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Property Rights and Takings Legislation in the Gulf States Just the Beginning or Is the Revolution Over?

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Introduction

In the 1990s, a concerted effort by private property owners touched off a national debate regarding the impact of government regulation on property use and the compensation due for the effect of such regulation.⁽¹⁾ While the U. S. Constitution guarantees that private property shall not be *taken* without compensation, that provision has been applied in a limited fashion leaving many property owners without recourse for bearing the economic burdens in an ever-increasing regulatory environment. As a result, property rights advocates across the country are calling for the enactment of statutory regimes that will compensate them for the impact that they claim results from regulation. Opponents of such measures claim that the real purpose is to use the specter of litigation and compensation claims in an effort to inhibit government from enacting new, or enforcing existing, environmental protection laws and regulations.

In most states, including those bordering the Gulf of Mexico, legislatures have addressed these concerns by debating the merits of statutory takings compensation regimes. This article outlines the issue of regulatory takings and the legislative activities of the Gulf states in recent years. It describes the efforts of takings regime proponents in the five states and assesses the actions taken by state lawmakers to address the concerns raised by private property owners. Part I presents an overview of the legal concept of compensable takings claims and the Supreme Court tests used to analyze such claims. It recounts the constitutional fifth amendment guarantee which has been narrowly interpreted regarding regulatory takings claims and the Supreme Court tests used to determine such claims. Part II characterizes the dissatisfaction of property rights advocates with a constitutional regime that awards compensation only to those individuals who can show a near-complete loss of economic value attributable to government regulations. That section also relates the efforts at the national level to enact federal laws that would compensate owners who suffer less than total economic losses due to government regulation.

Parts III reviews the actions taken in the Gulf states of Florida, Texas, Mississippi, Alabama, and Louisiana, to address the concerns raised by private landowners. It illustrates the manner in which each state has addressed the issue and whether the state has enacted a statutory takings regime. Where takings compensation regimes have been enacted, the process of making a claim and/or resolving disputes is examined. Finally, this part presents the effect of each state's efforts regarding statutory takings regimes.

I. Compensable Takings Claims

No constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment,

Water Log

unless the seller voluntarily consents to postponement of payment.⁽²⁾

Magna Carta, 1215

In 1215, the Magna Carta expressed the notion that a person has the right to compensation when a government takes away that person's property. The Fifth Amendment recognizes that "private property [shall not] be taken for public use, without just compensation."⁽³⁾ This guarantee extends beyond the physical appropriation of property to include governmental regulations that effectively accomplish the same result by restricting a property's use.

The SandBar

The common law foundation for regulatory takings began in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* warning that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."⁽⁴⁾ Prior to this opinion, courts generally treated property as taken for Fifth Amendment purposes only when it had been directly appropriated by the government or when the owner had been effectively stripped of physical possession.⁽⁵⁾ Physical invasion remains an easy question for courts but there is still a struggle to determine when a regulation overburdens property to the level of a taking.

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Physical Taking

In the years since *Pennsylvania Coal v. Mahon*, the Supreme Court has established the importance of the right to exclude in a landowner's bundle of rights.⁽⁶⁾ In 1979, the Supreme Court decided that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property."⁽⁷⁾ The Court explained that This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.⁽⁸⁾

The Supreme Court followed this rationale in *Loretto v. Teleprompter Manhattan CATV Corp.* by finding that an ordinance that called for a permanent placement of cable lines constituted a regulatory taking of the property. This established the rule that a permanent physical occupation of real property is a per se taking.

Regulatory Taking

The Court neglected to establish such a per se rule for regulatory takings for many years. In the last two decades, the Supreme Court has reviewed a number of such cases, providing cloudy analysis to determine when a governmental regulation goes "too far" as suggested by Justice Holmes in 1922⁽⁹⁾ and is so burdensome that it takes property without compensating the owner, prohibited by the Fifth Amendment.⁽¹⁰⁾ In the 1992 case *Lucas v. South Carolina Coastal Council*,⁽¹¹⁾ the Court decided that when a regulation denies all economically beneficial or productive use of land, a taking has occurred. Developer David Lucas sued South Carolina for denying him the right to build residential homes on two waterfront lots on a South Carolina barrier island, the Isle of Palms. The Coastal Council denied his building permit under authority of the Beachfront Management Act which limited development behind an erosion line, effectively prohibiting Lucas from building any structures on the property. The Court found that a taking had occurred since the legislature's actions deprived the land of all of its economic viability.⁽¹²⁾ South Carolina bought the land from Lucas for over \$1.5 million.

For those cases that fall in between a physical invasion and a total loss of property value, the Supreme Court began to develop its test in 1978 to determine a regulatory taking in *Penn Central Transportation v. City of New York*.⁽¹³⁾ In *Penn Central*, the Court decided that a New York historic preservation law that prohibited Penn Central from erecting a fifty story high-rise office tower on its property above historic Grand Central Terminal did not effect a taking of the property. The Court declined to create a takings test, preferring to conduct takings inquiries on a case-by-case basis using factors such as character of the governmental action and economic impact of the regulation to determine whether a regulatory scheme effects a taking of property. In *Penn Central*, the Court balanced the diminution in value to the property and interference with Penn Central's investment-backed expectations with the public interest served by the historic preservation regulation.⁽¹⁴⁾

The Court actually developed a takings test only two years later in *Agins v. City of Tiburon*⁽¹⁵⁾ when it created a 2-prong test to determine the existence of a regulatory taking. Landowners in the city of Tiburon, California,

acquired a five acre tract of land overlooking the San Francisco Bay. California passed a law requiring Tiburon to prepare a general plan for land use and open-space development and the city reduced the permissible density for the plaintiff's land. In *Agins*, the Court found that a regulatory taking has occurred if (1) the regulation or governmental action exhibits an "impermissible use" of the government's police power⁽¹⁶⁾ or (2) if the regulation or action denies the property owner "economically viable use" of the property. In *Agins*, the government met the criteria by proving an essential nexus between the government mandate to the property owner and the public interest and proving that the public interest was connected to the mandate.

In *Nollan v. California Coastal Commission*,⁽¹⁷⁾ the Supreme Court elaborated on the first prong of the *Agins* test revealing that "substantially advancing a legitimate state interest" also includes essential nexus between the governmental purpose & the effect of the condition imposed. In *Nollan*, beach-front property owners sued the state agency for conditioning a permit to build a residence on their granting a public easement on the property. The owners sued and the Supreme Court found that the state conditional permit constituted an impermissible use of the state's power. The state failed to show a legitimate state purpose for the governmental mandate and, thus, if the state required an easement from the owners, the state must provide compensation for the taking of part of their property.

Finally, the Supreme Court again refined its takings analysis in *Dolan v. City of Tigard* by elaborating on the first prong of the *Agins* test.⁽¹⁸⁾ The Court found that to prove that a regulation substantially advances a state interest, there must be (1) an essential nexus between the governmental purpose and the effect of the condition or exaction; and (2) a "rough proportionality" must exist, i.e., the exactions must bear the required relationship to the projected impact of the proposed development. The City of Tigard unsuccessfully argued that the requirement of land dedication for a public greenway and a bicycle path was a reasonable enough connection between the mandate to the landowner and the public interest. The Court found 5-4 that the government could have satisfied their interest in non-invasive ways. Finally, in 1999, the Court's ruling in *City of Monterey v. Del Monte Dunes at Monterey, LTD.*⁽¹⁹⁾ established that the "rough proportionality" standard from *Dolan* is applicable only in exaction cases. In *City of Monterey*, a developer filed a takings claim when its application for a construction permit was repeatedly denied despite being assessed favorably by the city's architectural review committee and planning commission. The Ninth Circuit affirmed the district court's decision in favor of the developer, using the rough-proportionality test to support its ruling. In reviewing the decision, the Supreme Court held use of the rough-proportionality test in *City of Monterey* was improper and emphasized, "[w]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land use decisions conditioning approval of development on the dedication of property to public use." This served as notice that the slight widening of the takings analysis by *Dolan*'s rough-proportionality test, would not apply to takings cases in general. At best, the Supreme Court has provided a confusing takings analysis, leaving many takings claims, those which fall between a complete loss of property value and a physical invasion, in limbo. The result has been to bolster debate about the rights of property owners against regulatory burdens and to encourage action at the state level to address questions that the Supreme Court refuses to clarify.

II. The Private Property Rights Movement

In addition to increased attention by the Supreme Court, the property rights movement also gained considerable momentum in the late 1980s as a result of three other events. First, in 1988, President Reagan presented his Executive Order No. 12, 630.⁽²⁰⁾ It stated that "governmental officials should be sensitive to, anticipate, and account for the obligations imposed by the Just Compensation Clause of the Fifth Amendment" and that "actions undertaken by governmental officials . . . that substantially affects its value or use may constitute a taking of property."⁽²¹⁾ Executive Order 12, 630 became the model for assessment laws enacted years later.

Second, in 1989, the Clean Water Act and its new expansive definition of wetland caused many property owners to oppose such far-reaching governmental regulations, especially in coastal wetland areas.⁽²²⁾ Finally, in 1990, the Endangered Species Act and the (in)famous spotted owl controversy further fueled the debate for limited governmental control over private property.⁽²³⁾ In fact, one property rights supporter referred to the eruption of restrictive environmental regulation as "the crisis currently facing American property owners."⁽²⁴⁾

With these factors fueling the fires, landowners began vocalizing their doubts as to their constitutional protections and pressured state legislatures to enact statutes which provided greater protection from regulatory takings. Thus, while this tension between regulators and landowners has existed for some time, the rise of the private property rights movement transformed this tension into action in the 1990s. By the early 1990s, state legislatures were seriously considering and passing takings statutes. The U.S. Congress considered a number of bills, as well.⁽²⁵⁾ The Supreme Court's decisions defining the scope of the Fifth Amendment in regulatory takings terms has played a key role in establishing the breadth of these laws, as states are eager to give their citizens rights which are above and beyond those granted though the Fifth Amendment.⁽²⁶⁾

Takings Legislation

Early takings laws provided two things: first, compensation to a landowner whose property value was diminished by a regulation; and second, assessment of regulations that may regulate a property to such an extent as to effect a taking. Compensation-based statutes call for the state to reimburse the landowner when a state law or regulation caused a diminution in the value of the landowner's property by a certain percentage such as 50%. If the land's fair market value declined by 50% or more, then the compensation statute calls for the state to pay the landowner the fair market value of the property before the regulation and the state generally took title to the land. Another version of the compensation bill calls for the state to reimburse the landowner only the diminution amount. The assessment-based statute calls for the state agencies to review proposed state rules and regulations to determine the law's potential impact on private property owners. Such evaluations are called "takings impact assessments."⁽²⁷⁾ In several statutes, this burden fell on state attorney generals who initially opposed the statutes due to fear of lack of resources to carry out such an administrative task. The second fear was that few regulations would pass the threshold and therefore, would never take effect.

Recent laws have evolved to include both compensation and assessment measures but must now address a number of procedural and substantive issues to be fair and effective. Procedurally, a statute must specify how a state agency should conduct a takings impact assessment and which state agency is responsible. In addition, a statute must specify procedures for a landowner who has experienced a taking including any dispute resolution, notice, or settlement requirements. Finally, many statutes now include provisions for attorneys fees to be recovered by the prevailing party.

Substantively, a takings statute must detail how and whether baseline property values will be determined. This includes whether the entire parcel is valued or merely the portion of the property that is impacted by the regulation. Second, the statute must define a taking, determining what diminution in value constitutes a taking and, ideally, what happens when the property value rises again. Third, the statute should specify how impacts will be valued and what offsetting regulatory benefits may be incorporated into regulatory loss calculations. Finally, the statute should spell out the remedy available to the landowner including repealing the regulation or compensating the landowner. The taking statutes of the gulf states fail to address all of these issues but provide a unique snapshot of the momentum behind the state takings statutes movement.

Proposed Federal Takings Legislation⁽²⁸⁾

State legislatures are not alone in searching for ways to advance private property rights.⁽³⁰⁾ In fact, some gulf states representatives of the United States Congress are making waves in Washington. For instance, in June, 1997, Senator Richard Shelby of Alabama introduced Senate Bill 953, the Private Property Owner's Bill of Rights.⁽³¹⁾ This bill grants landowners a right to an administrative appeal of wetland decisions under § 404 of the Clean Water Act⁽³²⁾ and decisions under the Endangered Species Act⁽³³⁾ that limits uses of the property. A landowner may receive compensation if an action has deprived her of \$10,000 or 20% or more of the fair market value of the affected portion of the property. This bill has been referred to the Senate Governmental Affairs Committee. Senator Orrin Hatch (R-UT) introduced a similar bill in May of 1997 entitled the "Omnibus Property Rights Act of 1997."⁽³⁴⁾ This bill provides compensation if an action has temporarily or permanently reduced the value of the property by 33% or more. It also grants supplemental jurisdiction to the Court of Federal Claims, provides for alternative dispute resolution, and requires takings impact assessments by federal agencies.

The Tucker Act Shuffle Relief Act of 1997, introduced by Texas Representative Lamar Smith, provides a clearer litigation path for takings claimants in federal court.⁽³⁵⁾ The bill gives concurrent jurisdiction to the U.S. District Court and the Court of Federal Claims by allowing jurisdiction over an action of this kind regardless of the amount in controversy and granting the Court of Federal Claims the power to grant injunctive and declaratory relief. This gives relief to those property owners who found themselves forced to elect between equitable relief in the federal district court and monetary relief in the Court of Federal Claims.⁽³⁶⁾

In 1997, Representative Elton Gallegly (R-CA) proposed the "Private Property Rights Implementation Act of 1997" to clarify when governmental action is sufficiently final to ripen federal claims and expedite access to the federal courts for injured parties by permitting certification of unsettled questions of state law.⁽³⁷⁾ This bill passed the House and was referred to the Senate in July of 1998. Representative Don Young introduced House Resolution 901, which was passed by the House and referred to the Senate in April, 1998. This bill protects private property rights in non-federal lands which surround public lands and acquired lands which are set aside as preservation or protection areas. International agreements which designate certain global lands as significant environmental areas spurred this bill. For instance, the United Nations designates sites as "World Heritage Sites" or "Biosphere Reserves" for purposes of conservation and study. Analysts joked that supporters of this bill fear the United

Nations militia will enter this land and take over. The bill passed the House and was referred to the Senate Committee on Energy and Natural Resources in April, 1998.

Other federal laws proposed include the Senate Bill 246 entitled the "Private Property Rights Act of 1999."⁽³⁸⁾ Proposed by Senator Hagel (R-NE), this bill provides that before taking specific actions, each agency must undertake a takings impact analysis to assess whether or not takings of private property may occur. The analysis should include the purpose of the proposed agency action, the likelihood of a taking, any alternatives which may lessen the likelihood of a taking, and an estimate of the potential liability if the government is required to compensate a private landowner. The bill also grants jurisdiction to the Court of Federal Claims and the U.S. District Court for actions for compensation and equitable relief (to avoid the "Tucker Act Shuffle," as described above).

Previous attempts to pass federal legislation aimed at private property rights have failed. However, passage of any one of these bills may limit future regulations aimed at protecting the nation's coasts and other statutes are also taking heat from property rights implications.⁽³⁹⁾

III. Gulf States' Takings Statutes:

The states bordering the Gulf of Mexico have risen to the challenge of creating takings statutes. The states have attempted to simplify the takings analysis and require a review of regulations to prevent such takings. Since 1994, four of the five Gulf States have enacted takings legislation with mixed reviews. Florida and Texas have comprehensive statutes which apply to regulatory takings of any type of private property. Mississippi and Louisiana have limited versions that apply to agricultural and forest lands. The fifth state, Alabama, does not have a takings statute but its state legislature has reviewed takings bills each year for the last five. With their active takings record and unique coastal ecosystem, analysis of Gulf states' takings statutes provides a valuable look at the impacts of state takings statutes on coastal areas.

FLORIDA

A. Background

In 1995, Florida enacted the Private Property Rights Protection Act (Florida Act).⁽⁴⁰⁾ With its hundreds of miles of gulf coastline, Florida's statute has the greatest potential to impact its coastline. One commentator commented that the Act was passed through a "mixture of savvy leadership in the Legislature, big money interests, the right political climate, and the populist ingredient."⁽⁴¹⁾ Florida was ripe for a takings statute and property rights advocates used heightened land use restrictions and a perceived increase in government regulation to boost their cause.⁽⁴²⁾

Florida, however, had an active movement decades before. Two task force studies were completed in the 1970s resulting in legislation introduced in the Florida Legislature.⁽⁴³⁾ This legislation passed in 1978 establishing procedures for aggrieved property owners to challenge the denial of certain environmental permits as takings.⁽⁴⁴⁾ The 1978 Act did not statutorily define a taking but set forth remedies available after a judicial determination that an agency action was an "unreasonable exercise of the state's police power constituting a taking without just compensation."⁽⁴⁵⁾ Efforts continued into the 1990s, including bills similar to the 1995 Act⁽⁴⁶⁾ and attempts to amend the Florida Constitutions with a property rights amendment.⁽⁴⁷⁾

In enacting the 1995 Act, the state reasoned "that some laws, regulations, and ordinances. . . may inordinately burden, restrict, or limit private property rights without amounting to a constitutional taking" and therefore the state should provide for "relief, or payment of compensation, when a new law, rule, regulation, or ordinance . . . as applied, unfairly affects real property."⁽⁴⁸⁾ Property rights analysts credit the Act with spurring other private property rights legislation around the nation. Its provisions, however, are unique and while other state legislatures have modeled their statutes after it, Florida's Act remains in its own league.⁽⁴⁹⁾

B. Compensation Scheme

Florida's compensation scheme is made up of two distinct acts. First, the Bert J Harris, Jr., Private Property Rights Protection Act (Harris Act) provides a cause of action to property owners whose land has been inordinately burdened by a Florida governmental regulation. Second, the Florida Land Use and Environmental Dispute Resolution Act (Dispute Resolution Act) provides an alternative method of reaching an agreement on use of private property other than litigation. Together, they make up Florida's Private Property Rights Protection Act which grant rights to Florida citizens above those provided by the Florida Constitution or the United States Constitution.

Under the Act, a landowner must present a claim to the offending governmental entity⁽⁵⁰⁾ at least 180 days prior to any legal action. The claim must assert that the property in question has been "inordinately burdened."⁽⁵¹⁾ Under this standard, a landowner's property has been taken if a property's use has been directly restricted or limited

such that "the property owner is permanently unable to attain the reasonable investment-backed expectation for the existing use of the real property" or is left with "existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public."⁽⁵²⁾ This claim should present the resulting diminution in value and the amount of compensation sought. This provision represents the first major distinguishing factor of Florida's Act. The other Gulf states have determined a specific percentage of diminution required to be considered a taking. The "inordinately burdened" standard forces a case by case analysis of takings claims.⁽⁵³⁾ While this allows greater flexibility in analyzing facts and circumstances, it may give so much flexibility that the Act is not implemented the same way in each court.

During the 180 days after the claim is made, the governmental entity may make a settlement offer to the claimant.⁽⁵⁴⁾ If the landowner accepts the settlement, the parties submit the agreement to the circuit court where the property is located. The court endorses the agreement when it can ensure that the relief granted protects the public interest served by the statute at issue.⁽⁵⁵⁾ If the parties do not reach a settlement agreement, the landowner may file an action in the circuit court.⁽⁵⁶⁾

The court is responsible for determining if an entity has caused a taking of property. If the court finds a taking, it submits the case to a jury to determine the amount of compensation.⁽⁵⁷⁾ The claimant must bring the cause of action within one year after the law or regulation is first applied to the property⁽⁵⁸⁾ and actions relating to transportation facilities are exempt.⁽⁵⁹⁾ The Harris Act provisions are restricted to applications of regulations enacted prior to passage of the Act.⁽⁶⁰⁾

C. Dispute Resolution Scheme

Passed at the same time as the Harris Act, the Florida Land Use and Environmental Dispute Resolution Act represents an administrative provision designed to facilitate discussion between the property owner and the governmental entity.⁽⁶¹⁾ This measure provides that if a landowner believes that a development order or an enforcement action of a governmental entity is unreasonable or unfairly burdens the use of his real property, she may request a hearing before a special master.⁽⁶²⁾ The special master makes recommendations of nonbinding alternatives to the restrictions, if found that an unreasonable or unfair burden exists on the property.⁽⁶³⁾

The Dispute Resolution Act provides Florida landowners with greater flexibility than the Harris Act. The Dispute Resolution Act applies to development orders and enforcement actions issued on or after October 1, 1995. Unlike the Harris Act, the Dispute Resolution Act applies irrespective of the enactment date of the underlying law, rule, regulation, or ordinance. Thus, while a landowner may not be able to initiate actions for compensation under the Harris Act, he may avail himself of the non-binding special master proceeding.

D. Results

The effects of Florida's Private Property Rights Protection Act in the last few years are unclear. Presently, less than 10 cases have been filed under the Harris Act.⁽⁶⁴⁾ These are in various stages of litigation but no takings determinations have been made nor have compensation payments been paid. Around 40 cases have been brought in front of a special master for mediation of disputes over existing regulations. This amounts to fewer than one case for every eight cities and counties in Florida.

On one hand, with numerous cases in various stages of litigation and dispute resolution, some view the Act as a success because it has afforded property owners a method of contesting overburdening governmental actions. The story of Pam and Mel McGinnis represents the other side. Advocates argue that the McGinnises have not been served by the Act. The couple's story again brings the question of coastal development to the forefront.

The couple moved from Illinois to Florida to build their dream home and retire. They bought a five acre tract of land on Terra Ceia Island, a finger of land jutting into Tampa Bay in northern Manatee County, with the hopes of a building secluded home with a waterfront view. The seller happened to be the federal government⁽⁶⁵⁾ who assured the McGinnises that the lot was developable. The land, however, was covered by wetlands and mangroves, a warning sign for any type of development. The couple sought a permit from the Florida Department of Environmental Protection (DEP) to fill from one third of an acre to one and a half acres of wetlands for a house and a driveway.

When the DEP gave notification that it intended to deny the permit request, the couple sought relief under the Harris Act. The first step was to appoint a special master who would "facilitate a resolution of the conflict between the owner and governmental entities to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached."⁽⁶⁶⁾ The DEP and McGinnises hired Raymond M. McLaren, a Bradenton,

Florida, consultant as the special master. After several meetings in the fall of 1996, a December meeting was planned to iron out final details. When a lawyer for an environmental group (ManaSota-88) and a newspaper journalist arrived and asked to attend, the master refused and held the meeting behind closed doors. The DEP demanded another meeting since this one failed to be "informal and open to the public" as required by the Act.⁽⁶⁷⁾ The master refused and instead issued a decision stating that the two sides had agreed to a plan that would minimize the McGinnises' impact on wetlands, requiring the couple to construct replacement wetlands and other environmental improvements.

The environmental group then sued the McGinnises, McLarney, and the DEP for failing to allow its participation at the December meeting. The DEP then rejected McLarney's decision, refusing to issue a permit to the couple. The remedy available to the couple is to challenge the denial of the permit before an administrative law judge. The couple appealed in January of 1996 and in June of 1998 a final agency decision was handed down, denying the McGinnises' permit.⁽⁶⁸⁾

The hardships undergone by the McGinnises highlight problems in the new Florida property rights law. The law was written with small landowners like the McGinnises in mind and yet has cost the couple over \$8,000 (½ the fee for the special master), has consumed years of their lives, has not provided them a method which to build their dream home, and has landed them in court with a local environmental group.⁽⁶⁹⁾ Aside from the practical difficulties, the law also fails to clarify the powers of the special master. The master's qualifications are not clear,⁽⁷⁰⁾ s/he is not subject to a code of conduct like an administrative judge, and the master's recommendations are not binding.⁽⁷¹⁾ In addition, while the law includes the special master proceedings to provide a method of efficient and effective compromise between landowners and regulators, if the landowners do not agree with the master's recommendations, the remedy is to challenge the decision before an administrative judge.⁽⁷²⁾ This remedy is available to the landowner at the outset to challenge a permit denial. Thus, the Act provides no incentive to use the special master option and after the McGinnis example has received much press throughout the state, the option appears even less appealing.

The McGinnis plight has become the war cry for private property rights advocates throughout the state calling for addition reform through amending the Harris Act to make it stronger or through constitutional amendments.⁽⁷³⁾ In signing the law, then-Governor Chiles hailed the measure as a compromise, because it protects pre-existing regulations while it affords claimants a mediation process, or in the alternative, quick access to courts where new regulations impact property value. The adversaries on the issue were not as satisfied. Opponents of the Florida Act argue that it has a chilling effect on future environmental and growth management plans and that the effect of the law remains uncertain.⁽⁷⁴⁾ Some proponents of the Act maintain that it does not go far enough.

For the last several years, property rights advocates have called for even stronger state constitutional provisions. In February 1996, a proposed House Joint Resolution was filed in the Florida House of Representatives.⁽⁷⁵⁾ The measure called for the creation of an amendment which provided property owners with a legal means to seek compensation for claims of diminished value resulting from existing as well as future regulation. It also entitled a claimant to judicial review and a jury trial on the issues without requiring the claimant to first exhaust administrative remedies available. The measure failed but Floridians proposed an initiative to put two constitutional amendment proposals on the 1998 Florida ballot. The first amendment, dubbed "Property Rights I," would clear the way for full compensation and circuit court jury trials for property owners who suffer a loss of the fair market value of all or part of a property.⁽⁷⁶⁾ The second amendment, "Property Rights II," represented a strategic move to bypass this opposition. It proposed that constitutional amendments concerning property rights not be limited to one subject. Ultimately, the Florida Supreme Court struck down both proposals.⁽⁷⁷⁾

Opponents of the Act cite the "prophylactic effect" on law-making.⁽⁷⁸⁾ Legal observers claim that state and local governments have created fewer regulations since the law took effect meaning less protection for unique coastal areas.⁽⁷⁹⁾ Shortly after enactment of the Act, Palm Beach scrapped a plan to reduce development in an agricultural reserve area east of the Everglades and Fort Lauderdale halted its process of modernizing its zoning codes.⁽⁸⁰⁾ Fearing expensive litigation, the city of West Palm Beach declined to enact a new ordinance reducing height limits for buildings along the waterfront.⁽⁸¹⁾ Voters disagreed and enacted by petition a five-story limit, later used to deny Fidelity Federal Savings Bank's plan for twin 15-story towers.⁽⁸²⁾ No litigation has resulted. Finally, the Florida Department of Transportation supported a plan to designate a wildlife corridor in Sarasota County. The plan, however, depended upon cooperation with the landowner of private pasture lands but failed.⁽⁸³⁾

Other laws designed to protect unique Florida areas may experience after shocks of the Act. A prime example is Florida's Beach and Shore Protection Act⁽⁸⁴⁾, passed in 1965, which has setback requirements for construction occurring on the coast.⁽⁸⁵⁾ The BSPA contains strict provisions for waterfront construction that may reduce the

value of privately owned beachfront property. This leaves the potential for a takings claim, especially if new, more stringent setback requirements are adopted.⁽⁸⁶⁾

Some refer to the Act as the wake-up call to government regulators.⁽⁸⁷⁾ It certainly has been a signal to property rights advocates. The non-profit law firm Pacific Legal Foundation, known for its support for private property rights, opened its Atlantic Center in Miami, Florida. Scouting agents for the firm recognized that the Foundation's arrival is probably a result of the comprehensive statewide planning that has taken place around Florida and the probability of a rise in lawsuits resulting from such planning.⁽⁸⁸⁾

TEXAS

A. Background

Like Florida, the property rights movement has been active in Texas for decades. In the last decade, property rights advocates have fought against both state and federal regulations, opposed state land use regulations to preserve farmland, and opposed federal attempts to designate water bodies in Texas as "Outstanding National Resource Waters."⁽⁸⁹⁾ Texans feared that this meant further regulation and limited use of property around the waters and still fear the consequences of the designation of the Rio Grande River as an American Heritage River. Finally, in 1994, the U.S. Fish and Wildlife Service threatened to designate 33 counties in central Texas as critical habitat for the endangered golden-cheeked warbler. Texans again recoiled fearing burdens on their constitutional right to use their property.⁽⁹⁰⁾

In 1995, Texas enacted its Private Real Property Rights Preservation Act.⁽⁹¹⁾ As in other states, opponents of the Act argued that it would have a chilling effect on state regulation. Proponents concede, but term the Act a "preventive" measure to ensure that the state does not mirror the actions of federal agencies perceived as intrusive.⁽⁹²⁾

B. Compensation Scheme

The Texas Act provides compensation for a legislative taking when a governmental action diminishes the value of the property by at least twenty-five percent. The Act's exclusions, however, severely limit its applicability. It applies to governmental actions such as the adoption of an ordinance, rule, or guideline, an action causing the physical invasion of property, and an action by a municipality which imposes unequal requirements. But, the Act excludes from "governmental actions" the following: an action reasonably taken to fulfill an obligation mandated by federal law or state law; law enforcement seizures or forfeitures; actions protecting against nuisance; formal exercise of the power of eminent domain; certain rules regarding water safety, hunting, and fishing; specific provisions of the Texas Natural Resources Code; actions to regulate construction in a floodplain area, to prevent subsidence, or to protect rights in groundwater; an action taken to prevent waste of oil and gas or prevent such pollution; and good faith emergency responses to threats of life or property and responses to threats to the public safety or health that do not create unnecessary burdens.⁽⁹³⁾ Finally, it only applies to rules and regulations "first proposed on or after September 1, 1995" and to any enforcement actions of such rules initiated after that date.⁽⁹⁴⁾ One commentator remarked that although "some of the exclusions and exceptions are simply codifications of the nuisance exception or the eminent domain power, many seem to have been inserted under pressure from special interest groups."⁽⁹⁵⁾

If a landowner finds that a governmental action meets the Act's criteria, she must file her claim within 180 days of the date she "knew or should have known that the governmental action restricted or limited her right in the private real property."⁽⁹⁶⁾ Once filed, the court finds a taking when a governmental action "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."⁽⁹⁷⁾ By including "in whole or in part," the Act leaves the fact finder a choice between analyzing the entire parcel of property in question or only that parcel affected by the regulation in order to determine diminution in value. This approach is in direct conflict with current Supreme Court takings jurisprudence which has consistently analyzed takings cases according to the entire parcel of property in question.⁽⁹⁸⁾ The statute fails to clarify its appropriate application for courts leaving the potential for judicial inconsistency.⁽⁹⁹⁾

If the trier of fact finds a taking, the court orders the governmental entity to rescind the action,⁽¹⁰⁰⁾ and determines the monetary damages suffered by the landowner from the date of the taking.⁽¹⁰¹⁾ An agency may opt to rescind the regulation *or* pay damages to reimburse the landowner for the taking of the property.⁽¹⁰²⁾ This section may serve to further limit the scope of the Act since it provides the entity with an avenue to avoid compensation. But, the agency may still be liable for court costs as the Act provides a "loser-pays" provision, i.e., the prevailing party is awarded reasonable attorney's fees and court costs.⁽¹⁰³⁾

The Texas Act compensation requirements apply to both state agencies and political subdivisions⁽¹⁰⁴⁾ but the Act

further limits its reach by specifically exempting cities from its obligations.⁽¹⁰⁵⁾

C. Assessment Scheme

Finally, the Act requires detailed planning on the part of governmental entities.⁽¹⁰⁶⁾ These requirements include a written takings impact assessment (TIA) for proposed actions. The Act called on the Texas Attorney General's office to develop guidelines for TIAs.⁽¹⁰⁷⁾ Essentially, the Act put all levels of government on notice that they "must regulate with greater precision and care and contemplate the effects of their actions on individual citizens."⁽¹⁰⁸⁾ The TIA must analyze how the regulation advances its stated purpose, the burdens on property owners and society, the potential for a taking, and alternatives to the proposed action.⁽¹⁰⁹⁾ The Act specifically provides that the failure to prepare a TIA provides a basis for judicial relief to set aside the regulation.⁽¹¹⁰⁾ In addition, it requires that a state agency proposing an action that might constitute a legislative taking must give 30 days notice by newspaper publication and/or notice in the Texas Register.⁽¹¹¹⁾

D. Results

Not surprisingly, only two cases have been brought under the Texas Act.⁽¹¹²⁾ In *Accord Agriculture v. TNRCC*⁽¹¹³⁾, a group of property owners who opposed the location of a nearby 11,000-head swine farm challenged the TNRCC's interpretation of the Act as applying only to a party seeking a permit to operate a regulated business and not to adjacent landowners who are damaged by a permitted activity. The court dismissed the claim, finding that the Act does not provide relief to adjacent landowners. In *Edwards Aquifer Auth. v. Bragg*⁽¹¹⁴⁾, the plaintiffs filed suit after the Edwards Aquifer Authority (EAA) denied the application to drill a well on their property. Bragg argued that the agency failed to conduct a TIA, as mandated under the Texas Act. The court concluded that EAA's denial of the permit fell under the "mandated by state law" exception of the Act and that a TIA was not required in this case.

Proponents of the Act emphasize that the purpose of the Act was not to encourage or initiate litigation.⁽¹¹⁵⁾ Texas Representative Bob Turner (R-TX) explained that landowners were not seeking compensation from the government through the Act. Instead, the Act's goal was to push governmental entities to review their proposed actions for possible over-regulation because "what we really want is for the government not to take our land in the first place."⁽¹¹⁶⁾ According to Representative Turner, the Act has done just that. Turner testified that the "bill has done exactly what we intended it to do -- which was to make government think about the impact of its proposed regulations on private property rights before it acted."⁽¹¹⁷⁾

Like the Florida Act, the Texas Act remains one of the biggest feathers in the property rights movement's cap. Advocates herald it as a model for state and federal takings statutes because of its detailed assessment requirements and thorough compensation scheme.⁽¹¹⁸⁾ Its exclusions and its ambitious definition of taking leave some property rights advocates desiring more certainty, more expansiveness, and more bite than bark. The Act's exclusions potentially include regulations adopted under authority of the Texas Coastal Management Program,⁽¹¹⁹⁾ the state's tool providing regulatory authority over the Texas coastline. Specifically, a regulation adopted pursuant to the Texas Program, is arguably an action that is "reasonably taken to fulfill an obligation mandated by state law."⁽¹²⁰⁾ In addition, the Act may exempt regulations adopted to meet obligations under federal law, such as the federal Coastal Zone Management Act, providing Texas regulators an additional avenue to pursue coastal protections.⁽¹²¹⁾ While property rights remain at the forefront of Texas politics, the language of the Act may preclude it from impacting the Texas coast.⁽¹²²⁾

IV. Mississippi

A. Background

In 1995, Mississippi enacted the Agricultural and Forestry Activities Act to provide compensation for takings of agricultural or forestry lands.⁽¹²³⁾ The legislature enacted the Act as a reply to the private property rights movement at the national level and the rush in both Florida and Texas to pass comprehensive legislation.⁽¹²⁴⁾ Aware that there was no evidence of severe takings issues in Mississippi, lawmakers acted on a notion that Mississippi needed to acknowledge the national property rights issue with state legislation.⁽¹²⁵⁾

The Act's history is colorful. In 1994, the Farm Bureau assisted in drafting and promoting a comprehensive takings bill targeting takings of any private property in Mississippi. The bill failed in both 1994 and 1995, after drawing much attention from both proponents and opponents of the bill. The attention aimed at this comprehensive takings bill in 1994 shifted focus away from the Mississippi Forestry Activities Act which passed easily.⁽¹²⁶⁾ This Act applied compensation requirements to diminution of private forest lands. In 1995, seeing an opportunity to represent its farming constituents, the Farm Bureau promoted the amendment of the Forest Activities Act to

include agricultural lands as well.⁽¹²⁷⁾ The new statute, the "Mississippi Agricultural and Forestry Activity Act," granted protection for regulatory takings of agricultural and forest lands.⁽¹²⁸⁾ The legislature declared that the use of land in the state "as forest and agricultural lands are essential factors in providing for the favorable quality of life in the State of Mississippi."⁽¹²⁹⁾ The Act also encourages continued agricultural use of land.⁽¹³⁰⁾

B. Compensation Scheme

The Mississippi Act grants a right of action to an owner of agricultural or forest lands if a governmental action prohibits or severely limits the right of an owner to conduct forestry or agricultural activities.⁽¹³¹⁾ The law applies to lands devoted to the growing of trees or the commercial production of agricultural products.⁽¹³²⁾ A landowner's right is "limited" if a regulation or law reduces the fair market value of forest or agricultural land, forestry products or personal property rights associated with conducting forestry or agricultural activities by more than forty percent.⁽¹³³⁾

The Mississippi Act provides that the fact finder shall look to "any part or parcel" of the property in determining reduction in fair market value.⁽¹³⁴⁾ As noted in Section III, by defining the property in this way, the statute directs the court to consider only the regulated area of the property in the calculation. One commentator suggests that it so narrowly defines the "relevant unit of property so as to make it likely that almost any environmental regulation will amount to a taking."⁽¹³⁵⁾

When diminution by 40% occurs, a landowner's remedies are twofold. First, the state may choose to repeal or rescind the regulation, remaining liable for only damages incurred in the temporary taking of the property.⁽¹³⁶⁾ Or, the state entity may pay the amount of diminution of the property value.⁽¹³⁷⁾ Finally, the Act provides for attorney's fees and litigation costs to the prevailing party.⁽¹³⁸⁾

Like the Texas statute, Mississippi's Act provides some far-reaching exclusions. For instance, the statute specifically exempts state actions which are taken to protect public health and safety,⁽¹³⁹⁾ including those taken by the Mississippi Air and Water Pollution Control Commission.⁽¹⁴⁰⁾ The statute also exempts actions taken by the Mississippi Commission on Wildlife, Fisheries and Parks.⁽¹⁴¹⁾

C. Assessment Scheme

The Act does not specifically provide for a takings impact assessment of proposed actions. The Mississippi Legislature provided for this by amending its Administrative Procedures Act to require economic impact statements from state agencies when they propose a new rule or significantly modify an old rule. Under the Act, "significantly" modifying an old rule means that the total aggregate cost to all persons required to comply with that rule exceeds \$100,000.⁽¹⁴²⁾

The Mississippi Administrative Procedures Act requires "each agency proposing the adoption of a rule imposing a duty, responsibility or requirement on any person shall consider the economic impact the rule will have . . . and the benefits the rule will cause . . ."⁽¹⁴³⁾ The economic impact statement must include the following: a description of the need for the proposed action; an estimate of the cost of the rule to the agency, including paperwork and the anticipated effect on state and local revenues; the cost of the rule to citizens and small businesses; a comparison of the cost and benefits of adopting and not adopting the rule; a list of reasonable alternatives to the rule; and a detailed statement of the data and methodology used in making the requisite estimates.⁽¹⁴⁴⁾ Rules which are exempt from this procedure are those required by the federal government, those expressly required by state law, emergency rules, and rules for which the notice required has been given prior to the effective date of the Act.⁽¹⁴⁵⁾

D. Results

1. Lack of Litigation

Mississippi property owners have not tested the compensation scheme. In the years since its passage, no cases have been filed to date under the Act.⁽¹⁴⁶⁾ Its scope, however, was limited by its application to only forestry and agricultural lands. Overall, takings litigation resulting from forestry and agricultural lands comprise less than 10% in the United States in the last 10 years.⁽¹⁴⁷⁾ Most litigation arises out of development of private property rather than agricultural or forestry-related land uses. Thus, the Act represents a response to the perceived threat to property rights. However, agricultural and forest landowners view the statute as a protection for long-term investments that agricultural and forestry products typically require in order to realize financial return.⁽¹⁴⁸⁾

In addition, no litigants have made use of the APA assessment provision. State agencies in Mississippi responded to this requirement by "doing their level-headed best."⁽¹⁴⁹⁾ The Mississippi Department of Marine Resources meets the statutory requirements through a document of a few pages, discussion at public meetings and

attachment to records for proof of procedure.⁽¹⁵⁰⁾ The Mississippi Department of Environmental Quality has avoided the requirement of an economic impact statement because their regulations were enacted or went into effect before March, 1995, but is aware of future regulations that may require such an analysis, such as mineral regulations.⁽¹⁵¹⁾

While it seems to be merely a procedural hoop for state entities, the economic impact statement requirement does force the entities to analyze regulations for potential takings claims which is more than ever before required of state agencies. Even without suits under its section, the amended APA has introduced state agencies to the "look before you leap" concept.

2. Mississippi's Gulf Coast

The effects of the assessment and compensation schemes on the Mississippi gulf coast are questionable. Historically, the coast has not produced great yields of agriculture or timber, compared to other areas of the state. While timber production accounts for some coastal income, today, agricultural and forestry lands make up less than 15% of the land of the three Mississippi coastal counties.⁽¹⁵²⁾

Thus, the coastal communities have not experienced activities under the Mississippi acts. In order to file under the APA, an amended regulation must meet the burden of causing \$100,000 in cumulative costs. While \$100,000 may not be a high standard to reach, with a low number of forestry and agricultural lands, the burden is higher than in counties with a higher agriculture or forestry base. If a case is filed under either the Administrative Procedures Act or the Activity Act, it may cause an agency to redraft a regulation or not pass the regulation at all. The potential effects on the coastal ecosystem are increased runoff, erosion, lower water quality, and a potential to hinder fisheries production. These effects are purely speculative, however, since neither Act has caused a stir in coastal counties.

An interesting question remains for the coast, however. With ever-increasing casino complexes and associated development, the possibility of zoning changes or new regulations on the coast will cause takings of some properties which significantly increase property values of others.⁽¹⁵³⁾

V. Louisiana

A. Background

The Louisiana Legislature considered several takings bills from 1992 - 1995. Prior to 1995, Louisiana's "Right to Farm Act" protected those engaged in agricultural practices from legal actions in various situations.⁽¹⁵⁴⁾ In 1995, the Louisiana Legislature amended this Right to Farm Act to include compensation and assessment provisions to apply to regulatory takings of both farmlands and forest lands.

The Louisiana Act has three major distinctions from other gulf state statutes. First, its definition of diminution in value requires only a 20% diminution in fair market value, the lowest of any enacted gulf state statute. Second, its written impact assessment scheme has unique procedural requirements. And, third, it distinguishes between agricultural and forestry lands with different standards.

B. Compensation Scheme

The Louisiana Act reads almost identically to that of Mississippi. It provides landowners a cause of action against a governmental entity to determine whether a government action cause a diminution in value of 20%.⁽¹⁵⁵⁾ The Act applies to any land on which agricultural or forestry operations occur.⁽¹⁵⁶⁾ Similar to the Mississippi statute, the Louisiana Act's definition of "governmental action" excludes those actions taken in compliance with federal law or regulation, directed or mandated by a court, or taken to protect public safety and health.⁽¹⁵⁷⁾ It also exempts state agricultural and forestry agencies from the Act.⁽¹⁵⁸⁾ As a result, the regulations with the greatest potential to limit property rights on forest or agricultural lands are not government actions under the Act.

This 20% diminution requirement is the lowest threshold in the gulf states legislation and even though it is limited to only agriculture and forest lands, it is not a difficult threshold to meet. Like the Mississippi Act, the Louisiana Act states that a taking occurs when there is at least a 20% reduction in value of "the affected portion of any parcel" of farmland or forestland.⁽¹⁵⁹⁾ As noted in Sections III and IV, by narrowly focusing on only the portions affected, the Louisiana Act significantly increases the likelihood that government actions constitute takings, especially since the diminution in value must only reach 20%.⁽¹⁶⁰⁾

The Act distinguishes between the two types of land in its definition of diminution in value. It provides that if a parcel of agricultural land experiences a diminution in value, the landowner is entitled to compensation. For agricultural lands, diminution in value is defined as a reduction in fair market value by 20%. If the governmental action "limits or prohibits" the use of forest land, then the owner receives compensation. Similarly, the Act defines

"limits or prohibits" as a reduction in fair market value of 20%.

Once the court finds that a 20% reduction in value, the statute provides two types of relief for owners of agricultural lands but only one type of relief for owners of forest lands. For a 20% reduction in value of agricultural lands, the statute provides that the owner may choose to recover a sum equal to the diminution in value of the property and retain title. In the alternative, agricultural landowners may recover the entire fair market value of the property prior to diminution in value of 20% and transfer title of the property to the governmental entity.⁽¹⁶¹⁾ For a 20% reduction in value of forest lands, the landowner's only method of relief is to recover a sum equal to the diminution in value and retain title.⁽¹⁶²⁾

C. Assessment Scheme

The Act also distinguishes between the agricultural and forestry lands through its written impact assessment requirement. A governmental agency must prepare a written assessment if the action is "likely to result in a diminution in value of private agricultural property."⁽¹⁶³⁾ Under the Right to Farm provisions, diminution in value is a reduction in fair market value by 20%. Likewise, a governmental agency must prepare a written assessment if the action is "likely to result in a diminution in value of forest land."⁽¹⁶⁴⁾ Under the Right to Forest provisions, however, diminution in value is not defined. Instead, the legislature defined the reduction in fair market value of forest land in terms of "limiting and prohibiting" activities on forest land. This definition, however, does not trigger the impact assessment provision. Ultimately, the Act provides that a governmental agency must prepare a written assessment of the action if it is likely to cause a 20% diminution in value in agricultural land but must prepare one if the action is likely to cause *any diminution in value* in forest land.

For both agricultural lands and forestry lands, Louisiana forces a unique requirement upon governmental entities. The governmental entities must deliver the written impact assessment to *any affected landowner*, as well as the Governor and Commissioner of Agriculture and Forestry.⁽¹⁶⁵⁾ This provision puts agricultural and forest landowners on early notice of potential takings actions and extends the notice provisions farther than even Texas' assessment provisions, hailed as the most expansive.

D. Results

Similar to the Mississippi Act, no litigants have tested the Louisiana Act in court.⁽¹⁶⁶⁾ Its provisions, however, leave a number of questions behind. The Act offers different protections to agricultural land over forest lands and it leaves courts to decide the portion of the parcel used to determine diminution in value.

Unlike Mississippi, Louisiana's Act has a greater chance to impact coastal resources. Louisiana's coastal counties contain substantially more agricultural and forest lands than Mississippi and the diminution rate for a taking is only 20%. Also, between 1987 and 1992, the number of farms operating in Louisiana coastal counties increased.⁽¹⁶⁷⁾ Louisiana also has unique coastal wetland areas and more stringent coastal regulations than Mississippi.⁽¹⁶⁸⁾ Its state coastal management program has been credited with notable accomplishments in reducing tidal wetland losses through its shoreline regulations, acquisitions, and research and public education. The Act, however, has been predicted to have more effect on inland areas of forestry rather than the smaller coastal pockets of agricultural lands.⁽¹⁶⁹⁾

VI. Alabama

A. Background

Alabama is the only gulf state without a private property protection act on its books. This does not reflect, however, a lack of effort on the part of private property rights advocates and Alabama legislators. Since the national movement heated up, Alabama has reviewed a number of bills but has never passed one. In previous years, both the Alabama House and Senate introduced inverse condemnation bills.⁽¹⁷⁰⁾ These bills provided a cause of action when land value diminished by 50% as a result of a state or local government regulation.⁽¹⁷¹⁾ In addition, many of the proposed bills required state agencies to develop and observe takings impact guidelines in promulgating or implementing regulatory programs.⁽¹⁷²⁾

In 1997, the Alabama House of Representatives followed its neighbors to the west and introduced a takings statute, the Alabama Right to Farm and Forest Act to apply a compensation and assessment scheme to agricultural and forest lands.⁽¹⁷³⁾ The bill received a favorable report from the House Ways and Means Committee but the House indefinitely postponed it and failed to vote during the 1997 sessions. The bill was not carried over to the 1998 session and has not been reintroduced.

B. Proposed Compensation Scheme

The bill aims to protect owners of agricultural and forest lands from "further diminution in value of lands."⁽¹⁷⁴⁾ The bill applies to "bona fide agricultural, pasture, forestry, or horticultural land" that is privately owned.⁽¹⁷⁵⁾ The bill goes further to state that a governmental entity shall "avoid diminution in value of private agricultural and forestry property which may potentially be used in agricultural and forestry production."⁽¹⁷⁶⁾ Thus, the land does not have to currently produce agricultural or forestry goods to be protected under the Act.

The most unique provision in the bill is the amount of diminution in value required to trigger the Act. If a governmental action causes *any* diminution in value, the landowner has a cause of action. If enacted, this would represent the most expansive compensation scheme in the nation. It would also provide an open avenue to get into court. The court decides if a governmental action causes a diminution in value of the economically viable use of the property. The bill defines governmental action as the "issuance of a rule, regulation, policy, or guideline promulgated by any governmental entity; or an order or other legally binding directive having the force of law."⁽¹⁷⁷⁾ However, it specifically excludes the adoption of a statute, an exercise of eminent domain, actions taken to protect public safety and health, and "actions taken in compliance with federal law or regulation."⁽¹⁷⁸⁾

Once the court finds a taking, the governmental entity has three methods to remedy the taking. First, the entity may rescind or repeal the regulation and pay damages for the temporary taking.⁽¹⁷⁹⁾ Second, the governmental entity may reimburse the owner the sum of diminution in value or, third, if the diminution in value is greater than 50%, the landowner may demand either the sum of diminution or the entire fair market value of the property prior to diminution and transfer title to the state.⁽¹⁸⁰⁾ It also provides costs of litigation to the prevailing party, including reasonable attorney fees and expert witness fees.⁽¹⁸¹⁾

C. Proposed Assessment Scheme

The Act subjects a proposed governmental action to a written assessment in which the entity analyzes the regulation's potential for a physical taking, any diminution in value, potential for interference with agricultural or forestry development, possible alternatives, the cost to reimburse landowners and where in the agency budget that reimbursal money is located.⁽¹⁸²⁾ While the bill creates a detailed assessment scheme, the provision's effectiveness may be limited because many governmental regulations have the potential to reduce the value of agricultural or forest property by even the smallest percentage.

Finally, the bill provides the state court the authority to require mediation at any point in the process⁽¹⁸³⁾ and encourages parties to use mediation as an alternative to automatic litigation. It also provides costs of litigation to the prevailing party, including reasonable attorney fees and expert witness fees.⁽¹⁸⁴⁾ Presumably, this includes the "qualified appraisal expert," as required by § 3 (1) who determines the diminution in value of the land. Alabama's bill also benefits the landowner by explicitly calling for a reduction in taxes of the property.⁽¹⁸⁵⁾

D. Potential Results

If Alabama were to pass a statute with these provisions, it will be the first taking statute amongst the gulf states and the nation to provide recovery for *any* diminution in value. While this section makes the bill seem far-reaching, its applicability to only agricultural and forestry lands and its exclusion of actions taken in compliance with federal law hinders its potential impact.

With regard to impacts on the gulf coast, Alabama's coastal area has few acres set aside as agricultural or forest lands and most of the areas are either designated reserves or developed. Its coastline does not appear to be assisted or impaired by the Act. As for the future of property rights in Alabama, the Legislature has been prepared to act since the early 1990s with the rise of the property rights movement but, perhaps the lack of a real takings problem in the state keeps such bills on the drawing board instead of in the books.

VIII. The Challenges for State Takings Statutes

With the rise in takings legislation at both the state and federal levels, new challenges have arisen as well. State statutes must confront specific provisions and their failure to clarify takings laws and methods of compensation. Also, in the greater scheme of property rights, statutes have yet to overcome their basic structural problems.

As noted above, many state statutes contain general provisions that either create ambiguities or leave gaps requiring ad hoc judicial construction of the laws or a revisit by state legislatures. Reliance on judicial interpretation for clarity may result in creating new rights to compensation for hundreds of property owners without considering additional costs.

Policy questions concerning the appropriate scope of governmental regulation and the fair distribution of burdens and benefits have plagued the takings debate for the last decade and now have entered the halls of state legislatures. The house of takings has been built on a foundation of protecting property rights and values by diminishing incentives to regulate activities on private land. However, the regulations these statutes take aim at

are also a part of protecting rights -- the right to have the public welfare guarded. The scope of governmental activities that property rights statutes hope to reduce are often regulations that communities take for granted -- zoning and land use planning, public recreation and open space laws, natural resource protection, and historic preservation. While these laws are premised on public welfare justifications, statutes distinguish them from the traditional police powers that protect "public health, safety and general welfare."⁽¹⁸⁶⁾ These laws, however, maintain property values, create communities, and maintain the character of a state's lands.⁽¹⁸⁷⁾

If these regulations are no longer promulgated, has the statute aimed at protecting property suddenly stripped away other property protections? What happens as a result? Should a landowner be liable to the public if she degrades or destroys natural processes that yield public benefits? One commentator finds it reasonable that "the public might be compensated for the annual value of the water purification, flood control, and species preservation provided by a wetland that was filled in to permit a landowner to profit from agriculture or urban development."⁽¹⁸⁸⁾ While most state legislatures have accepted that takings legislation should provide remedies to landowners, they have yet to extend that doctrine to providing remedies to the public for similar value losses.

In addition, no statute has ventured to answer the begged question: what if a governmental regulation increases the property value of a private parcel? Does this provide a landowner with a windfall or should a statute require payment by the landowner to the state? Additionally, the codification of regulatory compensation claims may support the corollary argument that government actions which result in a benefit to the property owner ought to be taxable to him.

Finally, due to decreases in public funding and increases in property rights concerns, coastal states have become "inventive" in developing new tools and approaches as an effective means of maintaining public access to coasts.⁽¹⁸⁹⁾ Traditionally, acquisition and regulatory techniques had been heavily utilized but recent years have shown the rise of legal assistance programs to secure public rights-of-way and partnerships with public and private institutions.⁽¹⁹⁰⁾

IV. Conclusion

While the "sky has not fallen" as predicted by some opponents of property rights, the statutes have not lived up to advocates' expectations, either.⁽¹⁹¹⁾ In addressing the legislative regulatory takings issue, some of the gulf states profess to have drafted an equitable solution to the public interest-private interest conflict. Florida and Texas have set out concepts, definitions and processes which may seem at first glance to "solve" the problem. Louisiana and Mississippi found that protection of agricultural and forestry interests is a sufficient response to the growing cry for property rights protection. Alabama struggles to pass either version of the famed takings statutes.

The property rights movement and the resulting takings legislative activities may be more successful in their ability to prompt regulators to use heightened scrutiny when contemplating regulations which may have economic impact on property owners. They may also be sending a message to the judiciary that restrictive regulations ought not to be presumed valid, requiring the government to articulate a clearer, more rational and more closely related need for governmental interference with private property.

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1. For analysis of the governmental actions that have awakened a large segment of the public to the need for reform, see Jonathon Adler, *Environmentalism at the Crossroads* (D.C.: Capital Research Center, 1995); James V. DeLong, *Property Matters* (N.Y.: The Free Press, 1997); Richard Pombo and Joseph Farah, *This Land is Our Land: How to End the War on Private Property* (N.Y.: St. Martins Press, 1996). See also *Hearings Before the Senate Committee on the Judiciary*, 105th Cong., 1st Sess. (1997) (testimony of Nancie Marzulla, President, Defenders of Property Rights). Marzulla explains that "[w]hen the claim is for property rights, however, the courts too often turn a deaf ear" and that "[n]ever before have government regulations threatened to destroy property rights on so large a scale and in so many different contexts as they do today." *Id*
 2. Magna Carta, p. 17 (1215).
 3. U.S. Const. amend V. This guarantee applies to the federal government and is extended to apply to state governments through the Fourteenth Amendment.
 4. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also Thomas G. Douglass, Jr., *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 Ga. L. Rev. 1061 (1996). For analysis of the various readings of *Mahon*, see Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": *The Myth and Meaning of Justice Holmes' Opinion in Pennsylvania Coal v. Mahon*, 106 Yale L.J. 396 (1996); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. Rev. 605 (1996); William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, on file with the author.
 5. *Mahon*, 260 U.S. at 415. The Court acknowledged that the government, under its police powers, has the right to regulate land use to some degree, even if this means a diminution in the owner's property value. But, it is possible that regulation could be so onerous that the economic interest is irreparably harmed. Justice Holmes explained

that a regulation which goes "too far" will be recognized as a taking.

6. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) (finding that an easement for cable wires is a physical invasion constituting a taking and relying upon *Kaiser Aetna* which "reemphasizes that a physical invasion is a government intrusion of an unusually serious character"); and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

7. *Kaiser Aetna v. United States*, 444 U.S. 164 at 176.

8. *Id.* at 180.

9. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (holding that no taking occurred when regulations preventing operation of quarry in residential district significantly reduced value of property) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that no taking occurred when regulation preventing operation of brick mill in residential area diminished value of property by over 90%).

10. U.S. Const. amend. V. It provides that "private property [shall not] be taken for public use, without just compensation." *Id.*

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

John Tibbetts, Beachfront Battles over Seawalls, 12 Coastal Heritage 3 (1997) (discussing the current issue between regulators in South Carolina and North Carolina prohibiting the building of seawalls and beachfront property owners claiming that seawalls are the only method of saving their property from falling into the sea due to extreme erosion). Tibbetts references the *Lucas* decision and explains:

Legal experts doubt that the U.S. Supreme Court would even consider the *Lucas* case if it were presented now, because beach erosion has eaten away the land in question, just as state regulators predicted. The ocean has eroded the buildable land on the undeveloped lot and threatened a home on the developed lot formerly owned by Lucas. In the *Lucas* decision, the Court relied on the traditional legal assumption that land is unchanging, says R. J. Lyman, an attorney with the Massachusetts Office of Environmental Affairs. Nature, however, shows that land forms, especially beachfront property, are in flux. The Court saw the Lucas lots in a "snapshot" taken when the beachfront was usually wide, he says, "but that snapshot was not representative of the moving picture" of ocean front property that can erode and disappear, he says.

Id. David Lucas stated that the high land on the Isle of Palms lots will return, likely to remain "erosion-free for several years." *Id.* at 9.

12. The Court recognized an exception to the application of the *Lucas* analysis when the government bases the regulation on the "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1029. The Oregon Supreme Court applied the *Lucas* analysis in *Stevens v. City of Cannon Beach* where the landowner sued the City of Cannon Beach and the state of Oregon for denials of permits to construct a seawall on the dry sand portion of the plaintiff's beachfront lot. *Stevens v. City of Cannon Beach*, 845 P.2d 449 (Or. 1993), *cert. denied* 510 U.S. 1207 (1994). The Oregon Supreme Court found that the plaintiffs had no property interest in developing the dry sand portion of their property, applying the nuisance exception of the *Lucas* decision and upholding the applicability of the Oregon Beach Bill. *Stevens*, 845 P.2d at 456-57; Oregon Beach Bill: 1967 Or. Laws ch. 601 (codified at Or. Rev. Stat. §§ 390.605 et seq. (1994)).

13. *Penn Central Transportation v. City of New York*, 438 U.S. 104 (1978).

14. *Penn Central*, 438 U.S. at 124.

15. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

16. Justice Powell explained that the regulation is an impermissible use if it does not "substantially advance legitimate state interests." *Agins*, 447 U.S. at 260 (1980).

17. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

18. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). For a complete analysis of *Dolan*, see James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning After Dolan v. City of Tigard*, 21 Colum. J. Envtl. L. 103 (1996).

19. *City of Monterey v. Del Monte Dunes at Monterey, LTD.*, 119 S.Ct. 1624 (1999).

20. *Governmental Actions and Interference With Constitutionally Protected Property Rights*, Reagan's 1988 Exec. Order No. 12,630, 53 F.R. 8859, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. 601 (1994).

21. Exec. Order No. 12,630 § 3 (a), (b).

22. Federal Water Pollution Control Act [Clean Water Act] (CWA) 33 U.S.C. §§ 1251 - 1387 (1997).

23. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1997). See Robert Meltz, *The Property Rights Issue 12* (Congressional Research Service Report No. 95-200 A, 1995).

24. *Environment Regulations and Property Rights: Hearing Before the Senate Comm. On Env't and Public Works*, 104th Cong. 49 (1995) (statement of Don Martin, Vice-President/Secretary, Nat'l Ass'n of Home Builders).

A "crisis" of takings proportions is also occurring on the Alabama coast where the endangered Alabama Beach Mouse is hindering the plans of hopeful coastal developers. Conversation with Cynthia Sarthou, Gulf Restoration Network, Sept. 23, 1997.

25. The U.S. Congress in the last decade has reviewed a number of takings laws but none have become law. See *infra*, section II B. See also Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 14 Pace Envt'l L. Rev. 1 (1996) ("Beginning in 1995, bills were introduced in the Congress to the effect that any regulation that diminished the full developmental value of property in order to protect species could only be implemented if

the public paid for that diminution, even if its extent was very small").

26. Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L.Q. 187 (1997). Cordes explains that "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." *Id.* at 196. See *infra* section III A.

27. The Mississippi Administrative Procedure Act refers to these analyses as "economic impact statements" (EISs) requiring a written report before the adoption of a rule or significant amendment to an existing rule. Miss. Code Ann. 25-43-6 (1997).

28. *The notion that anyone has a call upon the public treasury for a partial loss of the value of his property because of a valid public welfare regulation . . . has never found a place in our laws or history.*⁽²⁹⁾

29. Glen Sugameli, (quoting Senator J. Bennett Johnston) -- pg. 227. -

30. The Congress has reviewed property rights statutes for a number of years. The House of Representatives of the 104th Congress passed H.R. 925, The Private Property Protection Act of 1995. It provided compensation where the regulatory diminution exceeded 20% of value but only applied to federal actions under the Clean Water Act, Endangered Species Act, and provisions of the Food Security Act of 1985. The Senate Judiciary Committee reported out a bill of broader scope, S. 605, the Omnibus Property Rights Act of 1995 where the government was liable for compensation when the diminution exceeded 33% of the fair market value. The 106th Congress considered similar bills, including H.R. 2550, The Private Property Protection Act of 1999 and S. 246, The Private Property Rights Implementation Act of 2000.

31. S.B. 953, 105th Cong., 1st Sess. (1997).

32. Federal Water Pollution Control Act [Clean Water Act] (CWA) 33 U.S.C. §§ 1251 - 1387 (1997).

33. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1997).

34. S.B. 781, 105th Cong., 1st Sess. (1997). Senator Hatch stated that the Omnibus Property Rights Act is designed to stop arbitrary governmental actions by creating incentives that would reduce federal agency usurpation of property rights, such as the codification of the Fifth Amendment's compensation requirement of the Takings Clause. *Hearings Before the Senate Judiciary Committee*, 105th Cong., 1st Sess. (1997) (testimony of Senator Orrin Hatch), available in LEXIS, NEWS Library, FEDNEW File, October 29, 1997.

35. See *Hearings Before the House Committee on Judiciary, Subcommittee on Immigration and Claims*, 105th Cong., 1st Sess. (testimony of Nancie Marzulla, President, Defenders of Property Rights) available in LEXIS, NEWS Library, FEDNEW File, October 29, 1997. Marzulla describes the plight of Paul Presault whose "Tucker Act odyssey" began in 1981 when he sued Vermont to reclaim a strip of land the state had used to run a government-operated railroad through his front yard. After 16 years of being sent from court to court, he awaits another legal hearing in the U.S. Court of Federal Claims. *Id.*

36. Proponents of the bill claim that the government has used the law to urge dismissal in the district court, on the ground that plaintiff should seek just compensation in the Court of Federal Claims and to urge dismissal in the Court of Federal Claims on the ground that the plaintiff should first seek equitable relief in the district court. See *Hearings Before the Senate Judiciary Committees*, 105th Cong., 1st Sess. (1997) (testimony of Senator Orrin Hatch) available in LEXIS, NEWS Library, FEDNEW File, October 29, 1997.

Opponents claim, however, that "giving a non-Article III tribunal the power to invalidate federal laws and regulations would raise serious separation of powers concerns." Marcia Coyle, *Fight Over Plan to Widen Claims Court Jurisdiction*, National Law Journal, September 29, 1997, at A10 (quoting Asst. Attorney General Eleanor D. Acheson, Office of Policy and Development, Department of Justice).

37. H.R. 1534, 105th Cong., 1st Sess. (1997).

38. S. 426, 106th Cong (1999).

39. *Endangered Species Recovery Act, Hearings Before the Senate Environment and Public Works Committee*, 105th Cong., 1st Sess. (1997) (testimony of Senator James M. Inhofe).

40. Fla. Stat. § 70.001 et seq. (1995). For in-depth analysis of the Act, see David Spohr..., Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 Fla. St. L. Rev. 315 (1995); Thomas G. Douglass, Jr., *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 Ga. L. Rev. 1061 (1996).

41. Vargas at 23 Fla. St. L. Rev. at 327 - 28.

42. *Id.* at 338.

43. Kent Wetherell, *Private Property Rights Legislation in Florida: The "Midnight Version" and Beyond*, 22 Fla. St. U. L. Rev. 525, 538- 540 (1994) (describing the studies of the Study Commission (1974) and the Select Committee (1976) to examine the taking of private property).

44. Ch. 78-85, 1978 Fla. Laws 124 (codified at Fla. Stat. § 161.212 (beach and shore preservation); § 253.763 (state lands); § 373.617 (water resources); § 380.085 (land and water management); § 403.90 (environmental control) (1993)).

45. During the two legislative sessions prior to 1995, Florida considered two takings bills similar to the Florida Act but failed to pass either. Vargas at 318.

46. Vargas, note 4 at 317; see *supra* at note 40.

47. *Id.*

48. Among the Gulf states, Florida's Act is rivaled only by Texas's Private Property Rights Act but has resulted in more activity. See *infra*, notes 89-122.

49. The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority. Fla. Stat. 70.001 (3)(c) (1997).

50. The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section. Fla. Stat. 70.001(3)(e) (1997).

51. *Id.*

52. See Ronald L. Weaver, *1997 Update on the Bert Harris Private Property Protection Act*, 71-OCT Fla. B.J. 70 (1997) (Cases interpreting the Act have determined that to constitute an inordinate burden, an action of one or more governmental entities must be direct and must either:

1. Restrict or limit the owner's use of the subject property such that the property owner is permanently restrained from attaining reasonable, investment-backed expectations for the "existing use of the real property or a vested right to a specific use of the real property as a whole;" or
2. Leave the property owner with "existing" or "vested" uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden that should be imposed on the public at large. Wetlands, woodpeckers, scrubjays, and the like should be protected generally, but owners need no longer bear disproportionate shares of the burden of that protection).

53. The settlement offer should effectuate the following:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.
2. Increases or modifications in the density, intensity, or use of areas of development.
3. The transfer of developmental rights.
4. Land swaps or exchanges.
5. Mitigation, including payments in lieu of onsite mitigation.
6. Location on the least sensitive portion of the property.
7. Conditioning the amount of development or use permitted.
8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
9. Issuance of the development order, a variance, special exception, or other extraordinary relief.
10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.
11. No changes to the action of the governmental entity. Fla. Stat. § 70.001(4)(c) (1997).

54. Fla. Stat. § 70.001(5)(b).

55. Fla. Stat. § 70.001(5)(b) (1997).

56. Fla. Stat. § 70.001(6)(b) (1997).

57. Fla. Stat. § 70.001(11) (1997).

58. Fla. Stat. § 70.001(10) (1997).

59. Florida attempted to make the Harris Act retroactive to 1990.

60. Fla. Stat. Ann. § 70.51 (1997).

61. *Id.* at § 70.51(2)(c) ("Special master" means a person selected by the parties to perform the duties prescribed in this section. The special master must be a resident of the state and possess experience and expertise in mediation and at least one of the following disciplines and a working familiarity with the others: land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same).

62. *Id.* at § 70.51(19).

63. For an analysis of the cases, see Weaver, *supra* note 53, 71-OCT Fla. B.J. 70.

64. The government seized the land in a drug forfeiture case and then auctioned off the tract in 1993 for \$ 80,000. Victor Hull, *Dream Home Mired in Red Tape*, Sarasota Herald-Tribune, April 20, 1997, at 1A.

65. Fla. Stat. 70.51(17)(a) (1997).
66. Fla. Stat. § 70.51(17) ("the hearing must be informal and open to the public").
67. Dept. of Administrative Hearings case #97-1894.
68. *Manasota-88, Inc. v. State of Florida Department of Environmental Protection, Ray McLarney, and Mel McGinnis* #96-8670.
69. The Act merely requires that the special master "must be a resident of the state and possess experience and expertise in mediation and at least one of the following disciplines and a working familiarity with the others: land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same." Fla. Stat. § 70.51(2)(c) (1997).
70. See Fla. Stat. § 70.51(21)(a) - (c) (1997) (allowing either party to reject the special master's recommendation).
71. *Id.*
72. *State Approaches to Protecting Private Property Rights Before the House Judiciary Committee, Subcommittee on the Constitution Subject*, 105th Cong., 1st Sess. (1997) (Prepared Statement of Dean Saunders, Former Member of the Florida House of Representatives).
73. Even without an assessment provision which requires governmental agencies to analyze proposed actions for a potential takings claim, governmental entities in Florida are aware of the willingness of property owners to file a claim, resulting in assessment activity without a requirement.
74. 1996 FL H.J.R. 1281.
75. Advisory Opinion to the Attorney General Re: People's Property Rights Amendments. . . , 699 So.2d 1304 (1997) (explaining that the initiative that sought to allow proposed amendments to cover multiple subjects if they require full compensation to be paid to owner when government restricts use of property violated single-subject requirement of Florida Constitution).
76. Advisory Opinion to the Attorney General Re: People's Property Rights Amendments..., 699 So.2d 1304 (1997) (explaining that the initiative that sought to allow proposed amendments to cover multiple subjects if they require full compensation to be paid to owner when government restricts use of property violated single-subject requirement of Florida Constitution).
77. Victor Hull, *Little-Used Law Having Wide Impact*, Sarasota Herald-Tribune, April 20, 1997, at A17 (quoting Jim Bennett, Pinellas County Chief Assistant County Attorney).
78. *Id.*
79. *Id.*
80. *An Act of Desperation*, The Palm Beach Post, January 29, 1997, at 16A.
81. *Id.*
82. *Toll of Roadkill*, Sarasota Herald-Tribune, September 2, 1997, at 1A.
83. Fla. Stat. §§ 161.011-161.058 (1997).
84. *Id.*, at § 161.053(1)(a) (1997).
85. See Kenneth E. Spahn, *The Beach and Shore Protection Act: Regulating Coastal Construction in Florida*, 26 Stetson L. Rev. 353 (1995).
86. See Daryl Janes, *Landowners Turn to State for Relief from Regulation Yo-yo*, 15:44 Austin Business Journal 12 (1995).
87. *Id.* at C2. See also *State Approaches to Protecting Private Property Rights Before the House Committee on the Judiciary, Subcommittee on the Constitution Subject*, 105th Cong, 1st Sess. (1997) (Prepared Statement of Jane Cameron Hayman, Deputy General Counsel, Florida League of Cities, Inc.).
88. *Hearings Before the House Resources Committee*, 105th Cong., 1st Sess., (1997) (testimony of Desmond Smith, President, Trans Texas Heritage Association).
89. *Id.*
90. Tex. Gov't Code Ann. § 2007.001. For detailed analysis of the Texas Private Property Rights Preservation Act, see *State Approaches to Protecting Property Rights: Hearings Before the House Committee on the Judiciary, Subcommittee on the Constitution*, 105th Cong., 1st Sess. (1997) (testimony of Steven J. Eagle, Professor of Law, George Mason University School of Law), available in LEXIS, NEWS Library, Fed. New File, October 19, 1997; and Ann L. Renhard Cole, *State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs*, 76 Tex. L. Rev. 685 (1998).
91. *Taking the Property Rights Plunge*, Texas Lawyer 4 (1995) (citing statement of state senator Bivins, specifically citing duplication with the U.S. Fish & Wildlife Service).
92. Tex. Gov't Code Ann. §§ 2007.003(b)(1)-(14), (c), (e) (West 1997).
93. Tex. Gov't Code Ann. § 2007.006(c)(2) (West 1997).
94. Thomas G. Douglass, Jr., *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 GA. L. Rev. 1061, 1087 (1996).
95. Tex. Gov't Code Ann. §§ 2007.021 (b), 2007.022 (b) (West 1997).
96. Tex. Gov't Code Ann. § 2007.002. (West 1997).
97. Cordes, *supra* note 26, at 215 - 16.
98. See *infra* sections IV and V. Mississippi & Louisiana statutes leave open the same question.

99. Tex. Gov't Code Ann. § 2007.024(a) (West 1997). The rescission must occur within 30 days of the judgment or order.
100. Tex. Gov't Code Ann. § 2007.024(b) (West 1997).
101. The Act requires that the compensation money come from the agency's appropriated funds. Tex. Gov't Code Ann. § 2007.024 (f). (West 1997).
102. Tex. Gov't Code Ann. §2007.026 (West 1997).
103. Tex. Gov't Code Ann. § 2007.002 (1) (West 1997).
104. Tex. Gov't Code Ann. § 2007.003(4)(b)(1) (West 1997).
105. But, the TIA requirement only applies to subdivisions (1) through (3) of section 2007.003(a). This chapter applies only to the following governmental actions:
 (1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure; (2) an action that imposes a physical invasion or requires a dedication or exaction of private real property; (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and (4) enforcement of a governmental action listed in Subdivisions (1) through (3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.
- Tex. Gov't Code Ann. § 2007.003(a) (West 1997).
106. Tex. Gov't Code Ann. § 2007.041 (West 1997).
107. Pat Remington, *Testing the Balance of Interests*, The Fort Worth Star-Telegram, October 1, 1996, at 11.
108. Tex. Gov't Code Ann. § 2007.043 (a) - (c) (West 1997).
109. Tex. Gov't Code Ann. § 2007.044 (West 1997).
110. Tex. Gov't Code Ann. § 2007.042 (West 1997). On January 11, 1996, the Texas Attorney General Dan Morales proposed guidelines for the state and municipal governments to follow when considering an action that might have an adverse impact on property rights. Among other things, the guidelines define takings, stipulate the governmental actions that are covered and under what circumstances a takings impact assessment is required, and offer a question/answer guide for governmental entities facing the need to evaluate whether their proposed actions might constitute a taking. See Texas Environment Compliance Update, Vol. 5, Issue 9, March, 1996.
111. *Hearing Before the House Judiciary Committee Subcommittee on the Constitution*, 105th Cong., 1st Sess. (1997) (testimony of Representative Bob Turner) available in LEXIS, NEWS Library, Federal News Service File, October 29, 1997 ("Only one lawsuit has been filed on the basis of the act, and it was filed by an environmental organization on behalf of several landowners protesting a permit that was granted to a confined animal feeding operation located near them. The suit was ruled invalid, however, because the property rights act was not actually the proper basis for the lawsuits. The act applies only to governmental actions that directly affect private property.").
112. No. 96-159, Travis County District Court
113. 2000 Tex. App. LEXIS 382.
114. *Hearings Before the Senate Committee on the Judiciary*, 105th Cong., 1st Sess. (1997) (testimony of Nancie Marzulla, President, Defenders of Property Rights).
115. *Hearing Before the House Judiciary Committee Subcommittee on the Constitution*, 105th Cong., 1st Sess. (1997) (testimony of Representative Bob Turner) available in LEXIS, NEWS Library, Federal News Service File, October 29, 1997.
116. *Hearing Before the House Judiciary Committee Subcommittee on the Constitution*, 105th Cong., 1st Sess. (1997) (testimony of Representative Bob Turner) available in LEXIS, NEWS Library, Federal News Service File, October 29, 1997.
117. See Testimony of Rep. Turner, *supra* note 116, ("I believe that a federal Private Property Rights Act is appropriate and necessary and the Texas property rights act would make an excellent model").
118. Tex. Nat. Res. Code § 33.053 (1997).
119. Tex. Gov't Code Ann. § 2007.003(b)(4) (West 1997).
120. Coastal Zone Management Act, 16 U.S.C. §§ 1451 - 1464 (1997).
121. Agricultural interests in Texas are feeling the property rights crunch. Many farmers are being pushed to relinquish their agricultural lands to developers' interests. Still, most oppose any land-use or other initiatives to save farmland, preferring to hold the option to sell, often at higher prices for development. Steven H. Lee, *As Development Encroaches, Many Farmers Sell off Land*, The Dallas Morning News, October 21, 1997, at 1C.
122. Miss. Code. Ann. §§ 49-33-1 to 49-33-19 (1997).
123. Rhonda Phillips Culp, *The Mississippi Agricultural and Forestry Activity Act: An Analysis of the Impacts on Individual Land Tenure and Property Rights*, Land Tenure Center, North American Program (Aug. 1997).
124. *Id.*
125. For instance, the Mississippi Attorney General's Office was generally viewed to be neutral because of the lack of attention paid to the Forestry Activities Act. The majority of the Office's opposition, however, was focused

on the similar Farm Bureau Bill. Culp, *supra* note 124, at 6.

But, the easy passage of the Forestry Activities Act may also be a result of the fact that forest landowners represent a powerful entity in Mississippi, as evidenced by the following: (1) Seventy percent of the forest ownership in Mississippi is by private landowners; (2) forest production values in Mississippi are high; (3) forestry payrolls in Mississippi represent the largest agricultural crop in the state; (4) in 1995, one in four manufacturing jobs in the state were in the forest industry; and (5) in 1993, the value of the Mississippi timber harvest was \$1.2 billion, the first time any agricultural crop in the state exceeded one billion dollars in a year. Culp, *supra* note 124, at 13.

126. Telephone interview with Vernon Gayle, Farm Bureau Lobbyist, October 22, 1997.

127. Miss. Code Ann. § 49-33-1 - 49-33-19 (1997).

128. Miss. Code Ann. § 49-33-5 (1997).

129. *Id.* See also Culp, *supra* note 124, at 7.

130. Miss. Code Ann. § 49-33-7 (e) (1997).

131. Miss. Code Ann. § 49-33-7 (b) (1997).

132. Miss. Code Ann. § 49-33-7 (h) (1997).

133. Miss. Code Ann. § 49-33-7 (h) (1997).

134. Cordes, *supra* note 26, at 215.

135. Miss. Code Ann. § 49-33-9(2) (1997).

136. Miss. Code Ann. § 49-33-9(3) (1997).

137. Miss. Code Ann. § 49-33-9(2) (1997).

138. Miss. Code. Ann. § 49-33-7(e), (l) (1997).

139. Miss. Code Ann. § 49-33-17 subjects the provisions of the Mississippi Agricultural and Forestry Activity Act to Mississippi Code Section 49-17-17, providing powers of the Mississippi Air and Water Pollution Control Commission to prevent pollution in the interest of the public health and safety.

140. Miss. Code. Ann. § 49-33-7(e)(ii) (1997).

141. Miss. Code Ann. § 25-43-6 (1) (1997).

142. Miss. Code Ann. § 25-43-6 (1997).

143. Miss. Code Ann. § 25-43-6 (2) (a) - (h) (1997).

144. Miss. Code Ann. § 25-43-6 (4) (a) - (d) (1997).

145. Telephone interview with Scott Stewart, Mississippi Office of the Attorney General, August 16, 2000.

146. Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 Okla. L.R. 191 (1995).

147. Telephone interview with Vernon Gayle, Farm Bureau Lobbyist, October 22, 1997.

148. Telephone Interview with John Henry, Assistant Attorney General, Department of Marine Resources, Oct. 14, 1997.

149. Telephone Interview with John Henry, Assistant Attorney General, Department of Marine Resources, Oct. 14, 1997.

150. Telephone Interview with Roy Furrh, Attorney, Department of Environmental Quality, Oct. 14, 1997.

151. U.S. Department of Commerce, Bureau of the Census, 1992 Agricultural Atlas of the United States, 1992 Census of Agriculture, Vol. 2, Sept. 95.

152. For a description of the rise of the casino industry on the Mississippi coast, see Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 Miss. L.J. 291 (1995). After legalization of casino gambling in two of the three coastal counties, property values began to soar. See Becky Gillette, *Casino salvation? Report Says Casinos Have Moved People from Welfare to Work*, 19:43 Miss. Bus. J. 1 (1997); and Shelley Powers, *Shrimp Processor Takes a Gamble on Back Bay*, 9:7 Coast Business 24 (1997).

153. La. Rev. Stat. Ann. § 3:3603 (West 1997).

154. La. Rev. Stat. Ann. §§ 3:3610, 3:3623 (West 1997).

155. La. Rev. Stat. Ann. §§ 3:3602 (1), 3:3622(2) (West 1997).

156. La. Rev. Stat. Ann. § 3:3622 (3)(a) - (h) (West 1997).

157. La. Rev. Stat. Ann. § 3:3612(c) (West 1997).

158. La. Rev. Stat. Ann. §§ 3:3602 (11), 3:3622(6) (West 1997).

159. See Cordes, *supra* note 26, at 215.

160. La. Rev. Stat. Ann. § 3:3610 (D) (West 1997).

161. La. Rev. Stat. Ann. § 3:3623 (C) (West 1997).

162. La. Rev. Stat. Ann. § 3:3609 (A) (West 1997).

163. La. Rev. Stat. Ann. § 3:3622.1 (A) (West 1997).

164. La. Rev. Stat. Ann. §§ 3:3609 (agriculture provisions), 3:3622.1 (forestry provisions) (West 1997).

165. Correspondence with Henry Bernard, General Counsel of Louisiana Farm Bureau Federation, August 18, 2000.

166. U.S. Department of Commerce, Bureau of the Census, 1992 Agricultural Atlas of the United States, 1992 Census of Agriculture, Vol. 2, Sept. 95, at 3.

167. See Louisiana Coastal Wetlands Conservation and Management, La. R.S. 49:213.2.

168. Telephone Interview with Bud Mapes, Louisiana Farm Bureau, October 26, 1997.
169. See 1996 AL H.B. 525, 1996 AL S.B. 436, 1995 AL H.B. 498, 1995 AL S.B. 274, 1994 AL H.B. 413, 1994 AL S.B. 349.
170. *Id.*
171. *Id.*
172. 1997 AL H.B. 485.
173. 1997 AL H.B. 485 § 2 (b). While this implies that forest and agricultural lands have already experienced reductions in value, the bill was merely a preventative measure geared toward bringing Alabama up to par with neighboring states that have property rights statutes.
174. 1997 AL H.B. 485 § 3 (5).
175. 1997 AL H.B. 485 § 4 (2).
176. 1997 AL H.B. 485 § 3 (2).
177. 1997 AL H.B. 485 § 3 (2) (a) - (h).
178. 1997 AL H.B. 485 § 6 f
179. 1997 AL H.B. 485 § 6(d)
180. 1997 AL H.B. 485 § 6(e).
181. 1997 AL H.B. 485 § 5 (b) (1 - 9).
182. 1997 AL H.B. 485 § 6 (c).
183. 1997 AL H.B. 485 § 6 (e).
184. 1997 AL H.B. 485 § 7.
185. See generally Kirk Emerson and Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 Public Administration Review 411 (1997).
186. See Emerson & Wise, Public Administration Review. The authors argue that, for example, underregulation does not necessarily mean greater protection for property. Regulations rarely cut only one way. A negative impact can have a concomitant positive impact (as the courts well know through their efforts at judicial balancing). Requiring one property owner to maintain an existing wetland on his or her lakeshore property may enable the lake to remain free of pollution and thereby increase the overall parcel's value along with the value of other lakeshore property. Refraining from enforcing the regulation may avoid the "taking," but it also obviates the "givings" (or governmental benefits) that enhance the value of the regulated property and that of other property owners as well.
187. Gordon H. Orians, *Thought for the Morrow: Cumulative Threats to the Environment*, 37 Environment 6 (Sept. 1996).
188. See *Study Finds Coastal Management Act Effective on 25th Anniversary*, U.S. Newswire, July 22, 1997, available at LEXIS, NEWS Library, CURNWS File, September 20, 1997.
189. *Id.*
190. See generally *Property Rights: Hearings Before the House Judiciary Committee, Subcommittee on the Constitution*, 105th Cong., 1st Sess. (1997) (testimony of Nancie Marzulla, President of Defenders of Property Rights), available in LEXIS, NEWS Library, Fed. Doc. Clearing House File, October 29, 1997. Marzulla testified that although critics predicted that certain takings statutes would "bust the budget" due to increased compensation claims, or would lay waste to the environment, or would put zoning boards out of business, that none of the predictions came true. She acknowledges the two central problems of takings statutes are the lack of an adequate definition of "taking" and the need for prompt compensation to the property owner. *Id.*

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