2309 (1994).
[11] *Dolan*, at 2316.
[12] Nancie G. Marzulla, "State Private Property Rights Initiatives as a Response to Environmental Takings," *South Carolina Law Reveiw* Vol. 46 p. 628, 1995.
[13] The Supreme Court's current test for determining the presence of a regulatory taking is derived from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* outlines an ad hoc, factual inquiry balancing test which is designed to weigh the public benefit of the regulation against its effect on the owner's use of the property. The Penn Central Court identified three factors considered to be of particular significance: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with the owner's distinct investment-backed expectations; and (3) the character of the governmental action. Under current law, a private property owner is not automatically entitled to compensation when a governmental regulation simply decreases the value of his property, rather she must rely on *Penn Central's* ad hoc inquiry.

describes the current status of takings law as one in which, "the ability of a property owner to prevail in a regulatory takings case remains the exception rather than the rule. Such litigation is a long and arduous process that only the most well-financed and dedicated property owner is able to endure."[14] Because of the vague and limited remedies provided by the courts, many property owners are now pushing for legislation to protect their rights. Much of the focus of these efforts has been on Congress, where legislation has been stalled, most notably with the recent defeat of property rights legislation. But most of the real activity and progress has occurred at the state level.

The purpose of this study is to determine the current status of regulatory takings legislation in the states, evaluate its impact, discuss trends in the property rights movement and draw lessons from the states' experiences.

If governmental entities are required to "look before they leap," the likelihood that citizens will get stuck footing the bill for multimillion-dollar awards is reduced.

THE STATE EXPERIENCE WITH PROPERTY LEGISLATION

The various property rights bills that have been enacted at the state level can be divided into two broad categories: *assessment statutes and compensation statutes*. Some measures are a combination of these two categories.[15] *Assessment statutes*, often referred to as planning or "look-before-you-leap" bills, are the more common of the two. These statutes typically require the governmental entity proposing the regulation to conduct an evaluation of the potential takings implications. This assessment focuses upon whether an unconstitutional taking of private property is likely to result from the particular governmental action. As of January 1998, assessment legislation had been passed in eighteen states: Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, North Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming.[16] (See Appendix D.) Assessment bills are also pending in several others.

Assessment legislation draws governmental attention to the implications that regulatory programs have for property owners. Proponents hope that legislation of this type will sensitize the government to private property concerns "by forcing it to determine and evaluate the cost of regulation to private property owners."[17]

Benefits of this type of legislation also include savings for property owners who previously had to go to court to challenge regulations that were

[14] Marzulla, p. 628

[15] Louisiana, North Dakota and Texas have enacted legislation which combines assessment and compensation measures. See Grimes, p. 587.

[16] "State-by-State Legislative Update," Defenders of Property Rights, Washington, D.C., updated 1/20/98. Although the Arizona bill was enacted, it was later rejected by a three-to-two margin in a statewide referendum vote. The North Dakota and West Virginia statutes are limited in that they are wetlands planning legislation. *Id.*

[17] David Spohr, "Note: Florida's Takings Law: A Bark Worse Than It's Bite," Virginia Environmental Law Journal 313, 323 (Winter 1997).

Compensation statutes address the negative effects upon private property owners of regulations already enacted.

believed to be takings as well as savings for taxpayers in the form of precluded compensation payments.[18] If governmental entities are required to 'look before they leap,' the likelihood that citizens will get stuck footing the bill for multimillion-dollar awards is reduced. Such legislation also encourages prioritization so that governmental regulations having a valid, legitimate purpose are enacted and onerous, wasteful regulations are not. Additionally, planning requirements usually insist upon the utilization of effective alternatives when these alternatives affect property rights to a lesser degree. Lastly, assessment statutes "create a more stringent system of accountability" for the governmental entities proposing regulation.[19]

On the other hand, critics argue that this type of law does not work. They say that the current state of regulatory takings law is sufficiently ambiguous so as to make it difficult for government officials to determine conclusively whether their actions will constitute takings. They argue that no meaningful analysis can be done of the liability at stake when each outcome is case-specific.

Another criticism made by opponents to assessment legislation is that such statutes are attempting to solve a bureaucratic problem with the creation of another bureaucracy. They argue that the additional cost to the agency, combined with the administrative burden imposed by the assessment statute, outweighs any potential benefits. Many of the same critics assert that assessment statutes 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."[20] The procedures established by assessment legislation are considered by critics to constitute an unnecessary delay and expense.[21]

An attempt was made at the federal level to implement assessment procedures with President Reagan's Executive Order No. 12,630, "Governmental Actions and Interference With Constitutionally-Protected Property Rights."[22] The order specifically provided that "it does not enlarge or change the scope of takings law, but instead requires assessments according to current Supreme Court principles."[23] This effort proved to be more "lip service" than actual protection for private property rights. Since the governmental entities were not held accountable in any way for failure to

[18] Lund, p. 6.
[19] Kochan, p. 18.
[20] Cordes, p. 221. Opponents of assessment legislation believe that this is merely duplicating what is already required of such governmental entities.
[21] Ironically, most of the environmental groups that oppose takings impact assessments are staunch advocates of environmental impact assessments, such as those that are required under the National Environmental Policy Act and equivalent state statutes.
[22] 53 *Federal Register* 8859 (1988).
[23] Cordes, p. 205.

conduct takings impact assessments, the Executive Order has gone largely unused.[24]

Despite this shortcoming, assessment statutes, by addressing the issue before the taking has occurred, may be a potential preventative measure. A more serious fault, however, is that they fail to supply a remedy for private landowners whose property has been devalued as a result of a governmental regulation.

By contrast, *compensation statutes* address the negative effects upon private property owners of regulations already enacted. The purpose of compensation legislation is to expand the protection of private property rights by providing compensation to private landowners who suffer a loss resulting from governmental action.

Texas and Florida, possess the most extensive compensation statutes to date.

Compensation laws generally clarify and expand the definition of a taking to include the impact of use restrictions that might not rise to the level of a taking under the current judicial tests.[25] Typically, a compensation statute clarifies when a compensable taking has occurred by setting a threshold percentage diminution in property value which, when reached, creates the presumption that a regulatory taking has occurred. The diminution in value is calculated by comparing the fair market value of the property before and after the government regulation. This legislation entitles a private property owner to "compensation upon proof that a government regulation reduced the value of his or her property by a certain percentage."[26] Some compensation measures, however, do not set a threshold percentage. For example, Florida's statute requires merely that an "inordinate burden" be imposed on the private property owner by the governmental action.

Compensation bills have been introduced in more than twenty-five states; however, they have been met with rather limited success.[27] The legislatures of eight states have passed compensation bills of some sort: Florida, Louisiana, Maine, Mississippi, North Carolina, North Dakota, Texas, and Washington.[28] (See Appendix D.) North Dakota's legislation, however, failed to establish

[24] Marzulla, p. 630.

[25] Douglass, p. 1063. Examples of such actions include: permit conditions; partial takings; and temporary takings. By expanding the scope of a compensable taking, these statutes provide private property owners with a cause of action against governmental actions which render portions of their private property useless or reduce the value of their property. See Kochan, p. 18-19.

[26] Lund, p. 8.

[27] Cordes, p. 212. Some of these states include: Arizona, California, Delaware, Florida, Georgia, Idaho, Iowa, Kentucky, Maine, Maryland, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. See Lund, p. 8.

[28] "State-by-State Legislative Update," Defenders of Property Rights, Washington, D.C., updated 1/20/98.

an express cause of action or mandate compensation for the property owner. Washington's law was repealed by the voters in a statewide referendum, possibly due to the expansive nature of the legislation (it required compensation for *any* diminution in property value due to governmental action).[29]

If the government is forced to choose between paying compensation to property owners and modifying their environmental goals, the odds are that the goals can, and will, be modified.

Louisiana and Mississippi have each enacted compensation bills which apply only to agricultural and forestry activities. The Louisiana bill combines the two types of legislation, compensation and assessment, by giving property owners a cause of action to seek compensation when their property value has been reduced by twenty percent or more, and also requiring written impact assessments for proposed government regulations which could potentially result in such a reduction.[30] Mississippi, on the other hand, did not combine assessment and compensation formats in its legislation. The Mississippi statute requires that compensation be paid to a property owner if his agricultural or forestry land is devalued by forty percent or greater as a result of government regulation.[31] The other two states with enacted compensation legislation, Texas and Florida, possess the most extensive compensation statutes to date.

Compensation statutes provide a clearer standard for determining what constitutes a regulatory taking and when compensation is due. The thresholds set in compensation legislation increase the degree of certainty and accord a greater status to property rights.[32] This newfound clarity in defining compensable takings (regulatory takings legislation) is expected "to ease the litigation burden facing the state and the property owner."[33]

Supporters of compensation legislation also point out that compensation statutes force the governmental entities to think before destroying private property rights.[34] If an agency is required to pay compensation for regulatory takings, the result will be a greater awareness of the financial risks involved and a clearer perception of what actions are likely to constitute regulatory takings. By forcing agencies to pay for the private property rights taken through governmental regulatory action, we will encourage the examination of non-regulatory approaches which could achieve the same statutory purposes.[35]

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[29] Douglass, p. 1074.
[30] Right to Farm and Forest, LA Title 3, Chapter 22; 1995 LA H.B. 2199.
[31] Mississippi Forestry Activity Act, 1995 MS H.B. 1541.
[32] Spohr, p. 324.
[33] Marzulla, p. 615.
[34] Spohr, p. 324.
[35] Adler, p. 17. "Forcing agencies to bear the direct impact of their own regulatory activity is likely to achieve the desired result of modifying agency behavior and restoring regulatory accountability. If compensation is required, agencies seeking to regulate private land use will be forced to consider whether regulatory actions would produce a regulatory taking, and, if so, whether the benefits of the proposed regulatory action are worth the costs of paying compensation." *Id.*

Opponents of compensation statutes argue that they will impose substantial costs on government agencies, primarily from required compensation payments. It is this fear of fiscal obligation which prevents a significant number of compensation bills from being passed at the state level. Compensation legislation, however, does not increase the net social cost of environmental regulation involving takings. It simply ensures that the government pays for the costs of burdens that it imposes on private landowners. As James Huffman, Dean of the Northwestern School of Law at Lewis and Clark College explains, "The pervasive notion that society can avoid the costs of public action if government can avoid compensating for property affected is simple self-deception. The costs of government action will be borne by someone. The compensation requirement, like a rule of liability, simply determines who that someone is . . ."[36]

The deprivation of the private property owner's right to use and enjoy that property requires that just compensation be paid.

Another criticism made in response to proposed compensation statutes is that such legislation will devastate environmental protection.[37] If the government is forced to choose between paying compensation to property owners and modifying their environmental goals, the odds are that the goals can, and will, be modified. This "chilling" effect on environmental protection laws is argued as one of the potential downsides of enacting such compensation legislation, even though study after study demonstrates that more flexible, less punitive approaches to environmental protection could produce greater environmental benefits at a lower cost.[38]

Critics also argue that compensation statutes upset well-established standards of takings jurisprudence. The current judicial standards, however, are far from well-established. Rather, they are both vague and insufficiently protective of private property rights. The mere fact that property legislation steps beyond where the Supreme Court has drawn the constitutional line is hardly a valid criticism in and of itself.

Yet another argument made by critics is that "compensation laws unconscionably reduce the takings inquiry to a consideration of market value reduction alone," thereby ignoring other significant factors such as the nature of the public interest, the social benefits for the property owner from the regulation, and the potential harm of the owner's proposed use.[39] Opponents argue further that "by discouraging governments from acting against harmful uses of land, these bills [compensation legislation] actually reduce, not

[36] James Huffman, "Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrine at Work," *Journal of Land Use and Environmental Law*, Fall 1987, p. 173 n.9.
[37] Cordes, p. 228.
[38] *See*, for example, Jonathan Tolman, *Swamped: How America Achieved 'No Net Loss'* (Washington, D.C.: Competitive Enterprise Institute, 1996).
[39] Douglass, p. 1074.

enhance, property values."[40] This last criticism is shared by some property rights advocates as well as environmentalists.

The primary concern is that, "by setting a threshold, compensation bills might disparage the rights of property owners who are the victims of takings that fall below that threshold."[41] Compensation legislation, however, would not detract from these property owners' rights. Rather, it would simply clarify and mandate "a compensation process for victims of takings that exceed the threshold."[42]

Both the Florida and Texas laws substantially extend the "concept of a regulatory taking beyond the present boundaries established by the Supreme Court."

Another concern with the threshold concept is that it places the focus mistakenly on value. "…property values are not the fundamental issue in the property rights debate;" the proper inquiry is the nature of the governmental action in question.[43] If the government is limiting the use of private property for a purpose other than the prevention of harm or injury to another person or property, the deprivation of the private property owner's right to use and enjoy that property requires that just compensation be paid. It is the nature of the governmental action which should determine whether compensation is due, not the level of devaluation experienced by the landowner.[44]

Recent Activity at the State Level

Property rights legislation has been introduced in twelve states since January 1997.[45] Of these private property rights measures, six failed in 1997. Legislation to provide compensation for regulatory takings stalled in Arkansas (H.B. 1977), Montana (H.B. 306), and New Mexico (S.B. 654). Two property rights assessment bills failed passage at the state level in North Dakota (S.B. 2177) and Wyoming (H.B. 120). Compensation legislation passed in Colorado (S.B. 47), but it was vetoed by Governor Roy Romer on May 5, 1997.

Of the property rights measures still afloat after the 1997 legislative sessions, six are primarily assessment bills (Alaska, Hawaii, New York, Ohio, South Carolina, and Washington) and five are compensation statutes (Idaho, Illinois, Minnesota, Oklahoma, and Washington). A judicial review procedure

[40] Spohr, p. 324.
[41] Marzulla, p. 637.
[42] Marzulla, p. 637. "…compensation bills would in no way impair the ability of property owners to obtain compensation for lesser takings." *Id.*
[43] See Adler, *Property Rights, Regulatory Takings, and Environmental Protection.*
[44] *Id.*
[45] American Resources Information Network (ARIN), *1997 State Takings Legislation*, updated 4/4/97, www.arin.org. These states include: Arkansas, Colorado, Idaho, Illinois, Maine, Montana, New Mexico, New York, North Dakota, Ohio, South Carolina, and Wyoming.

bill (Colorado) and a state constitutional amendment (Maine) complete the picture of state legislative proposals that were slated for consideration at the beginning of 1998.

AT THE FOREFRONT OF REGULATORY TAKINGS LEGISLATION: FLORIDA & TEXAS

Texas and Florida currently possess the most comprehensive regulatory takings compensation legislation enacted to date. In 1995, these two states became the first to expand current takings law to protect property owners within their borders. Both the Florida and Texas laws substantially extend the "concept of a regulatory taking beyond the present boundaries established by the Supreme Court."[46] Each statute not only imposes significant restrictions on a broad range of governmental activities, but also creates a process to resolve takings issues.[47]

This new cause of action provides for relief, including compensation, to the private property owner for the actual loss to the fair market value of the affected real property.

Florida's Innovation

In May 1995, Florida became the first state to pass extensive compensation legislation with the enactment of the Bert J. Harris, Jr. Private Property Rights Protection Act (Harris Act). Florida's takings law differs from the traditional form of compensation legislation in that it requires compensation for governmental actions that "inordinately burden" real property use, rather than defining a taking as occurring at a threshold percentage diminution in value.

In section one of the Harris Act, a separate and distinct cause of action from current takings law is created when property is "inordinately burdened" by governmental action.[48] According to the Harris Act, private property is inordinately burdened when an action has directly restricted or limited the use of the property so that the owner is "permanently unable to attain the reasonable, investment-backed expectation[s]" for the property, or if the owner would permanently bear a disproportionate share of a burden which in fairness should be borne by the public at large.[49] The inordinate burden standard applies to existing uses of real property as well as vested rights to specific uses of real property.[50]

This new cause of action provides for relief, including compensation, to the private property owner for the actual loss to the fair market value of the affected real property.[51] In order to pursue a remedy under the Harris Act, a

[46] Douglass, p. 1075.
[47] Cordes, p. 215.
[48] Fla. Stat. Ann. § 70.001(1).
[49] *See* Fla. Stat. Ann. § 70.001(3)(e).
[50] *See* Fla. Stat. Ann. § 70.001(2).
[51] House of Representatives Committee on Judiciary, Final Bill Analysis & Economic Impact Statement, CS/HB 863, May 23, 1995.

landowner must give notice along with a valid appraisal to the governmental entity which caused the inordinate burden at least 180 days prior to initiating a lawsuit.[52] The governmental entity is then required to make a written settlement offer during this time period, as well as a written "ripeness decision" which identifies the allowable uses of the property.[53] The ripeness decision or the expiration of the 180 day period is the final prerequisite to filing the action in state circuit court.

The procedure is an informal one, aimed at resolving the property owner's claim.

The requirement of a "ripeness decision" is significant because it provides the necessary final decision for judicial review. Currently, a large number of takings claims are deemed unripe due to the failure of the record to demonstrate what economically viable uses might remain on he property.[54] Since the governmental action is finalized and the remaining economically viable uses have been established, the Harris Act ensures a decision on the merits.

The Harris Act also provides a liberal definition of a "governmental entity" whose actions may entitle a property owner to compensation. The statute applies to any "agency of the state, a regional or local government created by the State Constitution or by general or special act, any county or municipality, and any other entity that independently exercises governmental authority."[55] However, the Harris Act does not apply to the federal government or the actions of any state or local governmental entity acting pursuant to a formal delegation of federal authority.[56] Another exemption from the statute is made for any actions of government relating to the operation, maintenance, or expansion of transportation facilities.[57] In addition, a cause of action brought under the Harris Act may not be commenced if the claim is presented more than one year after the law or regulation was first applied by the governmental entity to the subject real property.[58] The final, and perhaps most significant, restriction on the scope of the Harris Act limits the cause of action to the application of laws or regulations which were enacted after May 11, 1995.[59] The Harris Act is a significant step forward in the battle for private property rights. Since the statute is prospective, however, a vast number of regulations currently imposing burdens on landowners is left to go unchecked.

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[52] *See* Fla. Stat. Ann. § 70.001(4)(a).

[53] *See* Fla. Stat. Ann. § 70.001(4)(c) and (5)(a).

[54] Cordes, p. 220.

[55] *See* Fla. Stat. Ann. § 70.001(3)(c). "The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit." *Id.* at (3)(d).

[56] *See* Fla. Stat. Ann. § 70.001(3)(c).

[57] *See* Fla. Stat. Ann. § 70.001(10).

[58] *See* Fla. Stat. Ann. § 70.001 (11). However, if a private property owner seeks relief from the governmental action through lawfully available judicial or administrative proceedings, the statute of limitations is tolled until the conclusion of the proceedings. *Id.*

[59] *See* Fla. Stat. Ann. § 70.001(12). Subsequent amendments to regulations or laws enacted prior to May 11, 1995 are subject to the provisions of the Act only to the extent that the amendment imposes an inordinate burden apart from the existing law or regulation. *Id.*

While section one of the Harris Act establishes a new cause of action for private property owners, section two establishes an alternative dispute resolution process for land use and environmental claims. This section creates the Florida Land Use and Environmental Dispute Resolution Act (hereinafter the Dispute Resolution Act) which establishes an informal, non-judicial proceeding through which an owner of real property may seek review by a "special master" of a development order which unfairly or unreasonably burdens the use of his property.[60]

The procedure is an informal one, aimed at resolving the property owner's claim. Within fourteen days after the conclusion of a hearing, the special master is required to make a written recommendation.[61] Following the receipt of the special master's recommendation, the governmental entity has 45 days in which to accept, reject, or modify the recommendation.[62] If the special master proceeding is unsuccessful in resolving the dispute, the governmental entity must issue a decision which describes the available uses of the property.[63] This decision constitutes the final prerequisite to judicial action, thus rendering the matter ripe for subsequent judicial proceedings.[64]

The Florida statute is geared not toward producing large cash payouts on the part of the government, but rather to more thoughtful and fair land-use decisions.

The Dispute Resolution Act applies "only to development orders issued, modified, or amended, or to enforcement actions issued, on or after October 1, 1995."[65] The relevant distinction from the prospective nature of the Harris Act is the application of the Dispute Resolution Act irrespective of the enactment date of the underlying law or regulation.[66] This difference allows private property owners barred from filing a claim under the Harris Act to seek a resolution through the special master proceeding for a burdensome development order which was issued pursuant to laws or regulations enacted prior to May 11, 1995.

In summary, the Florida statute is geared not toward producing large cash payouts on the part of the government, but rather to more thoughtful and fair land-use decisions.[67] The "inordinate burden" standard lowers the compensable taking threshold below that of constitutional takings jurisprudence.[68] Significantly, the statute lowers the process costs for property owners, ensures an individual determination of fairness and a greater opportunity to be heard while promoting a more consensus-based system of land-use

The enactment of the Private Real Property Rights Preservation Act (hereinafter the Texas Act) in June of 1995 was another significant advance for the property rights movement.

[60] *See* Fla. Stat. Ann. § 70.51.
[61] *See* Fla. Stat. Ann. § 70.51(19). If the hearing does not end in a resolution, then the special master must determine whether the development order unreasonably or unfairly burdens the real property. *Id.*
[62] *See* Fla. Stat. Ann. § 70.51(21) and (22).
[63] *See* Fla. Stat. Ann. § 70.51(23).
[64] *See* Fla. Stat. Ann. § 70.51(23).
[65] *See* Fla. Stat. Ann. § 70.51(30).
[66] Douglass, p. 1083.
[67] Spohr, p. 361.
[68] Spohr, p. 359 (citing Fla. Stat. Ann. § 70.001(9)).

decision-making.[69] Such a move toward a more individualized land-use decision-making process could produce a more responsive, flexible and sensible environmental regime.[70]

Texas Cracks Down

By establishing a bright-line statutory definition of a regulatory taking occurring at a twenty-five percent diminution in property value, the Texas Act tips the scale in favor of private property owners.

The enactment of the Private Real Property Rights Preservation Act (hereinafter the Texas Act) in June of 1995 was another significant advance for the property rights movement. Considered by some to be "the most significant new property protection law," the statute which combines the assessment and compensation formats has been proclaimed to be the most stringent state takings law in the nation.[71] The Texas Act has been described by its sponsor, State Senator Teel Bivins, to be a largely preventative measure which provides a bright-line takings standard to be applied to government regulations affecting private property.[72]

The assessment provisions of the Texas statute require the Attorney General to prepare and file guidelines to be utilized by governmental entities in the identification and evaluation of governmental actions which could potentially result in a taking.[73] The state agencies are to prepare a written "Takings Impact Assessment" (TIA) for these proposed governmental actions.[74] The TIA should state the purpose of the proposed action, describe the burdens imposed upon the private property owner as well as the benefits to society, and evaluate alternatives to the proposed regulation.[75] The Texas Act creates a cause of action for failure to prepare a required TIA by expressly providing that a basis for judicial relief to set aside the regulation is available in such instances.[76]

The compensation portion of the statute defines a taking to have occurred when a governmental action reduces the market value of private real property by twenty-five percent or more.[77] Following a determination by the court in favor of a private real property owner, the government has the option of either compensating the landowner for the reduction in land value or rescinding the governmental action.[78] Therefore, compensation is not mandatory.

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[69] Spohr, p. 359-60.
[70] Spohr, p. 362 (citing Jonathan Adler, "Reform Measures Outdated," *Grand Rapids Business Journal*, Sept. 9, 1996, at B4).
[71] Steven J. Eagle, *Regulatory Takings* (Charlottesville, Virginia: Michie, 1996), § 15-7(b), p. 665.
[72] Douglass, p. 1084.
[73] Tex. Gov't Code Ann. § 2007.041.
[74] *See* Tex. Gov't Code Ann. § 2007.043.
[75] *See* Tex. Gov't Code Ann. § 2007.043(b).
[76] *See* Tex. Gov't Code Ann. § 2007.044.
[77] *See* Tex. Gov't Code Ann. § 2007.002.
[78] *See* TEX. GOV'T CODE ANN. § 2007.024 (Lexis) .

The Texas Act applies to both political subdivisions and state agencies subject to certain exemptions.[79] As was true of Florida's law, the most significant exemption to this statute is found in the provision rendering the Texas Act prospective. Regulations which were already in effect by September 1, 1995 are not subject to the requirements of the statute.[80] Realistically, this means that the burdens already imposed upon private property owners are not actionable under the law. Lastly, the Texas Act provides for two emergency exceptions: it does not apply to actions taken with a "reasonable good faith belief" that such action is necessary in order to prevent a "grave and immediate threat to life or property,"[81] or to actions taken in "response to a real and substantial threat to public health and safety," with the proviso that the burden cannot be greater than is necessary to "achieve the health and safety purpose."[82]

The Texas Private Real Property Rights Preservation Act provides a statutory response to the inability of current constitutional law to adequately protect the rights of private property owners from governmental regulations.

By establishing a bright-line statutory definition of a regulatory taking occurring at a twenty-five percent diminution in property value, the Texas Act tips the scale in favor of private property owners.[83] The requirement of Takings Impact Assessments and the new cause of action created for failure to perform a required TIA could serve to increase governmental entities' awareness of the importance of private property rights relative to public interest.[84] In conclusion, the Texas Private Real Property Rights Preservation Act provides a statutory response to the inability of current constitutional law to adequately protect the rights of private property owners from governmental regulations.

TEXAS V. FLORIDA

While each state has enacted a fairly rigorous property rights statute, the two laws differ in many significant respects which bear discussion. The most obvious distinction to be made is the threshold at which a taking is deemed to have occurred. The Texas statute sets its diminution threshold at a twenty-five percent reduction in market value, whereas Florida requires that an existing use or vested right to a specific use be "inordinately burdened" before the property owner is entitled to relief.[85]

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[79] *See* TEX. GOV'T CODE ANN. § 2007.003 (Lexis) Municipalities are exempt from the requirements of the statute, and county liability was postponed until September 1, 1997. Other exemptions include: seizure of contraband; actions taken by political subdivisions to fulfill obligations mandated by state or federal law; actions taken to prohibit a public or private nuisance; and seizure of property as evidence of a crime.
[80] *See* Tex. Gov't Code Ann. § 2007.003(c).
[81] *See* Tex. Gov't Code Ann. § 2007.003(b)(7).
[82] *See* Tex. Gov't Code Ann. § 2007.003(b)(13).
[83] Grimes, p. 612.
[84] Grimes, p. 612.
[85] *See supra,* notes 83 and 112.

Takings Threshold

The primary relevance of this particular distinction is that the Texas law sets a bright-line standard, whereas Florida leaves its standard to be construed through application (by the courts). The ambiguity of the "inordinate burden" standard leaves the Florida law open to interpretation and therefore less objective than its Texas counterpart. Additionally, the approach taken by Texas provides tangible guidance to both governmental entities and private real property owners thereby offering more certainty in application than the flexible Florida alternative.[86]

Of the two laws, the Harris Act is more likely to expedite the judicial resolution of takings claims brought against the state.

Procedural Provisions

Florida implemented two procedural provisions, which should discourage substantial increases in litigation under the Harris Act.[87] The first provision requires a private property owner to submit to a 180-day notice period during which the governmental entity is required to tender a settlement offer.[88] The Texas law, on the other hand, allows aggrieved property owners to bring suit without delay.[89] Regardless of where the suit originates, however, the Texas Act forces an aggrieved landowner to file no later than the 180th day he knew or should have known that the governmental action restricted his property rights.[90]

A second procedural provision of the Harris Act stipulates that the court, rather than the jury, must decide whether a taking has occurred.[91] The Texas statute, on the other hand, expressly provides "whether a governmental action results in a taking is a question of fact."[92] This provision, practically speaking, will result in the vast majority of Texas cases being submitted to the jury. Of the two laws, the Harris Act is more likely to expedite the judicial resolution of takings claims brought against the state.

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[86] Douglass, p. 1092. This tangible guidance provided by the Texas statute reduces the amount of public and private resources allocated to the evaluation of particular governmental actions. *Id.*

[87] Douglass, p. 1094. The first provision encourages negotiation between the parties while the second provision mandates judicial evaluation of claims. *Id.*

[88] Fla. Stat. Ann. § 70.001(4)-(5).

[89] Douglass, p. 1094. (citing Tex. Gov't Code § 2007.021-.025).

[90] Tex. Gov't Code Ann. §§ 2007.021(b) and 2007.022(b).

[91] Fla. Stat. Ann.§ 70.001 (6)(a). In specifying the court as the arbiter of the takings issue, Florida treats the question of whether a taking has occurred as a question of law. The court is responsible for determining whether the governmental action in question has "inordinately burdened" the property. If the court finds an inordinate burden to exist, the jury then determines the amount of compensation due the private property owner based upon the extent of diminution in property value. *Id.* at 6(a)-(b).

[92] Tex. Gov't Code Ann. § 2007.023(a). The magnitude of the diminution in the property's market value, as assessed by the trier of fact, determines whether a taking of the real property by the governmental entity has occurred. See Douglass, p. 1096.

Available Remedies

The remedy provisions of the two statutes are another point worthy of comparison. Florida's Harris Act provides for compensation as a presumptive remedy, but the law allows the governmental entity to propose a variance or exemption in the mandatory settlement offer.[93] Texas, on the other hand, provides for invalidation of the governmental action as a presumptive remedy, yet the governmental entity may elect to pay compensation to the property owner in order to retain the regulation.[94]

Texas, on the other hand, provides for invalidation of the governmental action as a presumptive remedy, yet the governmental entity may elect to pay compensation to the property owner in order to retain the regulation.

The practical result of the remedy provisions of the Texas Act will most likely be the invalidation of various regulations, given the "budgetary charm" of this route in comparison to the payment of compensation.[95] Since the default remedy under the Harris Act is compensation, Florida's law is more likely to result in negotiated settlements between the property owner and the governmental entity.[96]

An aspect of the takings provisions of the Texas law which is favorable to the private property owner is the inclusion of temporary restrictions in the definition of a taking.[97] Florida's statute specifically provides that the government is not liable for "temporary impacts to real property."[98] Therefore, an owner of private property subject to temporary restrictions can seek compensation under the Texas law but not under Florida's Harris Act.

Compensation Provisions

Under the Harris Act, the landowner's compensation is computed by the amount of diminution in the market value of the property, and the governmental entity acquires title to the property interest following the payment of compensation.[99] Thus, Florida's compensation provision treats the governmental action as a condemnation where the property interest is acquired by the government in the exercise of its eminent domain power.[100]

Florida's law is more likely to result in negotiated settlements between the property owner and the governmental entity.

[93] *Id.*
[94] *Id.*
[95] Douglass, p. 1098. The governmental entity is not faced with the choice of opting to invalidate the regulation or pay compensation until a taking has been found at trial. Tex. Gov't Code Ann. § 2007.024(c). Accordingly, the governmental entity is provided with greater incentive to await the outcome of the litigation than to tender a settlement offer since its liability is limited to the invalidation of the offending regulation.
[96] Douglass, p. 1097. Providing an exception or variance will usually be more fiscally attractive to the governmental entity when compared to the alternative of paying compensation to the landowner for the reduction in property value. *Id.*
[97] Tex. Gov't Code Ann. § 2007.002(5)(B)(i).
[98] Fla. Stat. Ann. § 70.001(3)(e).
[99] Fla. Stat. Ann. §§ 70.001(6)(b) and 70.001(7)(b).
[100] Douglass, p. 1100.

Texas takes the opposite route and allows the owner to retain title to the affected property after receiving compensation for the monetary damages suffered as a result of the regulatory taking.[101] In effect, this remedy provision compensates the property owner for the ongoing imposition of the governmental regulation.[102]

PRACTICAL IMPACT

Opponents of property rights legislation often threaten that a flood of litigation will overwhelm the courts and judicial system if such bills are enacted.

It is still too early to identify the full impact of these statutes on private landowners and government programs. Many of the statutes were enacted within the past two years, and in some circumstances, implementation was delayed until this year. Enacted in 1995, the Texas and Florida laws both provide a narrow period for evaluation. Nonetheless, the initial impact of these two laws merits discussion.

The Great Trickle

Opponents of property rights legislation often threaten that a flood of litigation will overwhelm the courts and judicial system if such bills are enacted. As of this writing, however, there have been only fourteen cases filed under Florida's Bert Harris Act with the Office of the Attorney General.[103] Of these fourteen claims, five allege an inordinate burden as a result of ordinances, four concern zoning issues, three concern permit issues, and in two of the claims, both of which involve a church as the petitioner, the issues are not provided on the Bert Harris Case Input Forms.[104]

The five cases alleging an inordinate burden as a result of an ordinance actually involve only three different petitioners. One company, USA Express, Inc., is the petitioner in three of the cases.[105] USA claims that a Miami Beach ordinance creating the Ocean Beach Historic District inordinately burdens its property which is located within the boundaries of the newly created district.[106] USA maintains that it should be compensated for the alleged loss in fair market value, or that the property should not be included in the District.[107] In a separate case, Fidelity Federal Savings Bank filed an application for site-plan approval of a building exceeding five stories in height which was rejected.[108] The rejection occurred the day before a referendum

[101] Tex. Gov't Code Ann. §§ 2007.024(b)-(d).
[102] Douglass, p. 1100.
[103] Office of the Attorney General, *Bert Harris Case Input Forms*, Pursuant to Florida Statutes, Chapter 70.001, received on November 3, 1997.
[104] *Id.*
[105] *Id.* Case numbers BH-96-13-02, BH-96-13-03, and BH-96-13-05.
[106] *Id.*
[107] *Id.*
[108] Office of the Attorney General, *Bert Harris Case Input Form*, Pursuant to Florida Statutes, Chapter 70.001, Case number BH-97-50-02, received on November 3, 1997.

which implemented an ordinance restricting building height limits to five stories in a certain downtown area.[109] The last petitioner alleging an inordinate burden is Timothy M. Sivore who claims that a local ordinance adopted in Weston renders his property legally non-conforming and deprives him of the right to construct two additional communication facility towers.[110]

There have also been thirty claims filed under the Dispute Resolution Act, three of which have been closed.[111] Of the closed cases, two involved vested rights issues, and in two of the cases, the agency approved the settlement agreement.[112] The case where the agency rejected the settlement agreement is now at the writ of certiorari stage in the court system.

The twenty-seven open claims consist of fourteen cases concerning vested rights issues, four regarding permit or license requests, three involving requests for rezoning, two involving requests for expansion or development, one concerning a requested variance, and in three of the cases, the issues were not provided on the Dispute Resolution Case Forms.[113] In one of these twenty-seven open claims, the petitioners withdrew the request for relief,[114] and in seven of the cases, the parties reached a settlement agreement at the Special Master proceeding.

The prospective nature of the statute is partially responsible for the low number of cases.

The prospective nature of the statute is partially responsible for the low number of cases since claims based upon a regulation already enacted prior to the statute are dismissed.[115] Additionally, limitations on the applicability of the statute substantially contribute to the low incidence of claims filed. Mike Rosen, executive director of the Florida Legal Foundation, feels the lack of claims is "directly attributable to the limitations" to which the statute is subject.[116]

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[109] *Id.*

[110] Office of the Attorney General, *Bert Harris Case Input Form*, Pursuant to Florida Statutes, Chapter 70.001, Case number BH-97-06-03, received on November 3, 1997.

[111] Office of the Attorney General, *Dispute Resolution Case Forms*, Pursuant to Florida Statutes, Chapter 70.51, received on November 3, 1997.

[112] Office of the Attorney General, Dispute *Resolution Case Forms*, Pursuant to Florida Statutes, Chapter 70.51, Case numbers DR-96-35-07, DR-96-35-08, and DR-96-35-14, received on November 3, 1997.

[113] *Id.* See Case numbers DR-96-36-01, DR-96-35-02→06, DR-96-35-09→13, DR-96-35-15, DR-96-36-16, DR-96-58-17, DR-96-35-18, DR-96-41-20, DR-96-35-19, DR-96-36-21, DR-97-35-01→05, DR-97-08-06, and DR-97-35-07→09.

[114] *Id.* See Case number DR-96-35-10.

[115] Telephone Interview with Mike Rosen, Executive Director, Florida Legal Foundation (July 8, 1997).

[116] *Id.* Some examples of such limitations include: the statute applies to only to the property which is subject to the governmental regulation; neighboring property owners have no cause of action; and temporary takings are not subject to the provisions of the Act.

Environmentalists opposing private property rights bills have also expressed concern that the fiscal cost of implementation is predicted to bankrupt local governments. Yet, this has not happened in Texas or Florida.

In Texas, the lawsuit frenzy is even less prevalent. Only a handful of claims, fewer than ten, have been filed with the Natural Resources Division of the Attorney General's office.[117] The first lawsuit filed under the Texas statute occurred when Accord Agriculture, Inc. sued the Texas Natural Resources Conservation Commission (TNRCC) *seeking*, among other things, "review of the TNRCC's confined animal feeding operation rules, the constitutionality of the 'Right to Farm Act,' and the constitutionality of the new" Private Real Property Rights Preservation Act.[118] Accord Agriculture sought to have the Texas Act declared unconstitutional because the "TNRCC interprets the Act as protecting a landowner *seeking* a permit to operate a regulated business, such as a confined animal feeding operation, but not an adjacent landowner whose property a permitted activity damages, such as a property owner suffering a devaluation of property value because of an adjacent pig farm."[119] Accord Agriculture asserted that the effect of the TNRCC's interpretation was unconstitutional because an applicant who is denied a permit can bring a takings lawsuit, while an adjacent landowner whose property is damaged when a permit is granted cannot bring a takings lawsuit. A hearing was scheduled for February 3, 1998 on a motion seeking to stay an order so that the pig farm may continue to operate.

The second claim was filed in Brazoria County where James and Dorothy Medearis sued the Drainage District alleging that the requirement of a drainage plan would force the couple to permanently dedicate and maintain a portion of their acreage for a detention pond causing a loss of at least twenty percent in property value and therefore resulting in a taking of their private property without just compensation.[120] Partial summary judgment was granted to the Medearises on February 11, 1997 when the court's order found that the Drainage District exceeded its constitutional authority under the Texas Constitution's Taking provision. A trial to determine damages and other outstanding issues was scheduled for September 1997.

Another claim arose when Emily Investments filed suit against Children's Protective Services ("CPS") claiming an unconstitutional taking of property, among other things, when CPS failed to vacate and remained over sixty extra days, allegedly costing Emily Investments the opportunity to sell the property for $2.2 million in the fall of 1989. Emily Investments claimed damages against Harris County Children's Protective Services under the Texas Act.

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[117] Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (November 13, 1997).

[118] Clarissa Kay Bauer and Lisa Brunn Gossett, "The Texas Private Real Property Rights Preservation Act," State Bar of Texasx. Environmental vol. 27 (1997), p. 158. Accord Agriculture, Inc. was formed "to protect its members from confined animal feeding operations that allegedly interfered with the members' quality of life and the members' use of their property." *Id.*

[119] *Id.* (emphasis in original).

[120] *Bauer and Grossett,* at 159.

On September 23, 1996, the court signed a nonsuit as to the claims filed under the Texas Act.[121]

Various cases, including claims under the Texas Act, relating to erosion along the Bolivar Peninsula were consolidated into a single case in federal court in Galveston, Texas.[122] John Gordon and his wife filed the initial case. When part of the Gordons' Bolivar property eroded and became submerged, it became the property of the State of Texas to be managed by the Texas General Land Office. The Gordons alleged that a cut dredged at Rollover Pass by the Texas Fish & Game Commission, the predecessor agency of the Texas Parks and Wildlife Department, caused the erosion. The Gordons stated that "it took millions of years to create the coast of Texas and Bolivar Peninsula" and requested actual damages in the amount of $730,000,000, or at least $365 (one dollar a day) for each year of geological time to create the Peninsula. The Gordons also sought a mandatory permanent injunction requiring the defendants to fill in what is left of the "cut" and to wholly restore the coast.

While all of the consolidated cases included claims relating to erosion on the Bolivar Peninsula allegedly attributable to the Rollover Pass cut, not all raised claims under the Texas Act.[123] On May 23, 1997, noting its sympathy with the plaintiffs but finding that the case involved a nonjusticiable political question far more appropriate for resolution by the legislative or executive branch, the court dismissed all claims asserted by the plaintiffs. In its summary of the case, the court indicated that the plaintiffs alleged the actions taken by the defendants "constitute a taking," but the Texas Act was never directly mentioned by the court nor were the takings issues addressed in the decision.[124]

Mary Kelly, executive director of the Texas Center for Policy Studies, attributes the small number of claims to the numerous exceptions in the Texas Act, particularly at the agency level where exceptions are interpreted broadly in order to prevent the application of the statute.[125] Cities are largely exempt under the law, and counties were exempted until September of 1997.[126] Sam Goodhope, Special Assistant Attorney General, indicated an increase in activity could potentially result now that counties are no longer exempt.[127]

Contrary to the dire predictions of environmental activists, the state judicial systems have not been subjected to an avalanche of lawsuits due to the enactment of property rights statutes.

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Telephone Interview with Mary Kelly, Executive Director, Texas Center for Policy Studies (June 26, 1997).
[126] Tex Gon't Ann. § 2007.003(d)(Lexis).
[127] Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (November 13, 1997).

The number of claims made in Texas and Florida since 1995 hardly constitutes a flood of litigation. Contrary to the dire predictions of environmental activists, the state judicial systems have not been subjected to an avalanche of lawsuits due to the enactment of property rights statutes. This minimal amount of litigation under the Florida and Texas statutes does make evaluation of judicial interpretation of the laws premature at this point.

Bankrupt Local Governments?

Environmentalists opposing private property rights bills have also expressed concern that the fiscal cost of implementation is predicted to bankrupt local governments. Yet, this has not happened in Texas or Florida. The costs which are expected to break the proverbial back of local governments are comprised of administrative expenses and compensation actually paid out to landowners. Much of the fiscal impact upon local government will depend upon the manner in which governmental entities react to the newly created risk of liability.

The fiscal impact of the Texas Act has been negligible to date.

The Final Bill Analysis and Economic Impact Statement prepared by the Florida House of Representatives' Committee on Judiciary regarding the Harris Act warned of a potential "significant fiscal impact upon state agencies and state funds and on local governments on both a non-recurring and recurring basis."[128] Since the bill did not provide the means and methods for the required expenditures, the Committee concluded the costs to state and local governments were undeterminable.[129] The lack of funding provided to counties and cities for private property rights compensation was a key concern raised in the Governor's Legislative Bill Analysis.[130] While administrative expenses do exist, the minimal amount of litigation under the Harris Act has not generated the enormous cash payouts predicted by the Act's critics. The Office of the Comptroller for the State of Florida has not, as of this writing, conducted a fiscal impact evaluation of the Harris Act.

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[128] House of Representatives Committee on Judiciary, Final Bill analysis and Economic Impact Statement, CS/HB 863, May 23, 1995, p. 10. The Committee continued, "[w]hether the government's response to the bill is to halt all actions which could possibly affect property values, to grant all requests for the use of property, or to take a middle position and deny some and grant others, it may have to pay compensation to the property owners." *Id.* The Dispute Resolution Act, through the informal proceedings process, was predicted to require "expenditures for training, housing and payment of special masters and potentially more litigation type [sic] expenses to prepare for and attend the mediation-like session." *Id.*

[129] *Id.*

[130] Executive Office of the Governor, Office of Planning and Budgeting, Legislative Bill Analysis, CS/HB863, May 16, 1995, p. 4.

The fiscal impact of the Texas Act has been negligible to date. The Comptroller of Public Accounts surveyed all the executive branch agencies, including institutions of higher education, and of the 131 agencies and universities surveyed, 119 responded.[131] (See Appendix A) Generally, the cost of compliance for an agency was minimal. The agencies that take actions covered by the Texas Act reported their costs ranged from zero to approximately $11,000 to develop specific agency procedures.[132] In fiscal 1996, agency costs to prepare TIAs ranged from $500 to $1,250.[133] Fiscal 1997 TIA-preparation costs are expected to be slightly higher, ranging from $500 to $5,000 and reflecting an anticipated increase in the number of TIAs to be conducted.[134] (See Appendix B&C) Due to the paltry amount of litigation under the Texas Act, administrative expenses comprise the bulk of the fiscal burden imposed upon state and local governments.

The substantial increase in the potential liability of state and local governments has led to a greater consideration of the costs and benefits of a proposed regulation prior to approval.

A Chill in the Air

Environmentalists also claim that takings compensation laws may "chill" the regulatory fervor of government officials. This prediction may well be accurate, but it has not produced environmental ruin. In Florida, the Harris Act has likely slowed the issuance of new regulations. Mike Rosen, executive director of the Florida Legal Foundation, attributes the chilling effect on local governmental entities to concern for financial liability.[135] The substantial increase in the potential liability of state and local governments has led to a greater consideration of the costs and benefits of a proposed regulation prior to approval. Still, only a handful of projects, none essential to the protection of public health, have been stopped.

While environmentalists use this "chilling effect" to illustrate their criticisms of property rights statutes, the proponents of such legislation argue this effect is proof that the laws are working as intended. According to Senator Bronson, the Harris Act has created "a new sense of restraint on government regulators" while demonstrating the government's interest in the welfare and rights of private property owners. It was the design of the Harris Act's sponsors to make those entities entrusted with protecting Florida's environment more cautious.[136]

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[131] Texas Comptroller of Public Accounts, John Sharp, Report on the Private Real Property Preservation Act (Senate Bill 14), January 1997, p. 5. Of the 119 agencies who responded, a total of 95 stated they took no actions that were covered by Senate Bill 14. Officials at 25 agencies said they had taken or may take actions that would be covered by the law. Eleven agencies did not report that determined their actions are not covered briefly explained the basis of their determination. *Id.*

[132] *Id.* at 6.

[133] *Id.*

[134] *Id.*

[135] Telephone Interview with Mike Rosen, Executive Director, Florida Legal Foundation (July 8, 1997).

[136] *Id.* at 354.

Similar motivations prompted the sponsors of the Texas Private Real Property Rights Preservation Act which was intended to ensure that governmental entities take a "hard look" at actions which might affect the value of private real property.[137] Opponents of the Texas Act consider the resulting "chilling effect" to be a strike against the environmental movement. Ken Kramer, the Texas State Director of the Sierra Club, has noted a definite "chilling effect" since the enactment of the Texas statute, "proposals have not been made or, if made, have not been pursued by the state agencies."[138]

By requiring governmental entities expressly to evaluate the effect their actions will have on private real property, state and local governments will be less likely to take actions which are damaging to property values. As a result of the statute, notes Sam Goodhope, "agencies are thinking more before they take regulatory action."[139] It is also argued that encouraging governmental entities to be more circumspect will benefit the state as well as private property owners by reducing exposure to takings claims and costs. Bill Power of the Texas Farm Bureau has also noted that "agencies are more conscious of their actions" as a result of the statute.[140]

By requiring governmental entities expressly to evaluate the effect their actions will have on private real property, state and local governments will be less likely to take actions which are damaging to property values.

The potential "chilling effect" under the Texas Act is mitigated, however, by the provision in the statute which provides the governmental entity with the *option* of paying compensation. The default remedy for the successful private property litigant is rescission of the offensive regulation.

Benefits for Property Owners

The Florida Senate's Committee on Community Affairs spoke of a possible fiscal impact upon the private sector as a result of compensation paid to "inordinately burdened" private property owners.[141] The Committee found, however, that the magnitude of the impact was indeterminable due to the importance of future judicial interpretation of the Harris Act's elements and the governmental entities' reactions to the increased liability.[142] As of this writing, the "chilling effect" when combined with the low incidence of claims negates any significant fiscal impact upon private property owners as a result of compensation payments.

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[137] Grimes, p. 597.

[138] Telephone Interview with Ken Kramer, Texas State Director, Sierra Club (December 4, 1997).

[139] Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Attorney General (November 13, 1997).

[140] Telephone Interview with Bill Power, Texas Farm Bureau (June 25, 1997).

[141] Senate Committee on Community Affairs, Senate Staff Analysis and Economic Impact Statement, Florida Real Property Protection Act, April 24, 1995, p. 9.

[142] *Id.* If state and local agencies react by avoiding governmental activity that may inordinately burden the use of property or by granting variances to its acts, less compensation would be paid to the private sector. *Id.*

When process costs are considered, however, the Harris and Dispute Resolution Acts have significantly helped private property owners. The long delay in obtaining (and sometimes the inability to obtain) a final, land-use decision within a reasonable time period is one of the more substantial process costs faced by private property litigants.[143] The Florida Acts provide for faster and easier-to-obtain responses and ripeness decisions, thereby lowering process costs to landowners.[144]

The Dispute Resolution Act seems likely to predominate as the route of choice for aggrieved property owners. The earlier comparison of claims filed under each Act indicates that more property owners are pursuing relief under the Dispute Resolution Act. Unlike the Harris Act, the Dispute Resolution Act is not restricted to the application of prospective regulations. Another appealing factor of the Dispute Resolution Act is the opportunity to bring an action in a less-adversarial process which does not require the same 180-day waiting period or extensive preparatory work required by the Harris Act. A final reason property owners might prefer the procedure under the Dispute Resolution Act is the relative expense of pursuing a Harris Act claim in terms of litigation costs and the initial required appraisal.[145]

The Florida Acts provide for faster and easier-to-obtain responses and ripeness decisions, thereby lowering process costs to landowners.

As with the Florida statute, the effect that the Texas Private Real Property Rights Preservation Act will have on private landowners is difficult to predict at this time. Property owners whose land is subject to regulation covered by the Texas Act should benefit to the extent that the TIA requirements are successful in increasing awareness concerning the effect of governmental actions upon private property values. Unfortunately, since the type of land-use regulation that affects most private property owners, municipal zoning, is excluded, relatively few landowners are likely to directly benefit from the Act.[146]

A smaller number of private property owners are likely to benefit under the compensation provisions of the Texas Act, namely, those who can demonstrate a twenty-five percent reduction in property value, can afford to prove it in court, and can bear the risk of loss.[147] Since the statute applies only to property that is the "subject of" the governmental action, neighboring private property owners have no cause of action even if they can demonstrate a diminution in value of twenty-five percent or more.[148] As discussed

[143] Spohr, p. 360.
[144] *Id.* The Harris Act requires issuance of a ripeness decision within 180 days of a complaint, and the Dispute Resolution Act places a four-month cap on exhausting all non-judicial appeals. *Id.*
[145] Spohr, *p. 358.*
[146] Grimes, p. 601.
[147] *Id.* at 602.
[148] *Id.* at 607.

previously, there has been no rush to litigate under the Texas Act. The most likely effect of the new cause of action made available by the statute will be the increased bargaining power for private property owners negotiating with government agencies.[149]

Property rights legislation, particularly measures that facilitate legitimate takings claims against government regulators, can provide significant benefits for small landowners and force government officials to pay more attention to the human costs of their edicts.

Although they have only been in effect for a short time, both the Texas and Florida Acts have been beneficial for property owners. While the number of claims going to trial is minimal, private property owners seem to have gained bargaining power with the state and local governmental entities which are now more willing to consider ways of advancing policy objectives without resorting to land-use controls. Procedural expenses are lessened for aggrieved private property owners by the provisions of the statutes and agencies now give greater consideration to a proposed regulation's effect upon property owners.

CONCLUSION

Efforts to enact property rights protections at the federal and state level have met with substantial resistance. Property rights opponents allege that providing greater protection for property owners will necessarily impose substantial burdens on government agencies and inhibit environmental protection. Yet, the experience of some states that have enacted property rights legislation, particularly Florida and Texas, suggests that these claims are unfounded. The costs of providing greater protection have been greatly exaggerated. Property rights legislation, particularly measures that facilitate legitimate takings claims against government regulators, can provide significant benefits for small landowners and force government officials to pay more attention to the human costs of their edicts. Their experience to date suggests that compensation legislation is a modest step that ensures greater protection of property rights without inhibiting essential government functions.

Property rights are essential to the preservation of individual liberty and a market economy. In recent years, several states have rushed to the forefront of providing protection for private property rights by enacting much needed legislation. It is now time for other states – and even the federal government, to follow suit.

[149] *Id.* at 602.

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