St. Mary's Law Journal

Volume 27 | Number 3 Article 3

1-1-1996

Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem Comment.

George E. Grimes Jr.

COMMENTS

TEXAS PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT: A POLITICAL SOLUTION TO THE REGULATORY TAKINGS PROBLEM

GEORGE E. GRIMES, JR.

I. INTRODUCTION

During the last twenty years, increasing regulation, particularly environmental regulation, has resulted in an antiregulation backlash and the

growth of a property rights movement.[1] Unable to successfully use the courts to protect private property from diminution in value due to government regulations, property rights advocates have looked to the federal and state legislatures for assistance.[2] In turn, a number of states have strengthened private property rights protection,[3] and several similar protective measures have recently been introduced in the United States Congress.[4] This property rights protection generally has taken one of two

---

1. *See, e.g.*, John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 328 (1994) (noting bitter debate over proper balance between property rights and environmental protection); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 615–16 (1995) (asserting that astonishing growth of environmental regulation has caused millions of Americans to fight back); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,248–49 (May 1994) (observing that conflicts between property rights and environmental protection are likely to escalate); Ernest E. Smith, *Environmental Issues for the '90s: Golden-Cheeked Warblers and Yellowfin Tuna*, 47 ME. L. REV. 345, 346–47 (1995) (reporting that opposition to environmental concerns has increased as such concerns have moved to center stage in last 30 years); *see also* Mary E. Kelly, *The Takings Bill: An Environmental and Political Minefield: The 74th Legislature Wasn't Easy on the Environment*, TEX. LAW., July 31, 1995, at S18 (asserting that chemical and agricultural industries pushed legislation, including Texas Private Real Property Rights Preservation Act, to weaken laws protecting environment).

2. *See, e.g.*, Robert J. Kleeman, *New Statutory Remedies* (describing growth of property rights advocacy group called "Take Back Texas," and noting group's support for Texas Private Real Property Rights Preservation Act), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 615 (1995) (observing that property rights advocates have supported federal legislation to protect property rights and introduced property rights acts in 44 states); *see also* Patrick Sullivan, Comment, *Regulatory Takings—The Weak and the Strong*, 1 MO. ENVTL. L. & POL'Y REV. 66, 66 (1993) (listing states that have enacted property rights acts with support of disgruntled property owners); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (reporting that bills to limit environmental regulation were introduced in 23 states and enacted in Utah, Arizona, and Delaware in 10 months prior to May 1993); Stefanie Scott, *Lengthy Shakeout Expected on Regulatory Takings Law*, SAN ANTONIO EXPRESS-NEWS, Sept. 8, 1995, at A14 (characterizing Texas Private Real Property Rights Preservation Act as response to propertyrights groups' concern over possible "critical habitat" designation in Texas).

3. *See* Larry Morandi, *Takings for Granted: Protection of the Environment Has Run Smack up Against Private Property Rights, and Legislators Are Struggling to Produce Some Sort of Balance Between Them*, STATE LEGISLATURES, June 1995, at 22, 23–27 (identifying states that have passed private property rights protection acts and describing types of legislation enacted in each).

4. *See* H.R. 925, 104th Cong., 1st Sess., 141 CONG. REC. 2629 (1995) (providing for compensation by federal government of private property owner whose property is reduced in value by 20% because of government regulations); S. 605, 104th Cong., 1st Sess. (1995) (establishing "a uniform and more efficient Federal process for protecting property own-

forms. The first requires the government to assess the possible effect on property rights before enacting regulations.[5] The second requires government to compensate property owners for the diminution in property value that government regulations cause.[6]

---

ers' rights guaranteed by the fifth amendment"); S. 503, 104th Cong., 1st Sess. (1995) (amending "Endangered Species Act of 1973 to impose a moratorium on the listing of species as endangered or threatened and the designation of critical habitat in order to ensure that constitutionally protected private property rights are not infringed"). The House of Representatives passed House Bill 925 on March 3, 1995 and forwarded it to the Senate. 1 Cong. Index (CCH) 35,014 (1995–1996).

5. *See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 336 (1994) (calling statutes requiring governmental assessment of possible effect of regulation on property rights "Procedural Models"); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633 (1995) (describing planning or look-before-you-leap bills enacted in six states); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (describing look-before-you-leap bills as milder of two types of property-protection acts proposed in many states); *see also* Patrick Sullivan, Comment, *Regulatory Takings—The Weak and the Strong*, 1 MO. ENVTL. L. & POL'Y REV. 66, 73 (1993) (describing statutes requiring economic assessment of regulations as "weak" propertyrights statutes). This Comment refers to these types of statutes as "assessment acts." As of June 1995, the following 14 states had passed some form of assessment act. ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (1993); DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); IDAHO CODE §§ 67-8001 to -8004 (1995); IND. CODE ANN. § 4-22-2-31 (Burns Supp. 1995); MO. REV. STAT. § 536.017 (Supp. 1996); N.D. CENT. CODE § 28-32-02.5 (Supp. 1995); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1995); UTAH CODE ANN. §§ 90-1 to -4, 90a-1 to -4 (Supp. 1995); VA. CODE ANN. § 9-6.14:7.1 (Michie Supp. 1995); WASH. REV. CODE ANN. § 36.70A.370(1) (West Supp. 1996); W. VA. CODE §§ 22-1A-1 to -6 (1994); WYO. STAT. §§ 9-5-301 to -305 (1995); 1995 KAN. SESS. LAWS 170; 1995 MONT. LAWS 462; Larry Morandi, *Takings for Granted: Protection of the Environment Has Run Smack up Against Private Property Rights, and Legislators Are Struggling to Produce Some Sort of Balance Between Them*, STATE LEGISLATURES, June 1995, at 22, 22–23.

6. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 635 (1995) (describing model bill, introduced in 15 states and drafted by Defenders of Property Rights, which defines "taking" as reduction in value of property by 50%); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (describing legislation proposed in 10 states that would automatically compensate property owner whose land was devalued 50% by regulation); *see also* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 337 (1994) (referring to statutes that render any regulation compensable taking that diminishes value of property by specified amount, usually 50%, as "Extreme Substantive Models"); Patrick Sullivan, Comment, *Regulatory Takings—The Weak and the Strong*, 1 MO. ENVTL. L. & POL'Y REV. 66, 73 (1993) (referring to statutes that define takings as 50% reduction in property values as "strong" property rights statutes). This Comment refers to these types of statutes as "compensation acts." North Dakota has a compensation act combined with its assessment act, and Mississippi has a stand-alone compensation act limited to timberlands. MISS. CODE ANN. § 49-33-9 (Supp. 1995); N.D. CENT. CODE § 28-32-02.5 (Supp.

In June 1995, the Texas Legislature joined the property rights movement by enacting the Private Real Property Rights Preservation Act,[7] which has been heralded as possibly the "strongest state takings law" in the nation.[8] The Act allows a property owner whose property is diminished in value at least twenty-five percent by government regulation to sue the government entity that issued the regulation, subject to certain exemptions.[9] If the property owner's suit is successful, the government entity must either rescind the regulation or pay the property owner the lost value of the property.[10] The Act also requires government entities to prepare a Takings Impact Assessment[11] prior to enforcing any regulation that could affect the value of private real property.[12] The Takings Impact Assessment must, among other things, identify the burdens a government regulation will likely impose on private real property ownership, describe reasonable alternative actions, and determine whether the regulation or the alternative actions will constitute takings.[13]

This Comment serves as a guide to the Texas Private Real Property Rights Preservation Act and examines the potential effects of the Act on government, property owners, the judicial system, and the public. Part II of this Comment examines the common-law background of regulatory takings in federal and state courts. Part III traces the political history of

---

1995); Larry Morandi, *Takings for Granted: Protection of the Environment Has Run Smack up Against Private Property Rights, and Legislators Are Struggling to Produce Some Sort of Balance Between Them*, STATE LEGISLATURES, June 1995, at 22, 25–27. The Washington Legislature enacted compensation legislation, Initiative 164, in 1995, but because of a referendum it was placed on the general election ballot as Referendum 48 and was defeated in a statewide vote on November 7, 1995. Neil Modie, *Land-Use, Gamble Issues Lose: Seattle Voters Reject 9-District City Council*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1995, at A1. The legislation would have required compensation by state or local government if regulation for a public purpose diminished property values by any degree. *Id.*

7. TEX. GOV'T CODE ANN. § 2007 (Vernon special pamphlet 1996).

8. *See* Robert Elder Jr., *Taking the Property Rights Plunge: Now that Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (reporting that proponents and opponents of legislation agree that Texas has passed strongest takings law in nation); Stefanie Scott, *Lengthy Shakeout Expected on Regulatory Takings Law*, SAN ANTONIO EXPRESS-NEWS, Sept. 8, 1995, at A14 (describing Texas law as most extensive of its kind in nation).

9. TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii). Some types of regulations and some government entities, such as municipalities, are exempt from the Act. *See id.* § 2007.003(b) (exempting, inter alia, municipalities, seizure of contraband, and seizure of evidence of crime).

10. *Id.* §§ 2007.023(b), 2007.024(c)-(e).

11. The popular literature in this area uses the terms "Takings Impact Assessment" and "Takings Implication Assessment" synonymously.

12. *Id.* § 2007.043(a).

13. *Id.* § 2007.043.

private property protection and describes private property protection acts in other jurisdictions. Part IV analyzes the government entities and types of actions to which the Texas act applies and examines Takings Impact Assessments. Finally, Part V evaluates likely effects of the Act on the Texas government, private property owners, the courts, and the general public.

II. THE COMMON-LAW BACKGROUND OF REGULATORY TAKINGS

A. *General Background*

The term "eminent domain" describes the government's power to take privately owned property away from an owner for public use without the property owner's consent.[14] The Fifth Amendment to the United States Constitution limits the federal government's power of eminent domain by requiring it to pay "just compensation" for property taken.[15] The purpose of this limitation is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[16] This prohibition has been applied to the states through the Fourteenth Amendment,[17] and virtually

---

14. 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.11, at 7 (rev. 3d ed. 1995); *see, e.g.*, United States v. 101.88 Acres of Land, 616 F.2d 762, 772 (5th Cir. 1980) (stating that eminent domain exists to allow sovereign to quickly acquire specific interests in land required to serve sovereign's purpose and pay landowner only for those interests); Scott v. City of Toledo, 36 F. 385, 394 (C.C.N.D. Ohio 1888) (acknowledging that right of sovereign to take property for public benefit is firmly established doctrine requiring no citation of authority); McInnis v. Brown County Water Improvement Dist. No. 1, 41 S.W.2d 741, 744 (Tex. Civ. App.—Austin 1931, writ ref'd) (declaring that "eminent domain, or the power to take private property for public use, is an inherent and inalienable attribute of sovereignty").

15. *See* U.S. CONST. amend. V (stating that "private property [shall not] be taken for public use, without just compensation"); *see also* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 314 (1987) (noting that Fifth Amendment does not prohibit taking of property, but rather only limits power to take property).

16. Armstrong v. United States, 364 U.S. 40, 49 (1960). This may be the most cited passage in all of regulatory takings jurisprudence. *E.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1070 (1992) (Stevens, J., dissenting); Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); *First English*, 482 U.S. at 318–19; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

17. *See Dolan*, 114 S. Ct. at 2316 (noting that 14th Amendment made 5th Amendment's Takings Clause applicable to states); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (holding that 14th Amendment to federal constitution prohibits states from taking private property without compensation); City of Arlington v. Byrd, 713 S.W.2d 224, 229 n.1 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (acknowledging that 14th Amendment made 5th Amendment's Takings Clause applicable to states), *cert. denied*, 482 U.S. 992 (1987); *see also* Roger Clegg, *Reclaiming the Text of the Takings*

all state constitutions place similar limitations on the power of eminent domain.[18]

In addition to the power of eminent domain, the government has other powers that may interfere with the use or value of property.[19] The most important of these is the "police power"—the power of the state to prohibit property uses that harm the general welfare of the people.[20] Regu-

---

Clause, 46 S.C. L. REV. 531, 565 (1995) (commenting that Takings Clause was not "incorporated" into 14th Amendment until 1897); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1082 n.24 (1993) (observing that Compensation Clause of Fifth Amendment was not applied to states until around turn of century). *But cf. Dolan*, 114 S. Ct. at 2326–27 (Stevens, J., dissenting) (opining that *Chicago, Burlington & Quincy Railroad* decision concerned 14th Amendment due process rights, not applicability of Takings Clause of 5th Amendment to states).

18. *See* 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.3, at 95 (rev. 3d ed. 1995) (noting that only North Carolina's state constitution lacks clause requiring compensation for government taking of property). Although North Carolina's state constitution does not expressly require compensation for government takings, the Supreme Court of North Carolina has noted that compensation for government takings is an integral part of its constitutional jurisprudence. Eller v. Board of Educ. of Buncombe County, 89 S.E.2d 144, 146 (N.C. 1955).

19. 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.4, at 104 (rev. 3d ed. 1995); *see also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1855) (explaining that powers exercised by sovereign under common and statutory law of England and colonies prior to adoption of federal constitution that are not prohibited by Constitution are not violations of "due process of law"). For purposes of comparison with the power of eminent domain, which requires compensation, Nichols lists the powers of the government to appropriate property without compensation, such as the power to: (1) construct public improvements; (2) control the public domain; (3) compel the rendition of personal services; (4) tax; (5) police; (6) destroy property as a means of preventing disasters; and (7) conduct war. 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.4, at 107 (rev. 3d ed. 1995); *see also, e.g.*, Hurtado v. United States, 410 U.S. 578, 589 (1973) (holding that requiring attendance of material witness in trial in exchange for little financial remuneration is not taking under Fifth Amendment); Houck v. Little River Drainage Dist., 239 U.S. 254, 262 (1915) (deciding that state apportionment of burden of taxation does not violate 14th Amendment unless it is arbitrary and abusive); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (finding that state law prohibiting manufacture of alcoholic beverages that rendered brewery valueless was valid exercise of police power and required no compensation); Bowditch v. Boston, 101 U.S. 16, 18–19 (1879) (establishing common-law basis for state power to destroy building without compensation to owner to prevent spread of fire); Mead v. Michigan Cent. R.R., 140 N.W. 973, 977 (Mich. 1913) (noting that change in street elevation that damaged railroad property was not exercise of power of eminent domain, but rather was exercise of power to control public highways); State v. Texas City, 303 S.W.2d 780, 782 (Tex. 1957) (holding that annexation of property into city and subsequent subjection of property to city taxation were not exercises of eminent domain).

20. 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.42, at 133–34 (rev. 3d ed. 1995); *see, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885) (stating that 14th Amendment was not intended to interfere with power of state to "prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legis-

lations enacted pursuant to this police power that interfere with the use or value of property generally do not result in compensable takings.[21] However, if the government's exercise of the police power is so unreasonable or arbitrary that it deprives the owner of virtually the complete use and enjoyment of the property, the government action results in a compensable taking under the law of eminent domain.[22]

Whether an exercise of police power constitutes a compensable taking is a matter of degree.[23] Generally, courts apply a balancing test that weighs the public interest in regulating the use of private property against the degree of injury to the owner.[24] In many cases, only when a govern-

---

late so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity"); Furey v. City of Sacramento, 780 F.2d 1448, 1454 (9th Cir. 1986) (observing that power to place reasonable restrictions on use of land without compensating landowners is within local government's inherent police power); *see also* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 313 (1993) (describing police-power exception to Takings Clause as incredibly broad).

21. *See, e.g., Lucas*, 505 U.S. at 1027 (acknowledging that police-power regulations may affect property values without requiring compensation); Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962) (holding that valid police-power regulation that deprives property of its most valuable use is not unconstitutional and does not require compensation); 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.42, at 145 (rev. 3d ed. 1995) (noting that interference with property rights resulting from exercise of police power does not require compensation).

22. *See Goldblatt*, 369 U.S. at 594 (declaring that government regulation may be so onerous that it constitutes taking requiring compensation); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (holding that law prohibiting coal mining in way that would cause subsidence of house violated Fifth Amendment because it made coal mining commercially impractical); Brazos River Auth. v. City of Graham, 335 S.W.2d 247, 250–51 (Tex. Civ. App.—Fort Worth 1960) (finding that construction of dam by state river authority, which caused flooding of city's publicly owned facilities and thereby rendered them virtually worthless, was compensable taking), *modified*, 354 S.W.2d 99 (Tex. 1961); *see also* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 297 (1993) (concluding that United States Supreme Court cases before *Lucas* suggested that regulations which deprive landowner of all economically viable use of land are compensable takings).

23. *See* McDonald v. County of Yolo, 477 U.S. 340, 348 (1986) (noting that Court has no "set formula to determine where regulation ends and taking begins"); *Penn Cent.*, 438 U.S. at 123–24 (noting that there is no set formula for determining taking and observing that decision is based on "essentially ad hoc, factual inquir[y]"); *cf.* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 576 (1995) (proposing rule of law to replace ad hoc, factual inquiry that Court has used to decide regulatory takings cases).

24. *See* Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980) (stating that decision of whether government action is taking requires balancing of public and private interests); *Penn Cent.*, 438 U.S. at 124–25 (identifying factors used in balancing test to determine what constitutes taking under Fifth Amendment); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (stating that land-use regulation can result in taking if regulation "does not substantially advance legitimate state interests, . . . or denies an

ment regulation has reduced the value of property to zero have property owners successfully claimed that the regulation resulted in a compensable taking.[25]

B. *Federal Law*

1. Pre-1987 Decisions

The difficulty of determining whether a government regulation is a taking of property may have been best identified by Justice Holmes: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[26] However, Justice Holmes also recognized that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[27] The United States Supreme Court has struggled for nearly seventy-five years to determine what constitutes "too far."[28] This inability to establish a bright-

---

owner economically viable use of his land"); *cf.* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 532 (1995) (arguing that text of Takings Clause should be used as rule of law rather than current balancing test); James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 144 (1995) (complaining that takings jurisprudence is infected with virus of balancing tests). The relevant factors to be considered, as identified in *Penn Central* are: (1) the "economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124; *see* 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 6.01, at 16–17 (rev. 3d ed. 1995) (describing *Penn Central*'s three-factor test).

25. *See Lucas*, 505 U.S. at 1015 (noting that property owner is entitled to compensation when regulation "denies all economically beneficial or productive use of land," despite importance of public interest involved); Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 297–98 (1993) (observing that laws which only deprive owners of most valuable use generally do not result in compensable takings); *see also Keystone*, 480 U.S. at 498, 506 (holding that statute prohibiting coal operators from mining 27 million tons of coal was not compensable taking); *Goldblatt*, 369 U.S. at 590 (upholding city regulation that prohibited continued operation of gravel mining operation, thereby depriving property owner of most beneficial use).

26. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

27. *Id.* at 415.

28. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (noting that "in 70-odd years of regulatory takings jurisprudence, [the Court has] generally eschewed any set formula for determining how far is too far, preferring to engage in . . . essentially ad hoc, factual inquiries") (internal quotation marks omitted); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–24 (1978) (admitting that Court has been unable to develop set formula); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1089 (1993) (noting that Supreme Court has established no clear principles or rules on takings).

line test for regulatory takings may be more controversial today than at any time in the history of takings jurisprudence.[29]

Regulatory takings jurisprudence in the United States began with *Mugler v. Kansas*,[30] in which the Court held that enforcement of a Kansas statute prohibiting the manufacture of alcoholic beverages did not result in a compensable taking of a brewery.[31] *Mugler* established that a state could constitutionally regulate under its police power to prevent a nuisance even though the exercise of that power causes a loss in private property value.[32] Notably, the Court decided *Mugler* on Fourteenth Amendment due process grounds rather than Fifth Amendment just compensation grounds.[33]

The Court first applied the Fifth Amendment's Just Compensation Clause to the states by incorporating it into the Fourteenth Amendment in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.[34] Thereafter, regulatory takings claims against both federal and state governments could be brought under the Due Process Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, or the Just Compensation Clause of the Fifth Amendment.[35]

---

29. *Cf.* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 152 (1995) (describing past decisions as "misplaced Robin Hood approach" under which assumption was that landowners could be forced to assume disproportionate costs because of their wealth); Julian R. Kossow, Dolan v. City of Tigard, *Takings Law and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 254 (1995) (stating that "the [*Dolan*] Court unleashes delay, denial, litigation, and incalculable economic waste" upon takings jurisprudence).

30. 123 U.S. 623 (1887); *see Lucas*, 505 U.S. 1048 (Blackmun, J., dissenting) (describing *Mugler* as only first in long line of cases that recognized right of government to regulate property in certain circumstances without compensation).

31. *Mugler*, 123 U.S. at 668–69.

32. *Id.*; *see Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting) (noting that liquor and oleomargarine cases established that regulation is not unconstitutional "merely because it deprives the owner of the only use to which the property can then be profitably put").

33. Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 565 (1995); *see Mugler*, 123 U.S. at 663–64 (discussing requirements of 14th Amendment). *Compare* U.S. CONST. amend. V (establishing that "private property [shall not] be taken for public use, without just compensation") *with* U.S. CONST. amend. XIV (stating that no person shall be deprived of "life, liberty or property, without due process of law").

34. 166 U.S. 226, 239 (1897). *Chicago Burlington & Quincy Railroad* was an eminent domain case in which the City of Chicago condemned a railroad right-of-way for a street crossing and paid one dollar as compensation. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 232.

35. *See* Hadecheck v. Sebastian, 239 U.S. 394, 407, 411 (1915) (upholding misdemeanor conviction for violation of zoning ordinance against 14th Amendment equal protection and due process and 5th Amendment just compensation challenges). *Compare* Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (upholding against due process challenge Virginia statute requiring destruction of Red Cedar trees that carried plant disease fatal to

The application of these federal constitutional strictures to state governments, coupled with the rise of land-use regulation in an increasingly urbanizing America, prompted many of the early regulatory takings cases.[36] In two of these cases, *Hadecheck v. Sebastian*[37] and *Village of Euclid v. Ambler Realty Co.*,[38] the Court carved out a broad police-power

---

apple trees) *and* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395–96 (1926) (upholding municipal zoning ordinance against 14th Amendment due process and equal protection challenges) *with* First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 310–11 (1987) (requiring compensation of property owner whose land was temporarily taken by invalid regulation under Fifth Amendment Just Compensation Clause) *and* Agins v. City of Tiburon, 447 U.S. 255, 262–63 (1980) (upholding municipal zoning ordinance against Fifth Amendment just compensation challenge).

36. *See Penn Cent.*, 438 U.S. at 125 (describing zoning laws as classic example of valid exercise of police power); *Ambler*, 272 U.S. at 390–91 (observing that rise of building zoning laws resulted in numerous and conflicting state-court decisions); *see also* Gardner v. Baltimore Mayor, 969 F.2d 63, 66–67 (4th Cir. 1992) (summarizing origin of land-use controls); Stephen I. Adler & Daniel M. Anderson, *Takings and Related Causes of Action Under Federal and Texas Law* (describing historical background for growth of urban land-use controls), *in* SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 9.03[2][a], at 9-47 to -48 (Carol J. Holgren ed., 1994).

37. 239 U.S. 394 (1915). The *Hadecheck* Court upheld a city's prohibition of brickmaking within residential districts despite the fact that the brickmaking operation had begun before the property was annexed into the City of Los Angeles, the residential uses had grown up around the operation after it had started, and the regulation reduced the value of the property from $800,000 to $60,000. *Hadecheck*, 239 U.S. at 405–06. The Court stated:

> [To hold the ordinance unconstitutional] would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

Id. at 410.

38. 272 U.S. 365 (1926). In *Ambler*, the Court recognized the need for regulations segregating incompatible land uses resulting from the great increase in population concentration in urban areas. *Ambler*, 272 U.S. at 386–87. The Court noted: "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise." *Id.* at 387; *see also Penn Cent.*, 438 U.S. at 125 (describing zoning laws as classic example of land-use regulation that may adversely affect property values without requiring compensation). Again, in *Ambler*, the Court reached its decision even though the property owner purchased the land prior to the enactment of the ordinance and the regulation reduced the value of the property by approximately 75%. *Ambler*, 272 U.S. at 381, 384. As part of a set of comprehensive land-use regulations, the Village of Euclid established a system of districts segregating various types of uses. *Id.* at 380–82. The ordinance prohibited industrial uses on some parts of Ambler Realty's land, and business uses on other parts. *Id.* at

exception to the Takings Clause: the right of cities to establish modern zoning ordinances, including ordinances that prohibit retail, industrial, and business uses in residential zones.[39] However, another case decided during the same period, *Pennsylvania Coal Co. v. Mahon*,[40] placed some limits on this broad exception to the Takings Clause.[41] In so doing, the *Mahon* Court reasoned that unless limitations are placed upon the right to diminish property values without compensation, government takings will grow until private property is destroyed.[42] In *Mahon*, the Court found that the statute at issue made the mining of certain coal commercially impracticable, in effect destroying its value.[43] Because of the statute's substantial negative effect,[44] the Court found the public's

---

382–83. Ambler challenged the ordinance as a violation of due process, claiming that this restriction on use reduced the value of his 68 acres of property from $10,000 to $2,500 per acre. *Id.* at 384. The Court found the regulations a reasonable and valid exercise of the police power to protect the safety and health of the community. *Id.* at 395.

39. *See Ambler*, 272 U.S. at 395 (validating right of city to establish zoning ordinances prohibiting retail and business uses in residential zones); *Hadecheck*, 239 U.S. at 409–10 (upholding city ordinance prohibiting brickmaking within residential district of city as valid exercise of state's police power).

40. 260 U.S. 393 (1922).

41. *See Lucas*, 505 U.S. at 1014 (noting that prior to *Mahon*, Takings Clause was thought to apply only to direct appropriation or its functional equivalent, and not to police-power regulation of property). The *Mahon* Court found unconstitutional, on both 5th and 14th Amendment grounds, a state statute that prohibited the underground mining of anthracite coal, which caused subsidence of buildings on the surface above. *Mahon*, 260 U.S. at 412–13, 416. In language that would largely define the regulatory-takings debate, Justice Holmes described the conflict between the Takings Clause and the police power. *Id.* at 413. He said that government could not function if it was required to pay for every reduction in property value caused by a change in the general law. *Id.*

42. *Mahon*, 260 U.S. at 415.

43. *Id.* at 414. In considering the public's interest in protecting estate owners from property subsidence due to coal mining, the Court emphasized that the owners of the surface estates had purchased their estates from the coal company subject to the coal company's future right to mine coal. *Id.* at 416; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987) (describing Pennsylvania's unique recognition of "support estate" that can be conveyed separately from mineral estate or surface estate). The *Mahon* Court recognized that the right to mine coal is an estate in land recognized in Pennsylvania and that this estate had been reserved by the coal companies when they sold the surface estates. *Mahon*, 260 U.S. at 414.

44. *See Mahon*, 260 U.S. at 412–13 (asserting that statute destroyed certain property and contract rights). In determining whether a police-power regulation has gone "too far," the Court evaluates the extent to which the regulation reduces the property's value. *See Lucas*, 505 U.S. at 1015, 1027 (holding that regulation which denies owner all economically viable use of land is taking, subject to nuisance exception); *Agins*, 447 U.S. at 260 (holding that regulation is not taking if it does not deny owner "economically viable use of his land"); *Penn Cent.*, 438 U.S. at 124 (recognizing economic impact of regulation on owner as one of three factors to be considered in takings analysis); *see also Mahon*, 260 U.S. at 412–13 (suggesting that police power may not be used to destroy property rights).

interest insufficient to justify such an extensive destruction of property value.[45]

In the years following *Mahon*, the Court generally engaged in "ad hoc, factual inquiries" to determine when a particular regulation had gone too far, thereby resulting in a compensable taking.[46] During this period, the Court formulated at least two tests for such regulations.[47] First, in *Penn Central Transportation Co. v. New York City*,[48] the Court identified three

---

45. *Mahon*, 260 U.S. at 414. In dissent, Justice Brandeis identified a problem that would continue to perplex the courts in future regulatory-takings cases: how to define the property interest for purposes of determining a reduction in value. *Id.* at 419 (Brandeis, J., dissenting); *see also Penn Cent.*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting) (noting difficult legal and conceptual problems with defining property interest). Justice Brandeis argued that the value of the coal that could not be mined under the statute might be negligible compared with the value of all the coal that could be mined. *Mahon*, 260 U.S. at 419.

46. *Lucas*, 505 U.S. at 1015; *see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (stating that "[t]here is no set formula to determine where regulation ends and taking begins").

47. *See* Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590–91 (Minn. Ct. App. 1988) (applying both two-part and three-part tests in challenge to rezoning of land when lower court was unable to determine which test was required by Supreme Court decisions); Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 294–300 (1993) (describing *Penn Central* three-part balancing test and *Agins* two-part disjunctive test); Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 448 (1994) (noting difficulty courts have experienced in determining which takings test to apply). *Compare Lucas*, 505 U.S. at 1015–19 (applying two-part test in challenge to state regulation of beachfront property) *with* Ruckelshause v. Monsanto Co., 467 U.S. 986, 1005–08 (1984) (applying three-part test in challenge to federal pesticide regulations requiring disclosure of contents).

48. 438 U.S. 104 (1978). *Penn Central* upheld New York City's Landmarks Preservation Law as applied to the Grand Central Terminal. *Penn Cent.*, 438 U.S. at 138. The owner, Penn Central Transportation Co., sought approval to build a 55-story office tower above the 8-story terminal, but its request was denied by the Landmarks Preservation Commission. *Id.* at 116–18. Penn Central had an agreement with a developer who would construct and operate the office building, guaranteeing Penn Central at least $3 million in rent each year for 50 years. *Id.* at 116. Penn Central sued the city claiming its property had been taken without just compensation. *Id.* at 119. The Court rejected Penn Central's claim that, regardless of the effect on the value of their entire property, it was entitled to compensation for the taking of its entire property interest in the air space above the terminal. *Id.* at 130. The Court said that property cannot be divided into discrete segments and must be considered as a whole. *Id.* at 130–31. The Court also found that the "air rights" were not rendered valueless because they could be transferred as development rights to other property owned by Penn Central or sold to other property owners. *Id.* at 137; *see also id.* at 151–52 (Rehnquist J., dissenting) (noting evidence in record that Penn Central had been offered substantial sums for its development rights). The Court found that because the historical landmark designation did not prevent Penn Central from operating the terminal at a profit, it was not such a severe economic burden that it constituted a taking. *Id.* at 135. Further, because Penn Central could continue to operate the terminal as it had for the past 65 years, the restrictions did not interfere with reasonable investment-backed expectations. *Id.* at 136. Finally, drawing an analogy to zoning regulations, the Court held that the his-

factors that were critical in determining whether a regulatory taking had occurred: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) the "character of the governmental action."[49] Second, in *Agins v. City of Tiburon*,[50] the Court stated that a regulation results in a compensable taking if the regulation either (1) "does not substantially advance legitimate state interests" or (2) "denies an owner [all] economically viable use of his land."[51] Thus, *Agins* appeared to set a limit on the police-power exception to the Takings Clause by holding that certain regulatory action results in a "categorical" or per se taking.[52]

Two years after *Agins*, the Court established another type of "categorical" taking in *Loretto v. Teleprompter Manhattan CATV Corp.*[53] The *Loretto* Court held that any permanent physical occupation of property, no matter how minor, constitutes a compensable taking regardless of the public interest the occupation may serve.[54] In reaching this conclusion, however, the Court noted that its opinion was narrowly drawn to apply

---

toric preservation law was a reasonable means of promoting the general welfare that was not unconstitutionally arbitrary as applied to Grand Central Terminal. *Id.* at 133–35.

49. *Id.* at 124.

50. 447 U.S. 255 (1980).

51. *Agins*, 447 U.S. at 260. In *Agins*, the owner of five acres of property overlooking the San Francisco Bay challenged a city zoning ordinance that prohibited the building of more than five single-family residences on the land. *Id.* at 257–58. The Supreme Court, without dissent, found that the zoning ordinance was a legitimate exercise of the police power because it was designed to protect citizens from the harmful effects of urbanization. *Id.* at 261. Further, because the zoning allowed some residential development, the Court held that the zoning did not prevent the best use of the land or interfere with the owner's reasonable investment expectations. *Id.* at 262.

52. *See, e.g.*, *Lucas*, 505 U.S. at 1015 (relying on *Agins* when describing categorical takings as situations in which no case-specific balancing of public interest with harm to property owner is required); Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 297 (1993) (noting that *Agins* provides landowners with two ways to attack regulations as being uncompensated takings); Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 447 (1994) (noting that either prong of *Agins* two-factor test can amount to taking).

53. 458 U.S. 419, 441 (1982). *Loretto* involved a New York statute that required owners of rental property to allow installation of cable television facilities on their property without demanding payment. *Loretto*, 458 U.S. at 423. The facilities were cables and connection boxes about ⅔ of a cubic foot in size and two cabinets of about 1½ cubic feet each. *Id.* at 438 n.16. The statute provided that the landlord was entitled to a one-time payment of one dollar as compensation for the installation. *Id.* at 423. Prior to enactment of the statute, defendant Teleprompter generally paid landlords five percent of the gross revenue derived from the property as compensation for the installation. *Id.*

54. *Id.* at 436; *accord Lucas*, 505 U.S. at 1015 (affirming that permanent invasions, no matter how small, require compensation).

only to permanent physical occupation.[55] Thus, the early takings cases established two situations in which government regulations would result in "categorical" compensable takings regardless of the state interest involved: permanent physical occupation and regulations that denied all economically viable use of the land.[56] In those situations that could not be defined as "categorical" takings on the basis of *Agins* or *Loretto*, the *Penn Central* balancing test applied.[57]

2. The "Takings Trilogy" of 1987

In 1987, the Supreme Court decided three important regulatory takings cases that significantly altered the course of its earlier takings jurisprudence.[58] First, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[59] a five-to-four majority upheld a Pennsylvania subsidence statute very similar to the one it had declared unconstitutional sixty-five years before in *Mahon*.[60] Rather than overturn *Mahon*, though, the Court distinguished its decision in *Keystone* on the basis of the character of the government action[61] and the degree of economic damage to the owner.[62]

---

55. *Loretto*, 458 U.S. at 441. For regulations that do not constitute a permanent physical occupation or a denial of all economically viable use, the *Penn Central* balancing test still applies. *Id.* Further, the balancing test applies even when the regulation causes a temporary physical invasion. *Id.*; *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980) (applying balancing test to case involving state-authorized temporary physical invasion of private property and holding that state could constitutionally require shopping center to permit individuals right of free speech and petition without compensating shopping center owners). The *Pruneyard* Court held that the physical invasion of the property was not determinative. *PruneYard*, 447 U.S. at 84.

56. *See Lucas*, 505 U.S. at 1015 (describing two distinct categories of activity that result in compensable takings); Nollan v. California Coastal Comm'n, 483 U.S. 825, 832–34 (1987) (indicating that Court has repeatedly held permanent physical occupation and denial of all economically viable use of land to be takings); *First English*, 482 U.S. at 314 (Stevens, J., dissenting) (asserting that cases make clear that regulations are takings only when there is physical invasion or extreme diminution of value).

57. *See Lucas*, 505 U.S. at 1019 n.8 (explaining that property owner whose land is diminished in value by less than 100% may still make claim under *Penn Central* balancing test).

58. These three cases—*Nollan*, *First English*, and *Keystone*—became known as the "takings trilogy" because of their significance in regulatory-takings jurisprudence. 7 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 52A.03[1], at 52A-28 to -29 (1994).

59. 480 U.S. 470 (1987).

60. *See Keystone*, 480 U.S. at 506 (Rehnquist, C.J., dissenting) (noting striking similarity of two statutes' interference with coal mine operators' property interests); *see also* Charles H. Clarke, *Regulatory Takings, Accommodation and Extreme Choices*, 23 CAP. U. L. REV. 667, 674 (1994) (describing *Keystone* as having effectively overruled *Mahon*).

61. *Keystone*, 480 U.S. at 485 (contrasting injured parties in *Mahon* and *Keystone*). The *Keystone* Court distinguished government action that prohibits or restricts nuisance-like activity from the broader range of police power and noted that action which stops

Unlike *Keystone*, which diminished the rights of private property owners,[63] two other cases, *First English Evangelical Lutheran Church v. County of Los Angeles*[64] and *Nollan v. California Coastal Commission*,[65] expanded the rights of private property owners for the first time since *Mahon*.[66] In *First English*, a six-to-three majority held for the first time that the Fifth Amendment requires the government to pay a property owner compensation for a regulatory taking even if the taking is only temporary.[67] Just two weeks after *First English*, the Court decided *Nollan*, in which a five-to-four majority found that requiring a beachfront property owner to grant an easement for public access in return for approval to build a house on the property violated the Just Compensation Clause.[68] The *Nollan* Court said that "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property."[69] Further, the *Nollan* Court held that a nexus must exist between the condition imposed on the property and the pur-

---

illegal activity or abates a public nuisance justifies a higher degree of interference with property rights without requiring compensation. *Id.* at 491–92 nn.20, 22. In *Mahon*, the injured party was a single homeowner. *Mahon*, 260 U.S. at 413. In contrast, *Keystone* involved a facial challenge to a statute that protected public buildings, noncommercial buildings used by the public, residences, and cemeteries. *Keystone*, 480 U.S. at 476.

62. *Keystone*, 480 U.S. at 485. The Court noted there was nothing in the record to show that the statute interfered with the operators' investment-backed expectations or prevented them from making a profit. *Id.* The four dissenting Justices found these distinguishing differences trivial. *Id.* at 508–09 (Rehnquist, C.J., dissenting).

63. *See* Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403, 410 (1992) (noting that *Keystone* continued trend in favor of upholding regulations).

64. 482 U.S. 304 (1987).

65. 483 U.S. 825 (1987).

66. *See* Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65, 73 (1991) (observing that *First English* and *Nollan* strongly asserted private ownership values and clarified obscured demarcations); Roger J. Marzulla & Nancy G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to Be Borne by Society As a Whole*, 40 CATH. U. L. REV. 549, 550 (1991) (describing *First English* and *Nollan* as "[t]he dawn of a new age in fifth amendment takings jurisprudence").

67. *First English*, 482 U.S. at 319. The Supreme Court remanded the case to the California court to determine whether there was, in fact, a taking. *Id.* at 322. On remand, the California court found that no taking had occurred. First English Evangelical Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893, 904–05 (Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

68. *Nollan*, 483 U.S. at 841–42.

69. *Id.* at 831.

pose of the regulation.[70] Therefore, by the end of the 1987 Term, the Court had introduced two valuable additions to the rights of private property owners: first, the right, under some circumstances, to compensation for a temporary regulatory taking;[71] and second, that the right to exclude others is an interest in property which, if taken by government action, is sufficient to constitute a compensable taking.[72]

3. Post-1987 Decisions

The Court's decisions in regulatory takings cases since *Keystone*, *First English*, and *Nollan* have continued the trend toward establishing greater protection of private property rights.[73] For example, in *Lucas v. South Carolina Coastal Council*,[74] the Court held that a regulation denying "all economically productive or beneficial use of land" is a taking unless the regulating authority can "identify background principles of nuisance and property law that prohibit the uses" regulated.[75] In other words, a new regulation of property that takes all value requires compensation to the owner unless the regulation does no more than formalize existing state common-law nuisance principles.[76] The *Lucas* Court warned, however,

---

70. *Id.* at 836–37; *see Dolan*, 114 S. Ct. at 2312 (citing *Nollan* for requirement of nexus between permit condition and legitimate state interest). The Court found it unnecessary to define the degree of nexus required because it determined that there was no nexus at all in the case. *Nollan*, 483 U.S. at 837.

71. *See First English*, 482 U.S. at 321 (recognizing right to compensation for temporary regulatory taking).

72. *See Nollan*, 483 U.S. at 831–32 (noting that right to exclusion of others is common property right and asserting that when government causes permanent occupation of land, taking results).

73. *See, e.g.*, William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 142 (1995) (discussing significance of fact that property owners have won last four regulatory-takings cases); Brenda J. Quick, Dolan v. City of Tigard: *The Case that Nobody Won*, 1995 DET. C.L. REV. 79, 107 (noting greater protection of property rights in recent decisions); Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause*: Nollan, Dolan *and* Ehrlich, 25 ENVTL L. 155, 155 (1995) (observing that Court's latest cases are sympathetic to landowners and hostile to regulation).

74. 505 U.S. 1003 (1992).

75. *Lucas*, 505 U.S. at 1031–32.

76. *Id.* at 1029. The basis for this exception to the categorical total-takings rule is that the property right taken, the "right" to use one's property to harm another, was never a part of the landowner's title in the first place. *Id.* at 1027; *see Keystone*, 480 U.S. at 491 n.20 (explaining that "since no individual has [the] right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity"); *see also* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 314–16 (1993) (commenting on difficulty of applying common-law nuisance exception to rule that regulation which deprives property of all beneficial use is per se compensable taking). Significantly, the *Lucas* Court noted that uses which were permissible in the past may become nuisances

that regulations which promote the public welfare (benefit-conferring) as well as those that protect health and safety (harm-preventing) are valid exercises of the police power.[77] *Lucas* also addressed the burden of proof in takings cases.[78] Prior to *Lucas*, the government enjoyed a strong presumption that the regulation did not constitute a compensable taking.[79] The Court in *Lucas*, however, shifted the burden to the government to show that a regulation does not result in a compensable taking.[80]

Two years after *Lucas*, the Court decided *Dolan v. City of Tigard*,[81] which, like *Nollan*, involved a city that conditioned the approval of a building permit on a property owner's willingness to cede land to the city.[82] In holding against the City of Tigard, the *Dolan* Court focused on the connection between the projected effects of the proposed building project and the city's reason for conditioning approval of that project on a cession of land to the city.[83] The Court stated that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in

---

through "changed circumstances or new knowledge." *Lucas*, 505 U.S. at 1031 (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g).

77. *See Lucas*, 505 U.S. at 1022–24 (distinguishing between harmful uses and uses promoting health and safety, and noting that each may authorize exercise of state police power); *see also* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 316 (1993) (asserting that *Lucas* broadened police-power exception to Takings Clause, giving government greater authority to regulate private property). Justice Scalia, writing for the majority in *Lucas*, noted the difficulty of distinguishing between a regulation that prevents harm, which was not compensable under the early cases, and one that confers benefits, which was compensable. *Lucas*, 505 U.S. at 1024–25. Justice Scalia recognized that because almost any regulation can be justified as "harm-preventing," deference to the legislature "amounts to a test of whether the legislature has a stupid staff." *Id.* at 1025 n.12; *see also id.* at 1035 (Kennedy, J., concurring) (stating belief that states' nuisance law should not limit authority to impose even severe restrictions without compensation). Moreover, Justice Kennedy stated in his concurrence that "[t]he state should not be prevented from enacting new regulatory initiatives in response to changing conditions." *Id.* at 1035 (Kennedy, J., concurring).

78. *See Lucas*, 505 U.S. 1032 (placing burden on state to identify "background principles of nuisance and property law" that justify regulation).

79. *See id.* at 1045 (Blackmun, J., dissenting) (asserting that prior regulatory-takings cases consistently were highly differential to legislative judgment); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 1 (1993) (arguing that *Lucas* Court reversed centuries-old deference to legislative authority).

80. *Lucas*, 505 U.S. at 1031–32.

81. 114 S. Ct. 2309 (1994) (five-to-four decision).

82. *Dolan*, 114 S. Ct. at 2312–13.

83. *See id.* at 2312, 2319 (sifting through possible tests and settling on "reasonable relationship" standard to determine whether degree of city's exactions bears required relationship to proposed development).

nature and extent to the impact of the proposed development."[84] In response to the *Dolan* dissent's argument that the exaction should have a powerful presumption of validity,[85] the Court, in a passage that property rights advocates find significant, stated: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."[86] Thus, the Court extended even greater protections to private property owners through its post-1987 takings decisions.

C. *Texas Law*

The development of the Supreme Court case law interpreting the United States Constitution generally has served as a backdrop for the development of Texas case law interpreting the Texas Constitution. In language similar to that found in the United States Constitution, the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."[87] Texas courts, like the courts of many states,

---

84. *Id.* at 2319–20. Thus, in cases in which the government requires a property owner to deed over portions of his property, the Court appears to have modified the "legitimate government interest" prong of the *Agins* test in a way that shifts the burden of proof from the property owner to the government. *See id.* at 2319–20 n.8 (arguing that burden would normally be placed on party challenging regulation); Julian R. Kossow, Dolan v. City of Tigard, *Takings Law and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 252 (1995) (arguing that Court's shift in burden of proof is most significant effect of *Dolan* decision and will result in "delay, denial, litigation, and incalculable economic waste"); Brenda J. Quick, Dolan v. City of Tigard: *The Case That Nobody Won*, 1995 DET. C.L. REV. 79, 107–08 (1995) (noting that additional burdens placed on government will make task of imposing exactions more difficult, increase risk of litigation, and ultimately harm public); *see also* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 149 (1995) (commenting that "rough proportionality" test elevates property interests to intermediate level of review from their "prior low status").

85. *Dolan*, 114 S. Ct. at 2325 (Stevens, J., dissenting).

86. *Id.* at 2320; *see also* Private Real Property Rights Preservation Act Guidelines, 21 Tex. Reg. 387, at § 1.11 n.2 (1996) (citing *Dolan* for growing appreciation of importance of property rights); James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 152 (1995) (noting that there is "no constitutionally sufficient explanation for the takings clause's stepchild status"); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 626 (1995) (suggesting that property rights will no longer be given less protection than other comparable civil rights after *Dolan*).

87. TEX. CONST. art. I, § 17. The "damaged or destroyed" language eliminates the question of whether government conduct short of physical appropriation is protected in Texas—it clearly is. *See* City of Austin v. Teague, 570 S.W.2d 389, 393 (Tex. 1978) (holding that "damaged" language of Article I, § 17 expands owner's right to compensation, and

have followed the lead of the United States Supreme Court in regulatory takings cases.[88]

One example of the similarity between Texas and federal takings law can be found in *City of Austin v. Teague*.[89] In *Teague*, the Texas Supreme Court followed the United States Supreme Court's lead in *Pennsylvania*

---

noting that deciding direct physical invasion is unnecessary). Owners of property close to public works projects, particularly street and drainage improvements, frequently raise claims under the "damaged or destroyed" language of the Texas Constitution. For example, the Texas Supreme Court considered such a claim and denied recovery in *City of Austin v. Avenue Corp.*, holding that a business could recover damages for lost profits only if interference with access caused by street and sidewalk repair was material and substantial. 704 S.W.2d 11, 12 (Tex. 1986). The owner must prove either: (1) "a total but temporary restriction of access"; (2) "a partial but permanent restriction of access"; or (3) "a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed." *Avenue Corp.*, 704 S.W.2d at 13. Another property owner brought a similar claim in *State v. Schmidt*, in which the court denied recovery for diminution of the value of developed commercial property due to "diversion of traffic, an increased circularity of travel to the property, a lessened visibility to passersby, and the inconvenience of construction activities." 867 S.W.2d 769, 770 (Tex. 1993), *cert. denied*, 115 S. Ct. 64 (1994). In reasoning that echoes the language of Justice Holmes in *Mahon*, the Texas Supreme Court stated:

> The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities. If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive.

Schmidt, 867 S.W.2d at 773 (quoting State Highway Comm'n v. Humphreys, 58 S.W.2d 144, 145 (Tex. Civ. App.—San Antonio 1933, writ ref'd)) (internal quotation marks and citation omitted); *cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). Finally, in *Westgate, Ltd. v. State*, the Texas Supreme Court held that owners of a shopping center could not recover damages for lost rent arising from the city's announcement that it planned to acquire the property in the future by eminent domain. 843 S.W.2d 448, 450 (Tex. 1992). Citing with approval two court of appeals cases, Allen v. City of Texas City, 775 S.W.2d 863, 865 (Tex. App.—Houston [1st Dist.] 1989, writ denied) and Hubler v. City of Corpus Christi, 564 S.W.2d 816, 822 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.), the court said: "[G]overnment action which may result in a future loss of property does not give rise to a present cause of action . . . in the absence of a current, direct restriction on the property's use." *Westgate, Ltd.*, 843 S.W.2d at 452–53. The *Westgate, Ltd.* court also noted that "direct restriction" means an actual physical or legal restriction on the property's use, such as a blocking of access or a denial of a development permit. *Id.* at 452.

88. *See* Taub v. City of Deer Park, 882 S.W.2d 824, 826 (Tex. 1994) (referencing United States Supreme Court's decision in *Lucas* in holding that city's refusal to rezone property was not taking), *cert. denied*, 115 S. Ct. 904 (1995); Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 281 (1993) (noting that state court interpretations of state takings clauses almost exactly parallel United States Supreme Court's interpretation of federal Takings Clause).

89. 570 S.W.2d 389 (Tex. 1978).

Coal Co v. Mahon,[90] and rejected the notion that all exercises of state police power are exceptions to the Texas takings clause.[91] Recognizing that there is "perhaps no test and no single sentence rule that can resolve the varying problems that may arise by government's interference with a property owner's exercise of his rights," the Texas court identified some criteria for "adjust[ing] the conflicts between private ownership of property and the public's interest."[92] The *Teague* court noted that compensation is justified when there has been an actual, physical taking, when property has been rendered "wholly useless," or when the government-imposed burden has caused a "disproportionate diminution in economic value" or a "total destruction" of property value.[93] The *Teague* court also held that recovery should be allowed when the government acts for its own advantage against an economic interest of the owner.[94] The court did state, however, that "there is good reason to deny compensation when there is no more than a regulation of a right or the prohibition of some noxious use, or when the public need outweighs the private loss."[95]

---

90. 260 U.S. 393 (1922).

91. *Teague*, 570 S.W.2d at 392; *cf. Lucas*, 505 U.S. at 1015 (describing two categories of police-power regulations that require compensation under Takings Clause).

92. *Teague*, 570 S.W.2d at 392.

93. *Id* at 393.

94. *Id.* This action by the government refers to circumstances in which a city prevents development of a property to keep the value of the property low because the city plans to condemn the property in the future. *See* State v. Biggar, 873 S.W.2d 11, 14 (Tex. 1994) (finding compensable taking when state refused to approve routine drainage easement exchange, which resulted in lower property value on land sought in eminent domain for highway improvements); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (finding compensable taking when city interrupted subdivision development at site that it intended to acquire by eminent domain in future).

95. *Teague*, 570 S.W.2d at 393. In *Teague*, the Texas Supreme Court found that the plaintiffs had established their right to damages, but reversed the lower court judgment on the amount of damages. *Id.* at 394–95. The district court had ordered the city to issue the required permits to allow the property to be developed, and also awarded $109,939 in temporary damages to the property owners for the period between the time their third permit request was denied and the date the permit was issued. *Id.* at 390. The city issued the permits and appealed the damage award. *Id.* The court of appeals affirmed upon a $30,000 remittitur, which the plaintiffs accepted. *Id.* On the city's appeal, the supreme court analogized to contract disputes in which the plaintiff seeks lost profits and held that "[a]nticipated rentals from land that is presently undeveloped [are] just as speculative and uncertain as measuring anticipated profits from a presently unestablished business." *Id.* at 395. Because the plaintiffs' expert witnesses did not testify that the undeveloped land would earn anything until it was developed or sold, the court found the plaintiffs had not proved "with reasonable certainty that the unimproved tract would in reasonable certainty have produced any return at all." *Id.* The court did note, however, that "loss of rentals is an appropriate measure of damages" for developed property. *Id.* at 394.

The Texas Supreme Court has elaborated on the *Teague* criteria in subsequent decisions. For instance, in *Taub v. City of Deer Park*,[96] the court held that denial of a requested zoning change from single-family to multi-family use is not a compensable taking even if the result is that the property cannot be profitably developed.[97] According to *Taub*, property is not rendered "wholly useless" nor is its value "totally destroyed" simply because it cannot be profitably developed.[98] Similarly, in *City of College Station v. Turtle Rock Corp.*,[99] the Texas Supreme Court upheld a city ordinance requiring parkland dedication as a condition to subdivision plat approval.[100] The court noted that although the Texas Constitution requires payment of adequate compensation when private property is taken for public use, "all property is held subject to the valid exercise of the police power."[101]

Like the United States Supreme Court, the Texas Supreme Court has been unable to create a bright-line test to determine when a police-power regulation results in a compensable taking.[102] The Texas Supreme Court has merely held that an ordinance does not result in a compensable taking if it (1) is "substantially related to the health, safety or general welfare of the people" and (2) is reasonable, not arbitrary.[103] There is a strong presumption in favor of such an ordinance, which places an "extraordi-

---

96. 882 S.W.2d 824 (Tex. 1994).

97. *Taub*, 882 S.W.2d at 826.

98. *Id.* The *Taub* court stated:

> The takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause.

Id.

99. 680 S.W.2d 802 (Tex. 1984).

100. *Turtle Rock Corp.*, 680 S.W.2d at 803–08. The city ordinance also provided that under some circumstances the developer could pay cash in lieu of the land dedication. *Id.* at 804. If the developer paid cash, the city was required to spend the money for acquisition or development of a neighborhood park within two years or return the money to the property owners in the subdivision. *Id.*

101. *Id.*

102. *See* Arthur J. Anderson, *The Black Hole of Regulatory Takings Law: Can the Courts Bring Order out of Chaos?*, 57 TEX. B.J. 116, 116 (1994) (noting that Texas courts have struggled to find test to determine when taking has occurred).

103. *Turtle Rock Corp.*, 680 S.W.2d at 804–05 (internal quotation marks and citations omitted). The *Turtle Rock Corp.* court reversed a court of appeals decision which held that "all park land dedication ordinances are per se invalid." *Id.* The court of appeals had found that while dedications for streets and waterworks bear a "substantial relation to the safety and health of the community," parks do not. City of College Station v. Turtle Rock Corp., 666 S.W.2d 318, 321 (Tex. App.—Houston [14th Dist.]), *rev'd*, 680 S.W.2d 802 (Tex. 1984).

nary burden" on the challenging party.[104] Additionally, in keeping with the United States Supreme Court's approach, the Texas Supreme Court decides the question of whether a compensable taking has occurred as one of law and not of fact.[105]

In sum, Texas takings case law is very similar to the federal case law: Texas government conduct is a categorical taking when it invades or physically appropriates property, or when it unreasonably interferes with the right to use and enjoy property.[106] Unreasonable interference for purposes of a categorical taking is generally limited to severely restricting access[107] or denying a permit for development.[108] Interference that is

---

104. *Turtle Rock Corp.*, 680 S.W.2d at 805. The court in *Turtle Rock Corp.* affirmed that the test for whether a regulation is "substantially related" to a legitimate goal is that when "reasonable minds may differ . . . the ordinance must stand." *Id.* The second part of the test requires a "reasonable connection" between the requirement and the purpose. *Id.* In the *Turtle Rock Corp.* case, the required connection was between the increase in population caused by the development and the resulting need for recreational facilities. *Id.* at 806–07. "The burden rests on [the developer] to demonstrate that there is no such reasonable connection." *Id.* Examples of evidence the court may consider are the "size of lots in the subdivision, the economic impact on the subdivision, [and] the amount of open land consumed by the development." *Id.* at 807.

105. *Id.*

106. *See, e.g.*, *Westgate, Ltd.*, 843 S.W.2d at 452 (stating that property owner is entitled to damages when government takes property without giving owner adequate compensation); *Teague*, 570 S.W.2d at 393–94 (finding city liable for actions taken to impose servitude on plaintiff's property); DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965) (holding that plaintiff must be compensated when viaduct is constructed so as to obstruct all reasonable access to plaintiff's property); *see also* Harris County v. Felts, 881 S.W.2d 866, 868–70 (Tex. App.—Houston [14th Dist.] 1994) (restating Texas law on government takings and denying plaintiff's recovery because, although plaintiff's property decreased in value during construction of parkway, property was not damaged), *aff'd*, 915 S.W.2d 482 (Tex. 1996).

107. *See* City of Waco v. Texland Corp., 446 S.W.2d 1, 2 (Tex. 1969) (holding that taking occurred when access to property was "materially and substantially impaired"); *see also* Stephen I. Adler & Daniel M. Anderson, *Takings and Related Causes of Action Under Federal and Texas Law* (describing Texas Supreme Court's criteria for establishing taking based on restriction of access), *in* SOUTHWESTERN LEGAL FOUNDATION, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 9.02[3][a][ii], at 9-13 to -14 (Carol J. Holgren ed., 1994). *Compare Avenue Corp.*, 704 S.W.2d at 13 (holding that temporary partial reduction in access to property caused by street and sidewalk repair was not compensable taking) *with DuPuy*, 396 S.W.2d at 110 (holding that permanent impairment of access to property in which construction of elevated street left access only via cul-de-sac was damage requiring compensation).

108. *See, e.g.*, *Taub*, 882 S.W.2d at 826 (holding that refusal to rezone property to multi-family use was not compensable taking even if property could not be profitably developed for single-family use); *Turtle Rock Corp.*, 680 S.W.2d at 806–07 (holding that requiring developer to dedicate parkland as condition of subdivision plat approval was not compensable taking); *Teague*, 570 S.W.2d at 394 (holding that city's rejection of owners' third application for development permit denied all use of owners' land and constituted

less than categorical is, in Texas as in federal cases, subject to a balancing test.[109]

The Texas and federal balancing tests employed when government interference is less than categorical have been the subject of criticism;[110] however, some defend the balancing tests, asserting that the circumstances involved in issues of regulating real property for the public good are too complex for simple rules of law.[111] These supporters have often argued that the issue of regulatory takings is essentially one of distributive justice, which is more appropriately settled by legislatures than judges.[112] Lately, advocates of property rights have begun to agree.[113]

---

compensable taking, but finding purported loss of rentals insufficient proof of damages for temporary loss of unimproved land to justify award).

109. *See* Arthur J. Anderson, *The Black Hole of Regulatory Takings Law: Can the Courts Bring Order out of Chaos?*, 57 TEX. B.J. 116, 116 (1994) (observing that Texas and federal courts have been unable to establish measurement test for determining takings).

110. *See id.* at 119–20 (noting that federal and Texas cases have resulted in inconsistent takings doctrine); Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 577 (1995) (complaining that federal balancing test is unpredictable); James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 152 (1995) (expressing opinion that federal balancing test imposes disproportionate costs on property owners because of their wealth); *see also* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281, 317 (1993) (expressing hope that uncertainty of takings doctrine will be clarified by Supreme Court); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 628 (1995) (stating that courts have not adequately protected property rights against environmental regulations); *cf.* Loren A. Smith, *Introduction*, 46 S.C. L. REV. 525, 527 (1995) (noting courts' insensitivity to economic liberty).

111. *See* Charles H. Clarke, *Regulatory Takings, Accommodation and Extreme Choices*, 23 CAP. U. L. REV. 667, 687 (1994) (arguing that balancing is necessary to ensure that important public values other than property rights are considered in takings cases); Julian R. Kossow, Dolan v. City of Tigard: *Takings Law and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 STAN. ENVTL. L.J. 215, 255 (1995) (suggesting that courts should use *Penn Central* balancing test in case-by-case approach); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1454–55 (1993) (stating that courts should respond to conflicts between environmental regulations and property rights with flexibility).

112. *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 135–36 (1995) (suggesting that conflict between environmental protection and property rights should be resolved by political process, not courts); *see also* Charles H. Clarke, *The Owl and the Takings Clause*, 25 ST. MARY'S L.J. 693, 737 (1994) (arguing that public, through legislatures, should have right to protect environment).

113. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 628 (1995) (advocating legislation to protect private property rights); *Legal Scholars Say Takings Concerns Best Addressed Through Legislation*, 62 Banking Rep. (BNA) No. 18, at 795 (May 2, 1994) (reporting that two legal scholars on opposing sides of issue agree that compensation for regulatory takings is best addressed through legislation), *available in* Westlaw, BNA-BNK Database. *See generally*

III. The Call for a Statutory Response—Private Property Rights Protection Acts

A. *Political Background*

1. The EPA and the Reagan Revolution

The recent rise in property rights activism is largely a response to the environmental protection movement of the last quarter century.[114] Public concern about environmental issues since the first Earth Day on April 22, 1970 led to the creation of the Environmental Protection Agency (EPA)[115] and the enactment of much legislation designed to protect the environment. Current federal legislation requires environmental impact statements;[116] protects air,[117] water,[118] coastlines and coastal waters,[119] and endangered species;[120] and provides for the disposal of hazardous waste.[121] Moreover, some federal environmental legislation encourages states to act to meet certain federally mandated goals.[122] State and municipal governments have also expanded their traditional regulation of

---

John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 329–30 (1994) (commenting on rise of property rights protection statutes in states).

114. *See* Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 81 (1995) (discussing relationship between environmental protection and property rights movement); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 613–15 (1995) (describing how environmental protection movement of last two decades has served as impetus for recent property rights movement).

115. *See* National Environmental Policy Act, 42 U.S.C. §§ 4321–4370d (1988) (creating EPA); Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 430 (1993) (noting conspicuous timing correlation between first Earth Day and creation of EPA).

116. *See* 42 U.S.C. § 4332 (requiring federal agencies to assess environmental impact of major federal actions).

117. Clean Air Act, 42 U.S.C. §§ 7401–7671q (1994).

118. Clean Water Act, 33 U.S.C. §§ 1251–1387 (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (1994).

119. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1464 (1994); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401–1445 (1994).

120. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (1994).

121. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761 (1994); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (1994).

122. *See* 16 U.S.C. §§ 1451–1464 (providing financial incentives for states to establish and maintain coastal management and conservation programs). South Carolina's Coastal Management Act was enacted in 1977 in response to the federal act. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1007 (1992) (discussing passage of S.C. CODE ANN. §§ 48-39-10 to 48-39-290 (1988)). South Carolina's Coastal Management Act was the statute challenged in *Lucas*. *Id.*

land use to areas such as historic preservation, the establishment of open space, and the restriction of natural resource development.[123]

Opposition to environmental regulation, particularly in the western states, provided support for the conservative political movement of the 1980s and the election of President Ronald Reagan.[124] Yet, because Republicans were the minority in Congress during most of Reagan's two terms as President, Reagan was only able to slow, rather than reverse, the growth of environmental regulation.[125] Reagan's most significant contributions to the protection of private property rights from government regulation were his elevation of Justice Rehnquist to the position of Chief Justice in 1986, and his nominations of Justices O'Connor in 1981, Scalia in 1986, and Kennedy in 1988.[126] These appointments, along with President Bush's appointment of Clarence Thomas in 1991, shifted the Court's ideological makeup, resulting in greater protection of private property rights.[127]

---

123. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 622 (1995) (giving examples of state environmental laws).

124. *See* Florence Williams, *Landowners Turn the Fifth into Sharp-Pointed Sword*, HIGH COUNTRY NEWS, Feb. 8, 1993, at 1, 11 (reporting support of Reagan administration's deregulation agenda by property rights advocates).

125. *See* Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (reporting that Reagan administration did not fully succeed in establishing property rights agenda).

126. *See* Florence Williams, *Landowners Turn the Fifth into Sharp-Pointed Sword*, HIGH COUNTRY NEWS, Feb. 8, 1993, at 1, 11 (suggesting that most important legacy of Reagan administration is federal judges appointed).

127. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 153 (1995) (suggesting that shift toward more conservative Court will result in more protection for property owners); *see also* William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 142 (1995) (observing that last four regulatory takings cases decided by Court—*Dolan*, *Lucas*, *Nollan* and *First English*—have favored private property rights over government regulation); Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause*: Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 156 (1995) (describing ideology of Court as hostile to regulation). Except for Justice Souter, who filed a separate opinion in *Lucas* and a dissenting opinion in *Dolan*, and Justice O'Connor, who joined the dissent in *First English*, the Reagan-Bush appointees have consistently supported the property rights position. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2312, 2319–20 (1994) (holding that building permit conditions sought by government must be proportional to public burden created by development) (opinion by Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissenting opinion by Justice Souter); *Lucas*, 505 U.S. at 1029 (holding that regulation which takes all economic use of property is compensable taking unless regulation does no more than formalize common law of nuisance) (opinion by Justice Scalia, joined by Justices Rehnquist, O'Connor, and Thomas, with concurring opinion by Justice Kennedy and separate statement by Justice Souter); Nollan v. California Coastal Comm'n, 483 U.S. 825, 826, 832 (1987) (holding that government action which removes right of property owner to exclude

Another effect of the Reagan Presidency on the issue of property rights came in response to the Supreme Court's 1987 decisions in *First English* and *Nollan*.[128] On March 15, 1988, the Reagan administration issued Executive Order 12,630, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights."[129] The Order ensures that federal executive branch departments and agencies will avoid unnecessary takings and account in their budgets for the cost of those takings that are statutorily required.[130] The Order requires that every department or agency prepare a document called a Takings Impact Assessment (TIA) before implementing any action regulating private property.[131] The Order also provides that TIAs are designed only to improve internal management, and not "to create any right or benefit, substantive or pro-

---

others is compensable taking) (opinion by Justice Scalia, joined by Justices Rehnquist and O'Connor); First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 305, 310–11 (1987) (holding that Fifth Amendment requires government to pay compensation even for temporary takings) (majority opinion by Justice Rehnquist, with dissenting opinion joined by Justice O'Connor).

128. *See* Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,254, 10,257–58 (July 1988) (describing development of Executive Order 12,630 in response to 1987 cases); James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,474, 10,474 (Nov. 1988) (describing "takings" executive order as measure purportedly in response to *First English* and *Nollan*).

129. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994). The drafting of the Order is attributed to Roger Marzulla, then Assistant Attorney General for the Land and Natural Resources Division of the United States Department of Justice, and Mark Pollot, Marzulla's Special Assistant. *See* Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,254, 10,254 (July 1988) (noting positions of Marzulla and Pollot); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (identifying Pollot as author of Executive Order No. 12,630).

130. Exec. Order 12,630, § 1, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994).

131. *Id.* The TIA must: (1) identify as clearly as possible the "public health or safety risk created by the private property use" that is being regulated; (2) establish that the regulation "substantially advances the purpose of protecting public health and safety against the specifically identified risk"; (3) establish as well as possible that the regulations on the property are not disproportionate to the risk; and (4) "[e]stimate, to the extent possible, the potential cost to the government in the event a court later determines that the action constitutes a taking." *Id.* § 4(d). Some kinds of government regulations or actions are exempt from the Order, including actions abolishing regulations or programs, law enforcement seizure of property for violations of law, studies and planning activity, and any "military or foreign affairs functions." *Id.* § 2. United States Army Corps of Engineers civil works projects are not excluded from the Order. *Id.*

cedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."[132]

An early criticism of Executive Order 12,630 was that its real intent was to promote deregulation.[133] The Order has also been criticized as being so unclear that TIAs will either create confusion in the administrative branch exceeding that in the judicial system or turn into mere pro forma exercises.[134] The latter criticism appears to be true because federal TIAs have had little impact on regulation.[135]

2. The Property Rights Movement

Frustrated with the inability of the federal executive branch to adequately protect property rights, and discouraged by the slow pace of the federal judiciary, property rights advocates have turned to state and federal legislatures.[136] The property rights movement itself appears to consist of both grassroots organizations of small landowners and large

---

132. *Id.* § 6.

133. *See* James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,474, 10,475 n.16, 10,478 (Nov. 1988) (suggesting that possible intent of Order was to slow pace of regulation). Charles Fried, Solicitor General under Reagan, recognized the potential that Executive Order 12,630 had for promoting deregulation, or at least for hampering the growth of regulation. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 183 (1991). Fried described as "radical" the Justice Department's project to use the Fifth Amendment Takings Clause to put a severe brake on state and federal regulation: "If the government labored under so severe an obligation, there would be, to say the least, much less regulation." *Id.*

134. Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403, 427 (1992). *But see* Thomas E. Hookano & Mark L. Pollot, *Executive Order on Takings: A New Federal Decision-Making Framework*, C333 A.L.I.-A.B.A. 93, 98 (1988) (describing Order as necessary for fair treatment of private property interests), *available in* Westlaw, ALI-ABA Database; Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,254, 10,255 (July 1988) (describing Order as necessary to minimize impact of regulation on private property and risk of damage awards against government).

135. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 630 (1995) (reporting that Executive Order 12,630 has rarely been used); Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1 (describing TIAs as having limited impact).

136. *See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 330–31 (1994) (suggesting reasons why property rights activists have turned to state legislatures); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633 (1995) (reporting that frustrated property owners have introduced over 60 property rights bills in over half of states); *see also* Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret*

industries and their trade organizations, particularly those engaged in mining, forestry, and other agribusiness.[137] The movement has two related goals: (1) to reduce the amount of regulation that interferes with the use of property or reduces its value; and (2) to assure compensation to property owners when such interference or reduction in value occurs.[138]

Property rights advocates argue that it is unfair for a few individual property owners to pay for benefits enjoyed by many, and assert that it is this danger of majoritarian governmental overreaching that the Takings Clause of the Fifth Amendment was intended to prohibit.[139] These advocates reason that because this risk of overreaching is as present in regulatory takings as it is in outright appropriations, the Takings Clause should

---

As States Pass Reagan-Style Takings Laws, NAT'L L.J., May 10, 1993, at 1 (describing growth of property rights movement).

137. Marianne Lavelle, *The "Property Rights" Revolt: Environmentalists Fret As States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 1. Much of the movement's theory is based on Richard Epstein's 1985 book, *Private Property and the Power of Eminent Domain*. *See id.* (identifying Epstein as conservative theorist supporting work at state level). Epstein is cited frequently by supporters of increased property rights protection. *See, e.g.*, Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 533–34, 540 n.34 (1995) (citing Epstein for proposition that takings jurisprudence limits definition of property to mere possession, as distinguished from use, which is contrary to historical understanding); Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 596, 596 n.1 (1995) (citing Epstein for proposition that government should pay property owners for partial as well as complete regulatory takings); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1135 (1993) (describing Epstein's "anti-redistributive" views); Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government's Ability to Regulate?*, 44 ADMIN. L. REV. 403, 419–20 (1992) (describing Epstein's version of designing coherent takings doctrine as one that would result in more takings being found and more compensation being paid).

138. *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 137–38 (1995) (describing state property rights acts as intended either to reduce regulation or require compensation of property owners); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 614–15 (1995) (describing purposes of property rights movement as relief from regulatory overkill and fair compensation of property owners burdened by regulations). *But see* Robert J. Kleeman, *New Statutory Remedies* (describing goal of Texas property rights advocates as reduction of economic harm of regulation, not compensation), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995).

139. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 ENVTL. L. 143, 151 (1995) (noting that takings doctrine requires few property owners to bear disproportionate share of cost of regulation); Roger Marzulla et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 261 (1995) (arguing that without legislation, majority will continue to impose costs of environmental regulation on small group of land owners).

apply in equal measure to each.[140] Property rights advocates believe many regulations are unnecessary, overreaching, or inefficient; consequently, they believe that requiring government to compensate property owners for regulatory takings will discourage unneeded regulation.[141]

3. Critics of the Property Rights Movement

Notwithstanding the goals of property rights advocates, the property rights movement has not gone without criticism. Given that the movement is largely a response to the increasing environmental regulation of the last twenty-five years, it should not be surprising that the major criticism of the property rights movement has come from environmentalists.[142] Environmentalists argue that no one right is so absolute that it excludes consideration of other, conflicting rights.[143] Consequently, they contend that individual property rights must be balanced against the public interest, and that property owners should not be allowed to use their

140. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 538 (1995) (asserting that no textual basis in Constitution exists for differentiating between regulatory takings and outright seizures); Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 COLUM. L. REV. 591, 595–96 (1995) (expressing view that so long as risk of regulatory taking is same as outright disposition, remedy should be same).

141. *See* Jerry Ellig, *The Economics of Regulatory Takings*, 46 S.C. L. REV. 595, 611 (1995) (asserting that forcing public to pay for regulatory takings will assure balancing of costs and benefits of regulations); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 639 (1995) (predicting that public will not support many regulations when it has to bear cost).

142. *See, e.g.*, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 136 (1995) (arguing that increased protection of private property rights diminishes hope of protecting environment for future generations); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,249 (May 1994) (arguing that property rights activists seek to redefine property rights to detriment of environmental protection); Patricia Byrnes, *Are We Being Taken by Takings?*, WILDERNESS, Spring 1995, at 4, 4 (noting that most environmental organizations oppose takings legislation); David DeCosse, *Taking Property and the Common Good*, AMERICA, July 15, 1995, at 10, 10 (describing compensation legislation as threat to environmental legislation); Barbara Moulton, *Takings Legislation: Protection of Property Rights or Threat to the Public Interest?*, ENVIRONMENT, March 1995, at 44, 45 (identifying opponents of takings legislation as including many environmental organizations); *cf.* William P. Pendley, *War on the West Spreads*, WASH. TIMES, July 27, 1995, at F6 (describing opponents to takings legislation as environmental extremists).

143. *See, e.g.*, Charles H. Clarke, *Regulatory Takings, Accommodation and Extreme Choices*, 23 CAP. U. L. REV. 667, 687 (1994) (suggesting that maximizing public values other than property values justifies some uncompensated regulations of property); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,235 (May 1994) (concluding that American legal philosophy has never viewed property rights as absolute).

land to harm others.[144] Environmentalists further assert that proposed takings legislation amounts, in some cases, to a requirement that the public pay a landowner not to pollute the environment, and, in other cases, to a guarantee of the landowner's speculative profits.[145] Supporters of property-use regulations have long contended that complex and value-laden issues of balancing property rights with other public interests are better resolved by legislatures, and that courts should be highly deferential to majoritarian decisions.[146]

This debate between property rights advocates and environmentalists takes place in the context of a larger and highly partisan political debate over the proper role of government in the economy.[147] The practical effect of this "politicalization" of the takings issue has been to move the issue from the arena of scholarly debate and slow development in the courts to rapid, and some say radical, change in the legislatures.[148]

---

144. John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 431 (1995) (arguing that public ought to be able to prevent socially intolerable land uses); Philip Warburg & James M. McElfish, *Property Rights and Responsibilities: Nuisance, Land-Use Regulation, and Sustainable Use*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,520, 10,520 (Sept. 1994) (warning of pressing need to prevent unsustainable land uses in light of property rights movement).

145. John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 428 (1995) (accusing property rights advocates of wanting to be paid for "inconvenience" of obeying law); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,247 (May 1994) (arguing that common law of property does not protect speculative uses).

146. *See* Charles H. Clarke, *Regulatory Takings, Accommodation, and Extreme Choices*, 23 CAP. U. L. REV. 667, 687 (1994) (suggesting that public, through legislatures rather than courts, should decide how to balance property rights with other public values); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 25 (1993) (noting that legislatures are better suited to address complex, interrelated issues); *Legal Scholars Say Takings Concerns Best Addressed Through Legislation*, Banking Rep. (BNA) No. 18, at 1–2 (May 2, 1994) (recognizing that speakers with opposing views on regulatory takings agree that compensation of property owners for reductions in property value due to federal regulation should be addressed by legislatures rather than courts).

147. *See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 330 (1994) (noting that property rights movement may be part of ideological assault on role of government in mixed economy); Loren A. Smith, *Introduction*, 46 S.C. L. REV. 525, 526–27 (1995) (criticizing Supreme Court's past failure to protect "economic liberty"); Edward J. Sullivan, *Substantive Due Process Resurrected Through the Takings Clause*: Nollan, Dolan, *and* Ehrlich, 25 ENVTL. L. 155, 156 (1995) (criticizing emerging antiregulatory ideology on Supreme Court); Jonathan Turley, *Panel I: Liberty, Property, and Environmental Ethics*, 21 ECOLOGY L.Q. 403, 406 (1994) (recognizing characterization of environmentalists as countermajoritarian elitists by other panelists).

148. *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 138 (1995) (observing that proposed property rights legis-

B. *State Statutes*

Property rights advocates have proposed two basic types of legislation in the states: assessment acts and compensation acts.[149] Twelve states currently have assessment acts,[150] two states have compensation acts,[151] and three states have acts that combine assessment and compensation.[152] The most common type of state property rights protection is takings impact assessment legislation, patterned after Executive Order 12,630.[153] The first of these assessment acts was passed in Washington in 1991 as part of Washington's Growth Management Act.[154] Some of these protec-

---

lation is drastic departure from constitutional doctrine); John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L.J. 423, 430 (1995) (noting that proposed property rights protection acts would disrupt balance between property rights and public protection established in Constitution); John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 338 (1994) (describing takings statutes as attempting revolution in nature of property and government).

149. *See* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 137 (1995) (analyzing differences between two legislative categories of private property protection acts); *see also* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633 (1995) (describing two types of private property protection acts proposed by state legislators); Michelle K. Walsh, Note, *Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation As a Remedy*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 317, 325–30 (1995) (analyzing assessment and compensation acts).

150. *E.g.*, DEL. CODE ANN. tit. 29, § 605 (Supp. 1994); IDAHO CODE §§ 67-8001 to -8004 (1995); IND. CODE ANN. § 4-22-2-28 (Supp. 1995); MO. REV. STAT. § 536.017 (Supp. 1996); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1995); UTAH CODE ANN. §§ 63-90-1 to -4 (Supp. 1995); VA. CODE ANN. § 9-6.14:7.1 (Michie 1995); WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 1996); W. VA. CODE §§ 22-1A-1 to -6 (1994); WYO. STAT. §§ 9-5-301 to -305 (1995); 1995 KAN. SESS. LAWS 170; 1995 MONT. LAWS 462. Arizona's assessment act, passed in 1992, was defeated in a referendum election on November 8, 1994. ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (1995). In 1995, Arizona enacted legislation requiring cities, towns, and counties to provide for administrative appeal of their discretionary decisions that condition approval of use, improvement, or development of property on dedications or exactions. ARIZ. REV. STAT. ANN. §§ 9-500.12(A), 11-810(A) (1995). A property owner aggrieved by the administrative decision may file suit in state court. *Id.*

151. FLA. STAT. ANN. § 70.001 (West Supp. 1996); MISS. CODE ANN. §§ 49-33-7 to -9 (Supp. 1994).

152. *E.g.*, LA. REV. STAT. ANN. §§ 3:3601, 3:3602(11)–(15), 3:3608–:3624 (West 1996); N.D. CENT. CODE 28-32-01 to -03 (1995); TEX. GOV'T CODE ANN. §§ 2007.001–.045, 2002.011(7)–(9) (Vernon special pamphlet 1996).

153. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633 (1995) (stating that state assessment acts are modeled after Executive Order No. 12,630).

154. WASH. REV. CODE ANN. § 36.70A.370 (West Supp. 1996). The Washington act requires state agencies and some local governments to utilize a process established by the attorney general to "assure that proposed regulatory or administrative actions do not result

tion acts, in addition to requiring TIAs, direct that regulations be formulated to have the least possible effect on property use and value.[155] However, a number of the state assessment acts expressly disclaim any attempt to "expand or reduce the scope of private property protections provided in the state and federal constitutions."[156]

In contrast to assessment legislation, expansion of private property protections is the express purpose of state compensation acts.[157] These compensation acts create a statutory taking whenever government action has reduced the value of property by a specified percentage. In addition to Texas, the states of Mississippi,[158] North Dakota,[159] and Louisiana[160] have such acts. Florida, rather than setting a reduction-in-value bright line for takings, enacted legislation that provides a new cause of action for owners whose property is "inordinately burdened" by an action of the state, regional, or local government.[161] The Washington Legislature also

---

in an unconstitutional taking of private property." *Id.* § 36.70A.370(1)–.370(2). The Act also provides that the process is "protected by attorney client privilege," but does not provide a cause of action for seeking its compliance. *Id.* § 36.70A.370(4).

155. *See* N.D. CENT. CODE § 28-32-02.5 (Supp. 1995) (requiring that proposed rule be necessary to substantially advance its purpose and that there be no alternative action that would achieve same goal with less impact on property owners); UTAH CODE ANN. § 63-90-4(2) (Supp. 1995) (requiring that any restriction on private property be proportionate to risk caused by property and that any regulation substantially advance purpose of protection against specific risk).

156. *E.g.*, IDAHO CODE § 67-8001 (1995); WASH. REV. CODE ANN. § 36.70A.370(1) (West Supp. 1996); WYO. STAT. § 9-5-305 (1995); *see* TENN. CODE ANN. § 12-1-201 (West Supp. 1994) (stating that purpose of Tennessee act is not to "enlarge or to reduce" private property protections); W. VA. CODE § 22-1A-2 (Supp. 1994) (indicating that purpose of West Virginia law is not to "expand the scope of private real property protections").

157. *See* LA. REV. STAT. ANN. § 3:3601 (West Supp. 1996) (stating that purpose of Louisiana's compensation legislation is to protect owners of agricultural land); MISS. CODE ANN. § 49-33-3 (Supp. 1995) (noting that purpose of Mississippi's compensation legislation is to protect owners of forest and agricultural land).

158. MISS. CODE ANN. §§ 49-33-7, 49-33-9 (Supp. 1995); *see* Recent Legislation, 108 HARV. L. REV. 519, 524, 524 n.37 (1994) (describing Mississippi as only state as of 1994 to legislatively define what constitutes taking); Larry Morandi, *Takings for Granted: Protection of the Environment Has Run Smack up Against Private Property Rights, and Legislators Are Struggling to Produce Some Sort of Balance Between Them*, STATE LEGISLATURES, June 1995, at 22, 27 (describing Mississippi private property protection legislation).

159. N.D. CENT. CODE §§ 28-32-01 to -03 (Supp. 1995); *see* Larry Morandi, *Takings for Granted: Protection of the Environment Has Run Smack up Against Private Property Rights, and Legislators Are Struggling to Produce Some Sort of Balance Between Them*, STATE LEGISLATURES, June 1995, at 22, 25 (outlining North Dakota act).

160. LA. REV. STAT. ANN. §§ 3:3601, 3:3602(11)–(15), 3:3608–:3612, 3:3621–:3624 (West Supp. 1996).

161. *See* FLA. STAT. ANN. § 70.001(9) (West Supp. 1996) (stating that "[t]his section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution"). This new remedy

passed an act in 1995 that would have required compensation for *any* reduction in the value of property resulting from governmental action.[162] However, the act, Initiative 164, which would have been the most far-reaching compensation act in the nation, was defeated by public referendum in November 1995.[163]

IV. The Texas Private Real Property Rights Preservation Act of 1995

The Texas Private Real Property Rights Preservation Act, like the legislation in Louisiana[164] and North Dakota,[165] contains both compensation and assessment provisions.[166] The Act applies to any "ordinance, rule, regulatory requirement, resolution, policy, guideline or similar measure"[167] first proposed after September 1, 1995 by a state executive agency or any political subdivision of the state, except municipalities and

---

is a "separate and distinct cause of action from the law of takings." *Id.* § 70.001(1); *see also* Memorandum from Susan A. Murray, The National Audubon Society, to interested persons 12–13 (Aug. 15, 1995) (on file with the *St. Mary's Law Journal*) (describing takings bill's legislative history in 1995 session). A property is "inordinately burdened" when the "property owner bears permanently a disproportionate share of a burden . . . which in fairness should be borne by the public at large." Fla. Stat. Ann. § 70.001(3)(e) (West Supp. 1996); *cf.* Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that purpose of Takings Clause of Fifth Amendment is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). The Florida Legislature considered, but failed to enact, another bill that would have defined a taking as government action that reduces the value of property by 25%, instead of using the "inordinately burdened language." Memorandum from Susan A. Murray, The National Audubon Society, to interested persons 12–13 (Aug. 15, 1995) (on file with the *St. Mary's Law Journal*).

162. 1995 Wash. Legis. Serv. 98 (West); *see also* Neil Modie, *Land-Use, Gamble Issues Lose, Seattle Voters Reject 9-District City Council*, Seattle Post-Intelligencer, Nov. 8, 1995, at A1 (describing postlegislative history of Initiative 164).

163. *See* Rob Taylor, *The Voters Soundly Reject R-48*, Seattle Post-Intelligencer, Nov. 8, 1995, at A1 (noting that Initiative 164 was defeated); *State Returns: Election '95*, Seattle Post-Intelligencer, Nov. 8, 1995, at A8 (reporting returns as 60% opposed to Initiative 164 and 40% in favor, with 90% of precincts reporting). The issue was brought to the legislature by an initiative supported and financed by development and timber interests. Michael Paulson, *Lawmakers Still Back Land-Use Compensation*, Seattle Post-Intelligencer, Nov. 8, 1995, at A1. After the legislature passed Initiative 164 in April 1995, environmental groups gathered enough signatures to force a referendum, which appeared on the ballot as Referendum 48. *Id.*

164. La. Rev. Stat. Ann. §§ 3:3601, 3:3602(11)–(15), 3:3608–:3624 (West Supp. 1996).

165. N.D. Cent. Code § 28–32–02.5 (Supp. 1995).

166. Tex. Gov't Code Ann. §§ 2007.021–.045 (Vernon special pamphlet 1996).

167. Tex. Gov't Code Ann. § 2007.003(a)(1). This Comment refers to these actions as "covered government actions" or "covered actions."

counties.[168] The exception for municipalities is not a complete one because the Act *does* apply to some actions by municipalities in their extraterritorial jurisdiction (ETJ).[169]

Because the types of government action to which the Act nominally applies are so broad, its true scope is largely defined by those actions that are excluded.[170] The Act applies only to "private real property that is the subject of the governmental action";[171] thus, personal property is not protected by the Act.[172] Further, the "subject of" language excludes owners of property adjoining or near property that is owned by the government or subject to government regulatory action.[173] Consequently, a decision to build a new state prison on state property would not create a cause of

---

168. *Id.* § 2007.003(b). The Act applies to counties for any action taken after September 1, 1997, unless the Act is modified in the next session of the legislature. *Id.* § 2007.003(d). Like the takings statutes of other states, the Act does not mention action by the legislative branch.

169. *Id.* § 2007.003(a)(3); *see* TEX. LOC. GOV'T CODE ANN. § 42.021 (Vernon 1988) (describing extent of powers of municipalities to act in their ETJ). The Act applies to action by a municipality in its ETJ "that does not impose identical requirements or restrictions in the entire [ETJ]." TEX. GOV'T CODE ANN. § 2007.003(a)(3). Such ETJ action was apparently included in response to a perception of overreaching regulation by the City of Austin in its ETJ. *See* Robert J. Kleeman, *New Statutory Remedies* (noting that § 2007.003(a)(3) describes recent Austin regulations and was described in newspapers as "Austin bashing"), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 7 (1995); Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (describing § 2007.003(a)(3) language as largely response to Austin ordinance regarding Barton Creek Watershed, which was applicable to only part of its ETJ). Representative Combs, who represents a district that includes much of Austin's western ETJ, expressed concern about the fact that people living in the ETJ are subject to regulation by a city government for which they cannot vote and whose regulations in the ETJ may be different from and more onerous than those imposed within the city. Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996).

170. *See* Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (describing scope of Act as largely defined by exceptions).

171. TEX. GOV'T CODE ANN. § 2007.002(5)(B)(i).

172. *See id.* § 2007.002(5)(B) (establishing that Act applies only to real property); *see also* Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (reporting that legislature considered and rejected notion of including personal property in Act).

173. Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 5 (1995); *see* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (quoting Senator Teel Bivins, Senate sponsor of Act, as saying that Act does not apply to owners of property adjoining state-owned or state-regulated property); Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (confirming that "subject of the

action in adjoining landowners whose property was reduced in value by the action.[174] In addition, a decision by a government entity to allow a property owner to engage in a regulated use that nearby property owners claimed reduced their property values would not grant the complaining property owners a cause of action against the government.[175] This aspect of the Act has been criticized as failing to provide adequate environmental protection for the majority of property owners (primarily homeowners and small rural landowners) "to protect the profits of polluters and real estate developers."[176] Supporters of the new legislation have responded

---

governmental action" language was intended to preclude any cause of action for adjacent property owners).

174. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (quoting Senator Teel Bivins regarding need for "subject of" language to prevent property owners adjacent to new state prisons from suing for reduced property values). The University of Texas System expressed concern that the "imposes a physical invasion" language of the Act in § 2007.003(a)(2) might be interpreted to include noise or increased traffic from a school facility, which could bring a facility siting decision under the provisions of the Act. Letter from Ray Farabee, Vice Chancellor and General Counsel of the University of Texas System, to Sarah Duke of the Office of the Attorney General, State of Texas (Nov. 1, 1995) (on file with the *St. Mary's Law Journal*).

175. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (noting that "big business" interests fought for "subject of" language to assure that they could do as they wish on their land); Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (confirming that "subject of" language was used to prevent creation of new causes of action for adjoining property owners). For example, the operation of a concrete batch plant requires an air-quality exemption from the Texas Natural Resource Conservation Commission (TNRCC). *See* Jerry Needham, *Bulverde Cemented to War on Concrete: Early Setbacks Don't Stop Angry Residents*, SAN ANTONIO EXPRESS-NEWS, Jan. 2, 1996, at B1, B2 (describing nearby residents' opposition to TNRCC granting air emission permit exemption to proposed batch plant). If a proposed plant meets the criteria for exemption and the TNRCC grants the exemption, adjoining property owners have no cause of action under the Act even if they could prove a 25% reduction in their property values. Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996). Further, the "subject of" language prevents a cause of action under the Act by the owner of property negatively affected by construction of or changes made to public streets or highways. Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (confirming that legislators specifically considered and decided not to include protection of property owners whose access was damaged by road work). For example, when access to a business, farm, ranch, or residence is made more difficult by changing a surface street to limited access, there would be no cause of action under the Act. *Id.*

176. Joint Statement by the Environmental Defense Fund et al. on the Development of Guidelines by the Attorney General of Texas to Implement Senate Bill 14, presented to

that the Act applies only to overreaching regulation and have noted that the statutory threshold, which requires a claimant to prove that a regulation has reduced the value of the subject property by at least twenty-five percent, assures protection of the environment.[177]

In addition to these implied exclusions, the Act contains a laundry list of express exclusions.[178] While a number of these are quite specific, two general exclusions are likely to be most significant in determining the actual effect of the Act—exceptions for nuisance[179] and exceptions for public health and safety.[180] Critics of the Act are concerned that the nuisance and health-and-safety exceptions will not prevent the Act from applying to a broad range of important environmental regulations.[181] The legislative history appears to support this fear because a number of exceptions for environmental regulations proposed in a House substitute bill were deleted from the final version.[182]

Representatives of the Office of the Attorney General for the State of Texas at a Public Hearing in Belton, Tex. 6 (Nov. 2, 1995) (on file with the *St. Mary's Law Journal*) [hereinafter Joint Statement by EDF].

177. Susan Combs, *Property-Rights Bill Doesn't Guarantee Compensation*, AUSTIN AMERICAN-STATESMAN, May 15, 1995, at A9; *see* Robert J. Kleeman, *New Statutory Remedies* (observing that 25% reduction in property value will be difficult to prove given alternative available economic uses of most land), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 16 (1995); Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (suggesting that most property owners will not be able to prove that enforcement of existing regulation will cause 25% reduction in property value because real estate market anticipates effect of such regulation).

178. TEX. GOV'T CODE ANN. § 2007.003(b).

179. *Id.* § 2007.003(b)(6).

180. *Id.* § 2007.003(b)(13).

181. *See* Robert J. Kleeman, *New Statutory Remedies* (noting that opponents of Act argue that Act will prevent protection of public health and safety), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 12 (1995); Joint Statement by EDF, *supra* note 176, at 2 (expressing concern that limiting government action to responses to "substantial" threat to health and safety means few government actions will meet test); *see also* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (describing Act's "real and substantial" language as vague but critical to law).

182. CONFERENCE COMM. ON S.B. 14, REPORT, Tex., 74th Leg., R.S. (1995); *see* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996) (stating that Act was intended to prevent broad range of future over-regulation that could affect land values). The House substitute excluded actions "to protect domestic drinking water wells from contamination"; actions by the TNRCC to "regulate industrial wastewater discharges, industrial air emissions, . . . industrial waste management activities," and "the operation of a commercial hazardous waste management facility"; and certain actions by local governments to "enforce minimum standards of wastewater disposal, potable water service, and drainage in colonias." CONFERENCE COMM. ON S.B. 14, REPORT, Tex., 74th Leg., R.S. 5

Subject to the above exceptions and exclusions, the new Texas act provides both compensation and assessment mechanisms to keep government actors in check. The compensation provisions of the Act create a new statutory taking defined as a reduction of twenty-five percent or more in the fair market value of private real property.[183] Surprisingly, however, if the requisite reduction is shown, the property owner's remedy is *not* necessarily compensation, but instead recision of the regulation as applied to the property.[184] Although a government entity has the option

---

(1995). The House substitute would also have exempted the following: (1) actions by conservation and reclamation districts created under Article XVI, § 59 of the Texas Constitution; (2) actions by a political subdivision created under Article III, § 52(b)(1) and (3) of the Texas Constitution, the purpose of which is to improve waterways or to construct and maintain reservoirs; (3) actions of a drainage district; and (4) actions of a public school district. *Id.* at 4–5. In response to questions about whether the Act would apply to specific environmental regulations such as air-quality or toxic-waste-disposal permitting, Senator Bivins noted that decisions would have to be made on an individual basis by considering the facts of each case in relation to the requirements of the Act. Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996).

183. TEX. GOV'T CODE ANN. § 2007.002(5)(B)(ii). In addition, any government action that would require compensation under the Takings Clause of the United States Constitution or §§ 17 or 19 of Article I of the Texas Constitution is a taking under the Act. *Id.* § 2007.002(5)(A). Interest groups advocating the property rights legislation originally proposed an act that would require compensation for *any* reduction in the value of property by governmental action. *See* Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (describing legislative history of proposed act). Legislators recognized that such an act would threaten to eliminate all regulation and considered various formulations to limit the scope of the proposed act. *Id.* For example, legislators considered limiting the effect of the act to certain types of legislation in the same way that the West Virginia statute limits its scope to environmental regulations. *Cf.* W. VA. CODE § 22-1A-6 (1994) (stating that code provisions only apply to environmental protection programs). Finally, legislators determined that a reduction-in-value standard with appropriate exceptions was necessary to achieve the broad scope of coverage required to prohibit regulatory over-reaching without unnecessarily restricting government action. Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996). Bresnen described the decision to use 25% as the bright line in part as the result of consultation with property appraisers. *Id.* Any lesser figure would be subject to normal variations in appraisals and could raise difficult causation issues. *Id.* Bresnen noted that some property rights advocates see the decision as meaning that government can take up to 25% of your property without paying. *Id. But cf.* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996) (observing that although any reduction-in-value standard is necessarily arbitrary, some standard is necessary or enforcement would be too complex). Senator Bivins noted that opponents of the bill did not lobby extensively on this issue. Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996).

184. TEX. GOV'T CODE ANN. § 2007.023(b). The government entity must rescind the action as applied to the property owner within 30 days of the judgment. *Id.* § 2007.024(a). The government entity, however, has the option to pay compensation to the property owner in an amount determined by the trier of fact to keep the action in effect. *Id.*

of keeping the regulation in place while compensating the property owner, it is unlikely that such an entity will ever do so.[185] Nevertheless, in a suit under the compensation cause of action, the prevailing party, whether the government or a property owner, is entitled to reasonable attorney's fees and court costs.[186]

---

§§ 2007.024(c)–(e). When the government entity is a state agency, any compensation must be paid from that agency's appropriation. *Id.* § 2007.024(f). This provision denying a "right" to compensation has two other potential effects. First, it insulates property owners from unfavorable interpretations or decisions from judges who may be more concerned about protecting the public than the rights of property owners. Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (suggesting that justices of Texas Supreme Court are more fiscally conservative than Justices of United States Supreme Court and less favorable to property owners when it costs the state). Second, without damage awards, there is no incentive for an attorney to prosecute a case under the Act on a contingency basis; thus, the cost to the owner of bringing a suit is higher. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (noting that cost of suit will discourage litigation).

185. *See* Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (suggesting that state agencies would be unlikely to opt to pay rather than rescind); Telephone Interview with Diane Mazuca, Texas Natural Resource Conservation Commission Legislative Liaison (Jan. 8, 1996) (reporting that TNRCC plans to rescind any action found to be taking, rather than take funds from other programs). Robert Kleeman described this "invalidation" provision of the Act as a major breakthrough in achieving passage in the legislature by overcoming criticism that compensation of claims would bankrupt the state. Telephone Interview with Robert J. Kleeman, General Counsel for Take Back Texas (Jan. 3, 1995). One reason state agencies are likely to choose rescission is that they are not authorized to spend funds appropriated for other purposes to pay judgments or settlements except under very limited circumstances. *See* Appropriations Bill, 74th Leg., R.S., ch. 1063, art. IX, § 56, 1995 Tex. Sess. Law Serv. 5256, 6097 (Vernon) (listing limited circumstances in which state agencies may appropriate funds to defend or settle suits). Such expenditures are limited to $250,000 and require approval by the Governor and Attorney General. *Id.*; *see* Telephone Interview with John Opperman, Director of Texas Senate Finance Commission (Jan. 8, 1996) (describing conditions under which agency may pay judgment without requesting that specific claim appropriation be enacted by next legislative session). Opperman noted that the $250,000 limit in the 1995 appropriations bill was an increase over the $25,000 limit in prior bills. Telephone Interview with John Opperman, Director of Texas Senate Finance Commission (Jan. 8, 1996). A second reason for choosing rescission is that a decision to pay a judgment to keep a regulation in place may shift scarce resources from other programs. Telephone Interview with Diane Mazuca, Texas Natural Resource Conservation Commission Legislative Liaison (Jan. 8, 1996).

186. TEX. GOV'T CODE ANN. § 2007.026. The fact that plaintiffs will have to bear the entire cost of their suit, in addition to the government's costs if they lose will discourage many actions under the Act. Robert J. Kleeman, *New Statutory Remedies* (observing that "loser pays" rule was intended to discourage marginal cases), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 1, 18 (1995); *see* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Na-*

The assessment provisions of the Texas act generally apply to the same government actions that result in compensable takings.[187] However, TIAs are not required for some enforcement actions, such as withholding government permits.[188] In the instances in which TIAs are required, the Texas act generally follows Executive Order 12,630,[189] requiring that a written TIA: (1) describe the purpose of the proposed action; (2) show how the action advances its purpose; (3) identify the burdens on private real property and the benefits to the public; (4) determine whether the action will be a taking; and (5) describe reasonable alternatives, their burdens and benefits, and determine whether the alternatives would be a taking.[190] A summary of the TIA must be made public at least thirty days before the proposed action becomes effective.[191] Unlike Executive Order 12,630, though, the Texas act provides that any covered government action taken without a TIA is void.[192] To enforce this provision, the Act allows the owner of property affected by a covered governmental action to sue to invalidate the action if taken without a TIA.[193] An

---

tion, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs, TEX. LAW., July 31, 1995, at S4 (quoting Senator Bivins as saying that loser-pays provision will prevent rush to litigate).

187. *E.g.*, TEX. GOV'T CODE ANN. § 2007.043(a); HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex., S.B. 14, 74th Leg., R.S. 10 (1995); Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE §5, at 19 (1995).

188. *See* TEX. GOV'T CODE ANN. § 2007.043(a) (listing by reference government actions that require TIAs and excluding enforcement actions such as permitting (referring to TEX. GOV'T CODE ANN. § 2007.003(a)(1)–(3) (Vernon special pamphlet 1996))).

189. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994).

190. TEX. GOV'T CODE ANN. § 2007.043(b).

191. *Id.* §§ 2007.043(c), 2007.042(a).

192. *Id.* § 2007.044(a).

193. *Id.*; *cf.* Exec. Order No. 12,630, § 6, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994) (stating that Order is not intended to create judicial cause of action). An early criticism of the federal TIA requirement was that creating records of potentially adverse material, such as the likelihood of a taking and the burden imposed on property, would encourage litigation. James M. McElfish, Jr., *The Takings Executive Order: Constitutional Jurisprudence or Political Philosophy?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,474, 10,475 (Nov. 1988). One proponent of the Order suggested that the language of the Order prevented TIAs from being made public under the Freedom of Information Act and that this privacy was necessary to "encourage thoroughness and candor." Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation—Collision or Cooperation?*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,254, 10,258 (July 1988). The Order's language denying a cause of action for failure to perform a TIA has been upheld in a federal district court against a challenge to the modification of a grazing permit. McKinley v. U.S., 828 F. Supp. 888, 893 (D.N.M. 1993).

owner who is successful in such an action may recover reasonable attorney's fees and court costs.[194]

A final provision of the Texas act requires the Office of the Attorney General (OAG) to issue guidelines for use by state agencies and political subdivisions in preparing TIAs.[195] The OAG issued these guidelines in 1996.[196] Addressing a common criticism of assessment acts, the guidelines warn government entities that, although there is no need to "amass needless detail and meaningless data," the TIAs should be more than mere pro forma exercises to justify decisions already made.[197] The OAG suggests that each state agency or political subdivision develop "entity-specific" procedures to determine when its particular activities trigger the requirement for a TIA.[198] The guidelines also include an eight-item "checklist" for determining whether a TIA is required and, if one is required, what it should include.[199] The guidelines appear to require that a government entity perform a TIA whenever it determines that the proposed action will burden private real property to any degree, not just when it may cause a twenty-five percent reduction in value.[200] If the gov-

---

194. TEX. GOV'T CODE ANN. § 2007.044(c).

195. *Id.* § 2007.041.

196. Private Real Property Rights Preservation Act Guidelines, 21 Tex. Reg. 387 (1996) [hereinafter Guidelines].

197. *Id.* § 1.13, 21 Tex. Reg. at 387. The Guidelines require that the information and analysis in TIAs be of high quality, accurate and concise, and serve the purpose of assessing the impact of the action on private real property. *Id.*

198. *Id.* § 2.15, 21 Tex. Reg. at 390. The Guidelines provide that each government entity has discretion to determine the extent and form of the assessment on a case-by-case basis. *Id.* § 2.19, 21 Tex. Reg. at 390.

199. *Id.* § 3.11, 21 Tex. Reg. at 390. The Guidelines suggest that the procedures should start with two threshold questions. *Id.* § 2.16, 21 Tex. Reg. at 390. The first is a "Categorical Determination" to decide whether the Act is applicable to the government entity or the proposed government action at all. *Id.* §§ 2.16, 2.17, 3.22(a)–(b), 21 Tex. Reg. at 390–91. If the Act is applicable to both the entity and the action, a "No Private Real Property Impacts Determination" (NoPRPI), which is a preliminary analysis of proposed action to evaluate whether there is any potential burden on property, should be performed. *Id.* §§ 2.16, 2.18 & 3.22(c), 21 Tex. Reg. at 390–91. A categorical or NoPRPI determination indicates that no further compliance with the Act is required. *Id.* § 2.18, 21 Tex. Reg. at 390. However, if the government entity cannot determine that there is no burden on property, it must perform the TIA. *Id.* § 3.22(c)(2), 21 Tex. Reg. at 391.

200. Guidelines, *supra* note 196, § 322(c)(2), 21 Tex. Reg. at 391. For example, a public school district considering redrawing attendance boundaries may easily determine that such a change would not affect property values by 25%, but still be required to write a full TIA. Joint Statement by EDF, *supra* note 176, at 3. Failure to perform the TIA could result in a suit, which, if successful, could result in delays in implementing the boundary change. *See* TEX. GOV'T CODE ANN. § 2007.042 (requiring government entity to publish public notice of any covered government action that "may result in a taking" and requiring that notice include "reasonably specific description" of TIA). Section 2007.043, which describes the requirements for TIAs, provides: "A governmental entity shall prepare a writ-

ernment entity determines that it must write a TIA, item seven of the checklist requires the entity to perform, for all property potentially burdened by its proposed action, an evaluation of the takings implications based on the OAG's interpretation of the constitutional and statutory requirements.[201]

V. LIKELY EFFECTS OF THE ACT

Essentially, the Texas Private Real Property Rights Preservation Act is intended to ensure that government entities take a "hard look" at their actions that may affect the value of private real property.[202] To help attain this goal, the Act provides a new cause of action for property owners to obtain relief from forms of government action that reduce the value of their property by twenty-five percent or more.[203] Ultimately, the effec-

---

ten takings impact assessment of a proposed [covered governmental action] that complies with the evaluation guidelines developed by the attorney general . . . before the governmental entity provides the public notice required under Section 2007.042." *Id.* § 2007.043. An alternate interpretation of the Act might be to require a TIA only after an evaluation of the likelihood that the covered government action would constitute a taking under either the constitutional or statutory standard. If it is true, as many proponents of the Act suggest, that very few government actions will cause a 25% reduction in value, then the Guidelines will require many more TIAs to be written than under the alternate interpretation.

201. Guidelines, *supra* note 196, § 3.31(d), 21 Tex. Reg. at 391. This evaluation is based on the answers to seven questions:

> (1) Does the proposed covered governmental action result indirectly or directly in a permanent or temporary physical occupation of private real property? . . . (2) Does the proposed covered governmental action require a property owner to dedicate a portion of private real property or to grant an easement? . . . (3) Does the proposed covered governmental action deprive the property owner of all economically viable uses of the property? . . . (4) Does the proposed covered governmental action have a significant impact on the landowner's economic interest? . . . (5) Does the covered governmental action decrease the market value of the affected private real property by 25% or more? Is the affected private real property the subject of the covered governmental action? . . . (6) Does the proposed covered governmental action deny a fundamental attribute of ownership? [and] . . . (7) Does the governmental action serve the same purpose that would be served by directly prohibiting the use or action; and does the condition imposed substantially advance that purpose?

Id. § 3.31(d), 21 Tex. Reg. at 391–92. Each of these questions, with the exception of number five, which simply refers to § 2007.002(5)(B) of the Act, includes a commentary and, where appropriate, references to federal case law. *Id.* This section of the Guidelines is similar to the attorney general guidelines issued in Washington and Idaho, copies of which can be obtained through the respective offices of the state attorneys general.

202. *Id.* § 1.11, 21 Tex. Reg. at 387.

203. *See* TEX. GOV'T CODE ANN. §§ 2007.022–.026 (Vernon special pamphlet 1996) (describing procedure for cause of action); Robert J. Kleeman, *New Statutory Remedies* (describing new causes of action provided in Act), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995); *see also* Robert Elder, Jr., *Taking the Property*

tiveness of the compensation and assessment provisions of the Act will depend on complex interaction between government entities, property owners, the judicial system, and the public.[204]

A. *Government*

Many commentators have suggested that the most important provisions of the Act are the TIA requirements, and it is these requirements that will likely have the most profound effect on government entities.[205] Supporters of the Act maintain that by requiring government entities to expressly evaluate the effect their actions will have on private real property, government will be less likely to act in ways damaging to property values.[206] Supporters also contend that encouraging government entities to be more circumspect will benefit both property owners and the state by reducing exposure to takings claims and costs.[207] Nevertheless, critics of the Act assert that the cost and time required to perform TIAs will:

Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs, TEX. LAW., July 31, 1995, at S4 (describing Act as "vehicle for property owners unwilling to risk" constitutional takings suit).

204. *See* Robert J. Kleeman, *New Statutory Remedies* (observing that courts will ultimately determine what Act means and legislature will amend Act in response to decisions), *in* CLE INTERNATIONAL REGULATORY: TAKINGS CONFERENCE § 5, at 21 (1995); Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (reporting that supporters and opponents of Act agree that it will take years of administrative hearings and litigation to determine Act's value); Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (observing that effect of Act will depend upon Texas Supreme Court decisions).

205. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (reporting that supporters of Act believe biggest impact will be TIAs); Joint Statement by EDF, *supra* note 176, at 3 (agreeing with supporters of Act that most serious effect will be TIA requirements); *see also* Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (indicating that TIA requirement will be largest benefit of Act).

206. *See* Guidelines, *supra* note 196, § 1.11, 21 Tex. Reg. at 387 (describing Act as "instrument to ensure open and responsible government"); HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (reporting that proponents of TIAs say they will result in well-thought-out regulations); *see also* Robert J. Kleeman, *New Statutory Remedies* (predicting that Act will raise awareness of regulators), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995).

207. *See* HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (asserting that Act will save state money by preventing action that could require compensation); ANN WALTHER, PROPERTY RIGHTS: A BALANCE OF INTERESTS 6 (House Research Organization) (Feb. 1, 1995) (citing supporters of

(1) waste resources better used for substantive purposes; (2) discourage action necessary and important to protect the public health, safety, and welfare; and (3) sacrifice protection of the property of most people for the benefit of a few.[208] Further, critics question whether meaningful TIAs can be performed without identification of the specific property to be affected.[209]

Because enforcement of the Act is provided essentially by litigation or the threat of litigation, government compliance with the TIA requirements at least in the initial period will be largely voluntary. The Texas Natural Resource Conservation Commission (TNRCC), the state's environmental agency, is the government entity expected to be most affected by the Act.[210] In anticipation of the TIA requirements that became effec-

---

Act for proposition that TIAs will prevent action such as that which cost North Carolina $1.6 million in *Lucas* case).

208. *See, e.g., Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Mary Arnold, League of Women Voters of Texas) (tape available from House Committee Services) (opposing Act because it would severely inhibit environmental protection initiatives, be expensive to implement, and create new bureaucratic red tape); *Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Sandra Skrei, Regional Representative, National Audubon Society) (tape available from House Committee Services) (opposing Act because funds would be better spent on substantive purposes such as purchasing parklands rather than on TIAs); Stefanie Scott, *Environmentalists Decry Property Rights Bill*, SAN ANTONIO EXPRESS-NEWS, Apr. 14, 1995, at B8 (reporting that opponents of Act claim that each TIA would cost between $7,500 and $35,000); Joint Statement by EDF, *supra* note 176, at 1 (agreeing with September 26, 1994 letter signed by majority of state attorneys general criticizing proposed federal assessment act).

209. Joint Statement by EDF, *supra* note 176, attachment, Glenn P. Sugameli, Counsel for the National Wildlife Federation, *Standards for Comparing Takings Bills and Attorney General Guidelines to the Constitution.* This is a task that the Supreme Court has said is property-specific, and which the Court has itself undertaken only in a live controversy based on a full record. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 137 (1995). In determining whether a 25% reduction in property value has occurred, the need to precisely identify individual parcels of property for a meaningful evaluation seems even more critical. The Guidelines give no direction on the degree of effort required of government entities in identifying parcels of property that may be burdened by the proposed act. *See* Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (responding that OAG had not considered addressing whether government entity should be required to particularize properties that may be affected by 25% reduction in value).

210. Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4.

tive on January 1, 1996, the TNRCC began a model program in October 1995.[211] The model program includes a document explaining the TIA requirements, describing how the model TIA procedure is to be integrated into the normal rulemaking procedure, and providing a checklist to determine whether a TIA is required and how it should be performed.[212]

The TNRCC's model program calls for the Rulemaking Program Staff, with assistance from the Strategic Planning and Appropriations Division on the economic-analysis portion of the program, to prepare a concept paper explaining the background of the proposed rule.[213] If the concept paper is approved by the Rules and Policy Review Committee, the Rulemaking Program Staff fills out the checklist to determine whether a TIA is required.[214] The Legal Division will review the relevant materials and make the final determination as to whether the proposed action could constitute a taking.[215] If the proposed action is "determined to potentially constitute a taking," it is submitted to the TNRCC commissioners for a final decision.[216] A representative of the TNRCC commented that it is still too early to determine what effect the TIA requirements will have on the cost of rulemaking, but noted that no additional staff has been appropriated to handle the additional burden of TIA requirements.[217]

In addition to the initiatives underway in agencies such as the TNRCC, other government entities have begun to prepare for the TIA requirements. The OAG has scheduled briefings on the guidelines with many agencies as a part of the agencies' 120-day review period.[218] Moreover, the Texas Senate Natural Resources Committee has an interim charge to review the implementation of the Act by state agencies, and will be holding hearings periodically.[219] Despite these efforts, implementation of the

---

211. Telephone Interview with Diane Mazuca, Texas Natural Resource Conservation Commission Legislative Liaison (Jan. 9, 1996).

212. TNRCC Interim Guidance Document for Takings Impact Assessments for Rules (on file with the *St. Mary's Law Journal*).

213. *Id.*

214. *Id.*

215. *Id.*

216. TNRCC Interim Guidance Document for Takings Impact Assessments for Rules (on file with the *St. Mary's Law Journal*).

217. Telephone Interview with Diane Mazuca, Texas Natural Resource Conservation Commission Legislative Liaison (Jan. 9, 1996).

218. *See* Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (indicating that briefings on Guidelines are scheduled for state agencies).

219. *Id.* The first hearing was scheduled for January 24, 1996. *Id.*

TIA requirements by political subdivisions may prove problematic.[220] One observer has suggested that an immediate effect of the Act will be a "cottage industry" of lawyers and real estate appraisers helping political subdivisions write TIAs.[221] The long-term effect of the Act on government entities, however, remains to be seen.

B. *Property Owners*

The effect that the Texas Private Real Property Rights Preservation Act will have on property owners, like the effect that the Act will have on government entities, is difficult to predict. To the extent that the Act's TIA requirements are successful in increasing the awareness of government entities concerning the effect their actions have on property values, property owners whose land is subject to regulation covered by the Act should benefit.[222] However, because the type of land-use regulation that affects most property owners—municipal zoning—is excluded, relatively few property owners will benefit directly from the Act.[223] Further, because the type of regulation that seems most objectionable to rural interests—federal regulation—is beyond the reach of the Act, the Act's value is even more limited.[224]

---

220. *See* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 17, 1996) (noting that political subdivisions are "on notice" by Texas Register, but suggesting that successful lawsuit may be needed to get their attention).

221. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (quoting attorney who has studied Act for public school district); *see also* Telephone Interview with Ingred Hansen, Counsel, Texas Land Office (Sept. 20, 1995) (predicting that TIA requirement will be boon for real estate appraisers).

222. *See* HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (noting that TIAs will protect property owners from bearing cost of regulations, which should be paid by public); ANN WALTHER, PROPERTY RIGHTS: A BALANCE OF INTERESTS 5 (House Research Organization) (Feb. 1, 1995) (describing assessments as necessary buffer between power of government and rights of people).

223. *See* Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (expressing concern of proponents of property rights that exclusion of municipalities will exempt most government takings); HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (noting that city zoning exception and other exceptions in Act leave great deal of leeway for regulation); *see also* Memorandum from Office of Texas Senator Teel Bivins to author 2 (Jan. 11, 1996) (on file with the *St. Mary's Law Journal*) (explaining that city zoning was exempted because citizens are more accustomed to regulation).

224. *See New Property-Rights Bill May Not Assist Ranchers: U.S. Land-Use Regulations Supersede State Law*, DALLAS MORNING NEWS, July 3, 1995, at D8 (reporting that sponsor of Act acknowledges that Act will not prevent federal government regulation).

Relief under the compensation provisions may apply to an even smaller number of property owners, namely, those who can prove a twenty-five percent reduction in property value, can afford to prove it in court, and can bear the risk of loss.[225] These burdens, coupled with the uncertainties inherent in novel issues of law and jury verdicts,[226] suggest that there will be no rush to litigate under the Act.[227] Perhaps the most likely claimant under the Act is the property owner in the zone of transition between urban and rural areas—the developer within a municipal ETJ.[228] In addition to developers, operators of large waste-disposal operations or manufacturers whose operations are subject to environmental regulations may have sufficient financial incentives to bring a claim under the Act.[229]

Even those landowners with the inclination and wherewithal to pursue a claim must overcome significant obstacles in litigation. Supporters of the Act stress the difficulty of proving a reduction in property value be-

---

225. *See* HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (reporting that supporters of Act say there will not be spate of lawsuits because such lawsuits would be too expensive and time consuming).

226. *See, e.g.*, Robert J. Kleeman, *New Statutory Remedies* (observing that making takings question one of fact is beneficial to property owners to degree that jury trial is favorable to them), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE 1, 21 (1995); Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (reporting that single biggest factor that will determine effect of Act is jury verdicts); Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (suggesting that because cases will be decided by juries rather than judges, outcome of such cases will be less predictable).

227. *See* HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (predicting few lawsuits under Act because of cost to plaintiffs).

228. *See* Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (suggesting that developers in municipal ETJs are property owners most likely to sue under Act); *see also* Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (observing that perceived over-regulation by City of Austin in its ETJ was cited by supporters as reason to include some ETJ regulation in Act); Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (reporting that during Guidelines-development process, cities asked whether subdivision plat approval would be subject to Act).

229. *See Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Mary Alice Van Kerrenbrook) (tape available from House Committee Services) (positing that denying permit for toxic waste dump could result in takings judgment against state under Act).

cause the market value of land generally reflects the restrictions on its use.[230] Accordingly, one attorney who represents property owners suggests that the most likely effect of the new cause of action available under the Act will be increased bargaining power for property owners negotiating with government agencies over issues such as variance and permit conditions, rather than an increase in litigation.[231]

C. *The Judicial System*

In light of the obstacles facing property owners who pursue a claim under the Act, and despite some predictions of an avalanche of lawsuits,[232] the Act's effect on the judicial system may be minimal. The limitations on the types of actions and government entities to which the Act applies, the small number of property owners who will be affected and have standing, the financial disincentives to sue, and the uncertainty of outcome suggest that there will be relatively little litigation under the Act.[233] Because the Act makes the determination of whether government action constitutes a taking a question of fact rather than one of law, the uncertainty-of-outcome factor may have a particularly deterrent effect.[234] This major departure from Texas case law[235] appears to have

---

230. *See* Robert J. Kleeman, *New Statutory Remedies* (stating that because most land has many available economic uses, proving 25% reduction in value for any one use, such as adult bookstore, would be difficult), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 16 (1995); Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (noting that real estate market anticipates effect of regulation on property value); Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (explaining that property owner who paid $100,000 for land that would be worth $200,000 if permit was granted would not have reduction in value for purposes of Act if permit was denied).

231. Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 16 (1995).

232. *See* Stefanie Scott, *Environmentalists Decry Property Rights Bill*, SAN ANTONIO EXPRESS-NEWS, April 14, 1995, at B8 (quoting Ken Kramer, state director of Lone Star Chapter of Sierra Club, who said that bill will lead to so many lawsuits it should be called "Lawyers Full-Employment Act").

233. *See* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (discussing Senator Bivins's view that number of provisions of Act will prevent rush to litigate).

234. TEX. GOV'T CODE ANN. § 2007.023(a) (Vernon special pamphlet 1996).

235. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984) (stating that whether compensable taking occurred is question of law). It is unclear whether § 2007.023(a) applies to constitutional takings as well as statutory takings. Although the language of the Act could be interpreted to mean that both are to be decided as questions of fact, it seems more likely that constitutional takings will continue to be

been based on the belief that juries will be more favorable than judges to property owners.[236] Additionally, because enforcement of the Act is largely dependant on the threat of litigation, all of the factors that discourage litigation may result in the Act being less effective than intended.[237]

There are, however, many significant issues that ultimately must be answered by the courts.[238] For example, the "identical requirements" language of the provision applying the Act to a municipality acting in its ETJ is open to varying interpretation.[239] This provision limits the applicability of the Act to municipality action "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 juris-

---

decided as questions of law. *See* Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (predicting that constitutional takings inquiry will remain question of law); Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (suggesting that statute will not be interpreted to overturn case law on constitutional takings).

236. *See* Robert J. Kleeman, *New Statutory Remedies* (noting that change to make question one of fact was to avoid judicial interpretations favorable to government), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 15 (1995); Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (citing Act's sponsor, Senator Teel Bivins, as saying that jury findings will provide relief for property owners who have had no other recourse); Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996) (stating that property rights advocates were concerned about decisions of fiscally conservative judges who were more interested in protecting public than rights of property owners). Adler drafted some of the proposed legislation's language submitted by property rights advocates. Telephone Interview with Stephen Adler, Attorney (Jan. 8, 1996).

237. *Cf. Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Ken Kramer, Lone Star Chapter of Sierra Club) (tape available from House Committee Services) (suggesting that one possible outcome of Act would be for TIAs to become meaningless statements in which agencies routinely report that impact cannot be determined).

238. *See* Robert J. Kleeman, *New Statutory Remedies* (describing Act and identifying key issues that will need to be determined by courts), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 15–17 (1995); *see generally* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (collecting commentary on Act and describing language that is vague but critical).

239. *See* TEX. GOV'T CODE ANN. § 2007.003(a)(3) (establishing applicability of Act to ETJ municipal actions).

diction of the municipality."[240] This language may be interpreted narrowly to include only action that on its face applies merely to a part of the ETJ, or broadly to include any action in a city's ETJ that "in effect" or "as applied" does not impose identical requirements on the entire ETJ.[241]

These types of court decisions regarding the Act could significantly alter not only the Act's effectiveness, but the entire direction of property rights protection in Texas.[242] Decisions that interpret exceptions broadly and immunize government action from property owners' claims may result in demands that the legislature strengthen the Act. On the other hand, if judgments are favorable to property owners, they may be seen by the public as denying government the ability to provide necessary protection for the environment.[243] These factors suggest that the effect of the Act upon the judicial system will depend to a substantial degree first on how the courts themselves interpret the Act and thereafter upon the response of property owners and the public.

D. *The Public*

The public expects to be able to enjoy clean air and water and to be protected by the government from neighbors whose noise, dust, traffic, or

---

240. *Id.*

241. Telephone Interview with Robert J. Kleeman, General Counsel for Take Back Texas (Jan. 3, 1995). Under the broad interpretation, an ordinance ostensibly applying to the entire ETJ that facially imposed identical restrictions that have unequal effects might be subject to the Act. *Id. But see* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996) (suggesting that legislative intent was narrow view and asserting that Act applies only to action that is not identical on its face). Another municipal action in a city's ETJ that might be covered under the broad view of the Act is the approval of subdivisions. *See* Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (reporting that some municipalities had addressed issue in response to Texas Attorney General's requests for comments on TIA guidelines). Because subdivision platting approval is specific to a plan and therefore to the site, it may be characterized as an action not identical in the entire ETJ. *Id.* In this case, all municipal subdivision platting in a municipality's ETJ would be subject to the Act. *Id.* The guidelines issued by the OAG do not determine this issue, and the OAG has not expressed an opinion on this question. Goodhope suggested that ultimately it will be determined by the courts. *Id.*

242. *See* Robert J. Kleeman, *New Statutory Remedies* (observing that, regardless of speculation by pundits, courts will determine how Act affects government and property owners and legislature will respond to those decisions), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995).

243. *Cf.* Neil Modie, *Land-Use, Gamble Issues Loose, Seattle Voters Reject 9-District City Council*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1995, at A1 (describing defeat by majority of 60% of voters in referendum of property rights act that was passed in legislature by 70% of representatives and 57% of senators).

odor diminishes their quality of life or property values.[244] As the economy expands and the population grows, more and more people move into formerly rural areas, creating the conditions that have justified the need for urban land-use regulations for nearly seventy years.[245] More people and more wealth require more factories, which may pollute, and more landfills, which no one wants next door.[246] Ironically, the same public demand that drives up property values inevitably leads to the controls that some claim diminish those property values.[247]

Unlike Washington[248] and Arizona,[249] where voters rejected property rights protection acts in public referendums because of the acts' per-

---

244. *See* Laura Tolley, *Survey of Environment, Texans Yield Surprises*, HOUSTON POST, Mar. 8, 1995, at A1 (reporting results of poll of Texas residents taken in December 1994). Poll results indicated that 72% of Texans "believe stronger regulations are needed to control industrial pollution" and 64% agree that "some restrictions on private property rights are justified to protect important aspects of the environment." *Id.* National polls show similar results. For example, in a *Times-Mirror* poll conducted in October 1995, 79% of those polled said they agree or strongly agree with the statement that "this country should do whatever it takes to protect the environment." *People and the Press: Voter Anxiety Dividing GOP*, Roper Center for Public Opinion Research, Nov. 14, 1995, *available in* Westlaw, POLL-C Database.

245. *See* Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (upholding city density limitations as legitimate exercise of police power to protect citizens from ill effects of urbanization); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (affirming that cities may impose land-use controls, including historic preservation ordinances, to preserve "the character and desirable aesthetic features of a city").

246. *See* Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 241 (1994) (exploring solution to common problem that people need essential services such as hazardous waste disposal, but do not want facilities in their neighborhoods); Scott D. Cahalan, Recent Development, *NIMBY: Not in Mexico's Back Yard?: A Case for Recognition of a Human Right to Healthy Environment in the American States*, 23 GA. J. INT'L & COMP. L. 409, 409–10 (1993) (describing widespread public opposition in Texas and Mexico to hazardous-waste facility proposed near Sierra Blanca, Texas); *Wirthlin Quorum Survey*, Roper Center for Public Opinion Research, Aug. 1995 (reporting that 83% of those polled expressed concern about decline in property values if landfill were to be located within 10 miles of their home), *available in* Westlaw, POLL-C Database.

247. Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1449 (1993) (observing that urbanization led to zoning, which limited rights of landowners); James M. McElfish, Jr., *Property Rights, Property Roots: Rediscovery of the Basis for Legal Protection of the Environment*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,231, 10,248 (May 1994) (noting that most conflicts between land-use regulation and property rights arise from intensified uses of rural land).

248. *See* 1995 WASH. LEGIS. SERV. 261 (West) (describing terms of Private Property Regulatory Fairness Act, which was ultimately defeated); *see also* Rob Taylor, *The Voters Soundly Reject R-48*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1995, at A1 (stating that Referendum 48, which would have been nation's broadest law requiring government compensation to property owners for regulatory takings, was defeated).

ceived threat to the environment, the public in Texas has been largely indifferent to the Texas Private Real Property Rights Preservation Act.[250] This indifference could change if a large segment of the public—those people whose property likely will not be directly affected by the Act—see it as a threat to their own property, quality of life, or to the environment.[251] This public awareness could occur if, for example, a court construed the Act so as to invalidate government action that attempted to prohibit some major project considered objectionable by the public, such as a toxic-waste or nuclear-waste facility, or even an ordinary landfill.[252] The fact that the owners of such a project might prove to a court that the project did not represent a "real and substantial threat to public health and safety" may make it no less undesirable to the public. Additionally, because the Act applies only to property that is the "subject of" the government action, property owners near such a proposed facility would have no cause of action even if they could show the value of their property was reduced by twenty-five percent or more.[253]

---

249. Arizona's assessment act, passed in 1992, was defeated in a referendum election on November 8, 1994. ARIZ. REV. STAT. ANN. §§ 37-221 to -223 (Supp. 1995).

250. *See* Peggy Fikac, *Hundreds Protest Property-Rights Bill, Opponents Say Measure Would Weaken Health, Safety, Environment Protections*, DALLAS MORNING NEWS, Apr. 9, 1995, at A30 (reporting that only approximately 300 people protested property rights bill).

251. Joint Statement by EDF, *supra* note 176, at 5. Many environmentalists who are critical of the Act believe that most government regulation of land use enhances, rather than harms, property values by prohibiting a few property owners from using land in a way that harms the property of many others. *See* ANN WALTHER, PROPERTY RIGHTS: A BALANCE OF INTERESTS 7 (House Research Organization) (Feb. 1, 1995)(describing opposition to property rights legislation). Environmentalist critics assert that, to the extent that the Act prevents government from enforcing regulations that protect some property owners from their neighbors' pollution or other inappropriate land uses, the Act damages rather than protects property rights. Joint Statement by EDF, *supra* note 176, at 5; *see Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Mary Alice Van Kerrenbrook) (tape available from House Committee Services) (describing property owners' successful efforts to prevent licensing of nearby landfill and noting that Act would prevent government from denying licenses).

252. *See* Laura Tolley, *Survey of Environment, Texans Yields Surprises*, HOUS. POST, Mar. 8, 1995, at A1 (noting results of public opinion poll in which 72% of those polled said they believe "stronger regulations are needed to control industrial pollution"); *see also Harris Poll*, Roper Center for Public Opinion Research, Dec. 6, 1995 (reporting that 97% of those polled thought there was either great deal of health risk or some health risk in living near hazardous-waste site), *available in* Westlaw POLL-C Database.

253. Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 5 (1995); *see also* Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (reporting that Act does not apply to owners of property adjoining state-owned or state-regulated property); Telephone

Another source of increased public concern about government action might arise from the frequent complaints of property owners that the government is not doing enough to protect them from common, objectionable, and value-reducing uses of nearby land such as concrete batch plants.[254] To address these types of concerns, environmentalists who are otherwise critical of the Act have suggested that the TIA requirements be made "even-handed" by requiring a TIA whenever a government agency *weakens* a regulation or grants a permit that allows a use which could reduce the value of nearby property.[255] For example, if the TNRCC considers a repeal or modification of landfill regulations that would result in making it less desirable to live nearby, critics contend that a TIA should be required to consider the potential reduction in the value of the property that is near the landfill, but which is not directly affected by the

---

Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (confirming that "subject of the governmental action" language was intended to preclude any cause of action for adjacent property owners).

254. *See* Loydean Thomas, *Bulverde Citizens Use Air Monitors*, SAN ANTONIO EXPRESS-NEWS, Jan. 8, 1996, at A7 (describing residents' struggle in unincorporated part of Comal County to prevent concrete batch plant from opening in their neighborhood). The Thomas article quotes the leader of the citizens group as saying, "We don't feel TNRCC is protecting us." *Id.* A TNRCC representative responded that under current TNRCC rules, the agency could not deny the plant an exemption, and the problem would have to be addressed by the state legislature giving counties zoning authority. *Id.*; *see Bulverde Plant, TNRCC in Focus*, SAN ANTONIO EXPRESS-NEWS, Jan. 7, 1996, at L2 (editorializing that counties should have zoning authority and TNRCC regulatory power should be expanded to prevent objectional uses such as concrete batch plant proposed in Bulverde); *see also* Linda L. Welch, *Williamson Residents Want Hearing on Concrete Plant*, AUSTIN AMERICAN-STATESMAN, Oct. 11, 1995, at B6 (describing opposition of Williamson County residents to proposed concrete batch plant).

255. Joint Statement by EDF, *supra* note 176, at 6. An adjoining property owner may, at least have standing to sue for invalidation of an action performed without a required TIA. The Act provides a cause of action for an owner of property "affected" by a government action, which may be interpreted to include one who has not suffered a taking under the Act, or even one whose property was not the subject of the action. *See* TEX. GOV'T CODE ANN. § 2007.044(a) (Vernon special pamphlet 1996) (granting standing to bring suit to private real property owners "affected" by government action); Robert J. Kleeman, *New Statutory Remedies* (suggesting that standing under assessment section does not depend on impact or value loss), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 20–21 (1995); Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (suggesting that question of who has standing under TIA provision will ultimately have to be determined by courts). In such a case, unlike under the compensation section of the Act, an adjacent property owner would have a cause of action. *See* Telephone Interview with Sam Goodhope, Special Assistant Attorney General, Executive Administration Division, Office of the Texas Attorney General (Jan. 5, 1996) (suggesting that court might find that owner of property not subject to government action might have standing to sue under TIA cause of action).

change in regulations.[256] Supporters of the Act respond that such an expansion of the TIA requirement beyond its purpose of protecting land from direct government regulation would require so much additional work by state and local government that the Act would collapse under its own weight.[257]

Other provisions of the Act that may prove troublesome are the nuisance[258] and health-and-safety[259] exceptions, which supporters of the Act say will safeguard necessary environmental regulations.[260] For example, critics of this Act point out that the need for environmental protection statutes and regulations is a result of the failure of the common law of nuisance to adequately protect the environment, and therefore that the nuisance exception is bound to be as unsuccessful as the common law at protecting the environment.[261] Additionally, because the health-and-

256. Joint Statement by EDF, *supra* note 176, at 5.

257. *See* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996) (characterizing suggestions of some critics that Act should apply to property that is not subject to regulation as intended to defeat operation of Act by making it unworkable).

258. TEX. GOV'T CODE ANN. § 2007.003(b)(6). The Act does not apply to "an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state." *Id.*

259. *Id.* § 2007.003(b)(13). The Act does not apply to an action that: "(A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose." *Id.* For example, if a government entity decides that its action is exempt from the TIA requirement under a nuisance or health-and-safety exception, the entity will not have to perform the full TIA. Guidelines, *supra* note 196, §§ 2.16, 3.22(b), 21 Tex. Reg. at 390–91. This may lead to a critical element of the analysis not being made public. *See* TEX. GOV'T CODE ANN. § 2007.042 (requiring public notice of action with summary of TIA when action "may result in a taking").

260. *See* HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg. R.S. 10 (1995) (describing Act proponents' view that exemptions for public and private nuisance and for public health and safety immunize governmental action necessary to protect environment); Telephone Interview with Steve Bresnen, General Counsel and Director of Policy for Texas Lieutenant Governor Bullock (Jan. 4, 1996) (predicting that governmental agencies will most likely invoke either nuisance or health and safety exceptions to defend statutory takings challenges); Telephone Interview with Susan Combs, Representative, Texas House of Representatives (Jan. 4, 1996) (suggesting that denial of permits for many objectionable uses will not subject governmental entities to liability under Act because of nuisance or health and safety exceptions).

261. *See Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Mary Kelly, Texas Center for Policy Studies) (tape available from House Committee Services) (testifying that common law of nuisance is too narrow to protect environment); *Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar.

safety exception is seemingly limited in scope, it may also fail to protect the environment. The Act's health-and-safety exception continues the approach begun in Executive Order 12,630.[262] It is apparently intended as a limitation on the broader police-power exception, which allows regulations that promote the general welfare in addition to health and safety to escape purview under traditional takings analysis.[263] If the Act exempts only action that advances health and safety, and does not exempt action that promotes the welfare of the public generally, the degree to which environmental regulations will be affected is an open question.[264]

28, 1995) (statement of Mary Alice Van Kerrenbrook) (tape available from House Committee Services) (asserting that there is no Texas case in which pollution has been stopped by common law nuisance claim). A similar concern was addressed by Justice Kennedy in his concurring opinion in *Lucas v. South Carolina Coastal Council*, in which he declared: "The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Justice Kennedy went on to deny that nuisance prevention can be the "sole source of state authority to impose severe restrictions." *Id.*

262. Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994).

263. *See, e.g.*, *Penn Cent.*, 438 U.S. at 125 (upholding historic preservation ordinance based on police power); *Turtle Rock Corp.*, 680 S.W.2d at 805 (upholding parkland-dedication requirement based on police power). Kleeman has suggested that the Act's language is consistent with the decision in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) requiring individualized determinations by cities in cases involving permit conditions or exactions. Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 12 (1995). The public welfare concept has a broad range; it has been used to justify historic preservation ordinances and parkland-dedication requirements. *See Penn Cent.*, 438 U.S. at 138 (placing dispositive value on concept of public well-being); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984) (discussing importance of public welfare and exaction requirements).

264. *See* Telephone Interview with Teel Bivins, Senator, Texas Senate (Jan. 12, 1996) (responding to questions about whether Act would apply to specific types of environmental regulations and stating that each application would require analysis of facts of case in relation to Act's requirements). There are, of course, many types of environmental regulations. Some, such as prohibitions on dumping toxic waste, appear more clearly to advance health and safety than others, such as historic-preservation ordinances. Supporters of the Act have consistently maintained that the Act does not require the government to pay a property owner who is prohibited from operating a toxic waste dump or who is denied a permit for a sexually oriented business, nor does it prevent reasonable regulations to reduce pollution and protect the environment. Susan Combs, *Property-Rights Bill Doesn't Guarantee Compensation*, AUSTIN AMERICAN-STATESMAN, May 15, 1995, at A9; *see Private Real Property Rights Preservation Act: Hearings on Tex. H.B. 2591 Before the House Comm. on Land and Resource Management*, 74th Leg., R.S. (Mar. 28, 1995) (statement of Robert Kleeman) (tape available from House Committee Services) (suggesting that proposed Act could appropriately exempt acute forms of pollution); Ann Walther, PROPERTY RIGHTS: A BALANCE OF INTERESTS 5 (House Research Organization) (Feb. 1, 1995) (describing supporters' recognition that land-use regulations are necessary to protect public health and safety). Apparently, supporters of the Act do not consider regulations of the type currently in use to protect endangered species under federal legislation reasonable

In addition to potentially limiting the scope of the state's police power, the health-and-safety provision also sets a standard for government action that may be higher than that established in prior Texas case law.[265] Critics of the Act fear that these changes to the traditional police-power exception will prevent the government from protecting the health and safety of the public.[266]

---

regulations to protect the environment because the Endangered Species Act (ESA) is frequently cited as the type of government over-reaching that the Act is intended to prohibit. *See, e.g.*, Ann Walther, PROPERTY RIGHTS: A BALANCE OF INTERESTS 6 (House Research Organization) (Feb. 1, 1995) (describing ESA as burdensome, unnecessary environmental law that inhibits development and costs jobs); Robert J. Kleeman, *New Statutory Remedies* (describing federal ESA regulations as unrelated to pollution or nuisance), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 1 (1995); Robert Elder, Jr., *Taking the Property Rights Plunge: Now That Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4 (citing Senator Teel Bivins's assessment that one purpose of Act was to prevent state agencies from promulgating ESA restrictions).

265. HOUSE COMM. ON LAND AND RESOURCE MANAGEMENT, BILL ANALYSIS, Tex. S.B. 14, 74th Leg., R.S. 10 (1995) (describing opponents' belief that Act would establish definition of taking broader than state or federal constitution); ANN WALTHER, PROPERTY RIGHTS: A BALANCE OF INTERESTS 8 (House Research Organization) (Feb. 1, 1995) (summarizing opponent's claim that statutory taking goes beyond constitutional requirements); Robert J. Kleeman, *New Statutory Remedies* (observing that federal and state constitutional takings standards allow overreaching regulation), *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 21 (1995). Texas cases have imposed a "reasonable relationship" test, which requires that the regulation "substantially advance a legitimate state interest" and be "reasonable rather than arbitrary." Town of Sunnyvale v. Mayhew, 905 S.W.2d 234, 259 (Tex. App.—Dallas 1994, n.w.h.); *see also* Dolan v. City of Tigard, 114 S. Ct. 2309, 2318–20 (1995) (observing that many jurisdictions, including Texas, use "reasonable relationship" test to determine takings questions); *Turtle Rock Corp.*, 680 S.W.2d at 807 (requiring reasonable connection between need for recreation created by new subdivision and cost to developer of parkland-dedication requirement). This test requires consideration of both the need for the regulation and the benefit it provides. *Turtle Rock Corp.*, 680 S.W.2d at 807. That is, the court must determine that some genuine need exists and that the regulation is limited to providing a reasonable response to that need. *Id.* The case law presumes that land-use regulation is a reasonable and valid exercise of police power, and places an extraordinary burden of proof on the plaintiff to show that there is no reasonable connection. *Id.*; *Mayhew*, 905 S.W.2d at 263; *see* Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971) (explaining that plaintiff attacking city ordinance has "extraordinary burden"). This means that "if reasonable minds may differ" on whether the government action has a substantial relationship to health and safety, the action is a permissible exercise of the police power and thus an exception to the takings doctrine. *Turtle Rock Corp.*, 680 S.W.2d at 805; *Hunt*, 462 S.W.2d at 539.

266. Robert J. Kleeman, *New Statutory Remedies*, *in* CLE INTERNATIONAL: REGULATORY TAKINGS CONFERENCE § 5, at 12 (1995); *see* Joint Statement by EDF, *supra* note 176, at 2 (expressing concern that limiting government action to responses to "substantial" threats to health and safety means few government actions will meet test).

In sum, it is apparent from this review of the interests of the various affected parties that the effectiveness of the Act will depend upon a number of interrelated factors. These factors include the conduct of government regulatory agencies, whether property owners will sue under the compensation or assessment provisions of the Act, jury verdicts and court decisions interpreting numerous provisions of the Act, and public perception of and response to the effects of the Act. As time passes and the actual effects of the Act become clearer, however, the Texas Legislature can better evaluate whether legislative modifications are necessary.

VI. Conclusion

The Texas Private Real Property Rights Preservation Act provides an innovative statutory response to the perceived inability of constitutional law to adequately protect property rights from environmental regulations that were themselves a reaction to rapid changes in population, technology, and knowledge. By providing a statutory bright-line definition of regulatory takings at a twenty-five percent reduction in the value of real property, the Act tips the scale in favor of private property owners in the limited number of cases in which it applies. Moreover, by requiring takings impact assessments, the Act may increase government regulators' awareness of private property rights relative to other public interests. Whether the Act serves its intended goals, however, will depend on the complex interaction of regulators, property owners, the courts, and ultimately the public.