

THE EVOLUTION OF STATE TAKINGS LEGISLATION AND THE PROPOSALS CONSIDERED DURING THE 1997-98 LEGISLATIVE SESSION

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INTRODUCTION

Since 1991, every state in the Union has considered a proposal to increase protection of private property rights through the codification of the Takings Clause.¹ Throughout the history of Takings Clause jurisprudence, judicial determinations of what constitutes a taking and how takings should be remedied have been confused, muddled, and inconsistent. The proposed private property rights laws attempt to remedy the chaos courts have made of both federal and state takings jurisprudence.

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1. U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”). See Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 412 (1997).

Originally, courts found a taking only when the government physically removed property from the possession of a citizen. However, in 1922, the Supreme Court recognized that a government regulation could devalue a landowner's property to such an extent as to constitute a taking without physical change of possession.² For sixty-five years thereafter, lower courts disagreed over the correct way to remedy such a "regulatory taking." However, in 1987, the Supreme Court finally stated explicitly that an aggrieved landowner was entitled to monetary compensation for the devaluation of property.³ Despite this decision, the Supreme Court has yet to create a reliable method to determine when a regulatory taking actually occurs.⁴

Property rights activists have not been satisfied with the slow pace of judicial interpretation of the Takings Clause and, in recent years, have turned to their elected leaders for relief.⁵ Both Congress and the executive branch have tried, but nevertheless have failed, to address adequately the grievances of this now powerful interest group.⁶ State legislatures have met with more success; in 1995, there were over 120 "takings" bills considered by forty-two of the state legislatures.⁷ By 1997, more than half of those states had enacted such measures. During the 1997-98 legislative session, twenty-five different takings bills have been introduced in sixteen states.

2. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that taking can occur when a regulation goes "too far," even absent physical transfer of possession to the government).

3. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 319-22 (1987) (declaring that a property owner can be compensated either through invalidation of the government regulation at issue or merely through payment of money).

4. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated . . ."); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins.").

5. The property rights movement, primarily a rural construct, emerged in true grassroots fashion. Land users, including farmers, ranchers and developers, saw their livelihood threatened by increased government regulation. These individuals soon began to organize and raise their grievances as a group to local political leaders. In turn, these leaders put pressure on bureaucrats and politicians at higher levels of government and, within time, their complaints began to reach conservative politicians in Washington. See Thomas G. Douglass, Jr., Note, "Have They Gone Too Far?" *An Evaluation and Comparison of 1995 State Takings Legislation*, 30 GA. L. REV. 1061, 1070 (1996); see also *infra* note 20 and accompanying text.

6. See *infra* text accompanying notes 20-28.

7. Emerson & Wise, *supra* note 1, at 412.

This note evaluates the similarities and differences between each of these current bills as well as how the bills compare with those passed during previous legislative sessions. While legislators formerly crafted legislation with an eye towards winning favor with property rights activists, today's bills reflect legislators' desire to make laws that facilitate the resolution of takings claims. Fortunately, the most recent proposals are more complex and practical than their predecessors, which were often criticized as simplistic, purely symbolic, or unworkable. Part I considers the rise of state takings legislation and focuses on the reasons why property rights activists have increasingly looked to the states to enact such legislation over the last decade. Part II describes the evolution of the types of remedies for the takings problem considered by the states and tracks three distinct phases, or "waves," of state takings laws passed since 1991. This section focuses on the various models of legislation state legislators have proposed, and on how the complexity and practicality of, and opposition to, these proposals has changed over the last seven years. Finally, Part III analyzes the proposals considered during the current legislative session, both individually and as a whole.

I

RISE OF STATE TAKINGS LEGISLATION

In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes, writing for the majority, first defined a regulatory taking: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁸ Unfortunately for property owners, Holmes's opinion did not consider adequately two points. First, the opinion failed to discuss what the proper remedy would be in instances in which a court found a taking; neither monetary compensation nor invalidation of the regulation at issue was discussed in the opinion.⁹ Second, the Holmes opinion did not articulate how future courts should determine when a regulation goes "too far."¹⁰ The former point was addressed in *First English*,¹¹ but the second point still leaves courts confused and property rights activists disgruntled.

8. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

9. See Leslie M. MacRae, *The Regulatory Takings Bill: A Cure with Unintended Side Effects*, 5 DICK. J. ENVTL. L. & POL'Y 57, 58 (1996).

10. See Frank A. Vickory & Barry A. Diskin, *Advances in Private Property Protection Rights: The States in the Vanguard*, 34 AM. BUS. L.J., 561, 567 (1997).

11. See *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 319, 322 (1987) (holding that just compensation for regulatory taking can take form of either monetary payment or invalidation of proposed government action).

This deficiency, however, was not an issue for more than sixty years following *Pennsylvania Coal*, largely because the concerns of landowners were not at the forefront of the political agenda.¹² During that time, legislators were inclined to increase the government's regulatory power, rather than to limit it. As a result, Congress passed numerous environmental regulations that expanded the scope of the federal government's power. The effort peaked in the 1970s, when Congress passed sweeping reforms like the Resource Conservation and Recovery Act¹³ and the National Environmental Policy Act,¹⁴ both of which had the effect of greatly limiting the rights of landowners.¹⁵

Following the massive reforms of the late 1970s, a political backlash began against these laws, which were considered by some to be "environmental overkill."¹⁶ Public sentiment had shifted. Many citizens were angered by the restraints imposed upon them by government regulation and began to speak out. Some of the more practical protesters looked to the courts and the Takings Clause for relief. They argued that environmental regulations, by curbing landowners' land use in deference to environmental concerns, forced individuals to bear the costs of a public benefit—exactly what the Takings Clause was designed to prevent.¹⁷ Courts, while not specifically crafting a remedy, began to endorse the logic of the protesters' arguments. As a result, the modern era of takings jurisprudence was born.

Unfortunately, in this modern era, courts have failed to state coherently the extent of the rights protected by the Takings Clause. At present, there are at least four tests used by courts to determine whether or not a regulatory taking has occurred.¹⁸ These tests can be

12. See Nancie G. Marzulla, *State Private Property Rights Initiative As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 613-14, 630-33 (1995) (discussing both rise of environmental regulations and how federal, state and local governments focused thereon for more than two decades, as well as discussing the increasing electoral success of property rights advocates in races for Congress and state legislatures).

13. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1994).

14. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994).

15. See Marzulla, *supra* note 12, at 616-22 (discussing passage and effects of Resource Conservation and Recovery Act and the National Environmental Policy Act, among other statutes). For a complete discussion of these laws and others passed during the same time period see *id.*

16. See *id.* at 614-18 (coining term "environmental overkill" and discussing how overkill "gave way" to state takings legislation).

17. See *id.* at 625.

18. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 (1992) (offering bright-line test for regulatory taking; proposed regulation constitutes taking when 100 percent of fair market value of property eliminated); *Loretto v. Tele-*

criticized as largely empty protections since between 1922 and 1992, the Supreme Court failed to recognize a single regulation as having gone “too far.”¹⁹

Property rights activists, growing in number despite finding no relief from the judiciary, began turning to other branches of the federal government for a solution. As might be expected, many politicians in both Congress and the executive branch were eager to ally themselves with a populist movement gaining momentum across the nation. The first official act occurred in 1988, when President Ronald Reagan drafted Executive Order 12,630, entitled “Governmental Actions and Interference with Constitutionally Protected Property Rights” (Reagan’s Order).²⁰

Reagan’s Order, crafted in response to two major Supreme Court decisions of the late 1980s,²¹ has two primary components. First, it instructs all agencies within the executive branch to determine whether proposed actions may have takings implications.²² If such implications exist, the governing agency is required to conduct a “Takings Impact Assessment” (TIA).²³ This study must explore the costs of the proposed action to all affected property owners and consider why alternative actions could not accomplish the same end through less intrusive means.²⁴ Second, Reagan’s Order restricts the

prompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (declaring taking any time regulation causes any physical invasion of person’s property); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (offering multi-factored ad hoc test for finding regulatory taking); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (finding taking any time government regulation goes “too far”). The specifics of these tests are beyond the scope of this note. Each test, however, is supported by Supreme Court precedent and none provides property owners or government officials with adequate notice as to when a particular regulation might actually result in a taking. *See Penn Cent.*, 438 U.S. at 123-24 (“[T]his court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”).

19. *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 194 (1997).

20. Exec. Order No. 12,630, 53 *Fed. Reg.* 8859 (1988).

21. *See* *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

22. *See* Attorney General’s Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (unpublished) (issued June 30, 1988) § V(D) (defining “takings implications” very broadly); *see also* Robin E. Folsom, *Executive Order 12,630: A President’s Manipulation of the Fifth Amendment’s Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 *B.C. ENVTL. AFF. L. REV.* 639, 659-61 (1993).

23. *See* Folsom, *supra* note 22, at 667.

24. *See id.*

agencies' ability to approve the proposed actions once they are determined to have takings implications.²⁵

Upon its enactment, Reagan's Order met with exalted praise from property rights activists. However, that praise was short-lived. The enormous administrative costs associated with conducting TIAs often left agencies to choose between passing any regulation or conducting a cursory TIA.²⁶ By necessity, the latter choice is usually made, and as a result, Reagan's Order "has gone mostly unused."²⁷ In fact, ten years after its birth, two authors recently declared that Reagan's Order "has been essentially rescinded by the Clinton Administration."²⁸

In response to the ineffectiveness of Reagan's Order, property rights activists looked to Congress to fill the void. In 1990, Senator Steve Symms of Idaho introduced the first federal takings bill.²⁹ The bill strengthened Reagan's Order by applying it to all government agencies. Despite the bill's populist appeal, it was rejected in the Senate by a 52-43 vote.³⁰ Similar federal legislation was proposed in subsequent years and met a similar fate.³¹

Recent federal measures move beyond mere codification of the procedural requirements of Reagan's Order. Among them are proposals which: (1) give property owners greater notice as to when possible regulatory takings will occur;³² (2) clearly define what level of intrusion must exist before a taking will be found;³³ (3) restrict the scope of current federal laws that curb land use;³⁴ and (4) ease the process by

25. *See id.* at 663-67.

26. For a more detailed account of the criticisms surrounding Reagan's Order, see *infra* notes 66-68 and accompanying text.

27. *See* Marzulla, *supra* note 12, at 630.

28. Emerson & Wise, *supra* note 1, at 414.

29. *See* Marzulla, *supra* note 12, at 630.

30. *See id.*

31. *See id.* at 630-33. Senator Symms introduced a second bill in 1991 which also failed. In 1993, Senator Robert Dole of Kansas introduced a Symms-like bill, entitled the "Private Property Rights Act of 1993." The Dole proposal met with strong opposition from President Bill Clinton and was subsequently defeated. Apparently, the Clinton Administration was wary of codifying Reagan's Order, because doing so would prevent future administrations from amending it. *See id.*

32. *See* Omnibus Property Rights Act of 1997, S. 781, 105th Cong. § 403(c)(2) (1997) (establishing "uniform and more efficient federal process for protecting property owners' rights guaranteed by the [F]ifth [A]mendment"); Private Property Rights Act of 1997, S. 709, 105th Cong. § 5(e) (1997) (requiring each federal agency to complete TIA prior to any action which might result in taking); Private Property Protection Act of 1997, H.R. 95, 105th Cong. § 5 (1997) (essentially codifying Reagan's Order).

33. *See* S. 781 §§ 401-403; S. 709 § 5; H.R. 95 § 5.

34. *See* Private Property Owners' Bill of Rights, S. 953, 105th Cong. (1997) (outlining various rights that should be guaranteed to private property owners).

which aggrieved landowners can seek a remedy.³⁵ While periodically one of these proposals passes either the House or Senate, to date, Congress has not been able to forge a coalition necessary to pass a bill.

Consequently, property rights activists have achieved their most noteworthy successes in the state legislatures.³⁶ Since 1991, every state has considered takings legislation—a total of more than 250 bills in all.³⁷ As of this writing, thirty-nine bills had become law in twenty-six states.³⁸

II

EVOLUTION OF STATE TAKINGS LEGISLATION

Representative government, whether on the national or state level, is not suited for making sweeping change quickly. Frequently, ideas are debated over many legislative sessions before a workable bill is passed, and often the final product looks very different from the initial proposal. This is especially evident in the area of state takings legislation. Although it has been only seven years since the first property rights bill was considered by a state legislature, some noticeable patterns of change have emerged. Property rights legislation has evolved from symbolic measures to detailed, practical solutions that are capable of producing real reform.³⁹ This evolution has been marked by three distinct waves of property rights legislation.

A. *The Initial Wave of State Legislation: 1991-93*

Prior to 1995, states took four basic approaches to property rights legislation: preliminary measures, procedural measures, assessment provisions, and compensation measures.⁴⁰ The former two, discussed

35. See Property Owners Access to Justice Act, S. 1204, 105th Cong. (1997) (simplifying procedures by which property owner can have claim reviewed by judge); Private Property Rights Implementation Act, H.R. 1534, 105th Cong. (1997) (companion bill of S. 1204); Tucker Act Shuffle Relief Act, H.R. 992, 105th Cong. (1997) (allowing property owners to bring suit in either federal district court or United States Court of Federal Claims). Interestingly, both H.R. 1534 and H.R. 992 passed the House Judiciary Committee on October 7, 1997, and H.R. 1534 passed the entire House on October 22, 1997 by a vote of 248-178.

36. See Emerson & Wise, *supra* note 1, at 412.

37. See *id.*

38. See *id.*

39. See *State Approaches to Protecting Private Property Rights: Hearings before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong. (1997) [hereinafter *Hearings*] (statement of Harvey Jacobs, Ph.D., Professor & Chair, Department of Urban & Regional Planning, and Professor, Institute for Environmental Studies, University of Wisconsin-Madison), available in WESTLAW, 1997 WL 14151888.

40. See Emerson & Wise, *supra* note 1, at 413.

below, are now seen largely as precursors to the latter two, more complex, types of legislation. However, during the wave of legislation between 1991 and 1993 (the "Initial Wave"), preliminary and procedural bills were the only takings bills capable of surviving debate.

Preliminary bills declared the importance of property rights, established joint legislative commissions to study the problem of infringement of those rights, and created continuing education programs for government bureaucrats with the power to craft regulations curbing land use.⁴¹ Washington, the first state to pass a property rights bill in 1991, proposed this type of measure.⁴² Since that time, Arizona, Idaho, Rhode Island, South Dakota, and Virginia have each enacted similar legislation.⁴³ However, these laws made no procedural or substantive changes in the area of takings jurisprudence.⁴⁴ Usually, they were passed to win favor with the public or as a compromise between rival legislative factions.⁴⁵

Procedural bills typically proposed changes in the administration of government programs and regulations that would afford property owners greater property rights protection.⁴⁶ These measures usually were targeted at specific programs, and required consideration of the extent of the possible intrusion on property rights before any program was carried out or regulation passed.⁴⁷ Yet, these bills often failed to outline the extent of "consideration" required or what remedies, if any, the agency was supposed to provide. Despite these deficiencies, Colorado, Idaho, Montana, and Virginia each enacted such measures during the Initial Wave.⁴⁸

Neither preliminary nor procedural bills offered real substantive changes in the protection of property rights. Legislators, torn between a desire to respond to the populist property rights movement and a need to protect the government's regulatory power, were wary of pass-

41. *See id.* at 413-14. A recent example of such an initiative is included in the current proposal pending before the Illinois state legislature. That bill initially declares that "it is the policy of this State that no private property may be taken for public use by governmental action without payment of just compensation." H.B. 212 § 5-5(a), 90th Gen. Assembly, Reg. Sess. (Ill. 1997). By itself, such language does nothing substantive for property owners.

42. WASH. REV. CODE § 36.70A.370 (1995). *See also* Vickory & Diskin, *supra* note 10, at 596.

43. *See* Emerson & Wise, *supra* note 1, at 413.

44. *See id.*

45. *See id.* at 414.

46. *See id.*

47. *See id.* The procedures created by these bills resemble the procedures created by Reagan's Order and by assessment bills, but are not as detailed or substantive. *See infra* text accompanying notes 52-71.

48. *See* Emerson & Wise, *supra* note 1, at 414.

ing radical reform during the Initial Wave. During the next wave, however, when the property rights movement gained even more support, sentiments began to change. Assessment and compensation bills were then proposed as more substantive solutions.

B. *The Second Wave of State Legislation: 1993-95*

Whereas the majority of bills considered in the Initial Wave contained only one type of measure, the proposals of the following waves were rarely set forth individually.⁴⁹ Between 1993 and 1995 (the “Second Wave”), the bills offered for passage most often contained either assessment or compensation measures, but sometimes contained a hybrid of both.⁵⁰ Any preliminary or procedural measures were built into these more complex proposals.

1. *Assessment Provisions*

Commonly referred to as “look before you leap” measures, assessment provisions attempt to prevent regulatory takings *ex ante*.⁵¹ These statutes typically require state agencies, and sometimes local governments, to assess whether their actions might constitute takings under either federal or state law.⁵² Basic assessment bills generally codified the requirements of Reagan’s Order.⁵³ In doing so, most assessment bills required a state agency or local government to conduct a TIA prior to passage of any regulation which could have an impact upon property owners.⁵⁴ However, the details of assessment bills actually varied considerably from one bill to another.

The type of takings legislation most commonly proposed since 1991 is patterned on the assessment model. From 1991 to 1994, over sixty bills containing assessment measures were considered by more than thirty state legislatures.⁵⁵ To date, the governors of fifteen states have signed provisions of this type into law.⁵⁶

49. During the 1997-98 legislative session, Alaska was the only state to consider a pure assessment bill. *See infra* text accompanying notes 116-18.

50. *See generally* Emerson & Wise, *supra* note 1, at 414-18 (discussing various assessment and compensation measures).

51. *See* Marzulla, *supra* note 12, at 633.

52. *See* Emerson & Wise, *supra* note 1, at 414 (discussing general characteristics of assessment statutes).

53. *See supra* notes 20-25 and accompanying text. *See also* Cordes, *supra* note 19, at 205; Emerson & Wise, *supra* note 1, at 414; Marzulla, *supra* note 12, at 633.

54. *See* Cordes, *supra* note 19, at 205; Emerson & Wise, *supra* note 1, at 414; Marzulla, *supra* note 12, at 633.

55. *See* Marzulla, *supra* note 12, at 633.

56. *See* Cordes, *supra* note 19, at 204.

The most notable variation between the assessment bills concerns the party responsible for conducting the TIA. Three states specifically require their attorneys general to conduct the assessment of all proposed regulations.⁵⁷ Critics charge that these statutes fail to grant any additional property rights protection, since attorneys general are already charged with the responsibility of making legal determinations about proposed regulations.⁵⁸ In response, a number of states have instead patterned their bills more closely on Reagan's Order by requiring individual agencies to assess their own actions according to guidelines set by the attorney general.⁵⁹ For example, West Virginia and Michigan require that assessments be performed by certain state agencies.⁶⁰ Some states only require assessments to be conducted by agencies of the state government,⁶¹ while at least four extend the responsibility to local and municipal governments.⁶²

Another difference between assessment provisions is the type of government actions subject to review. Virtually every state requires assessments for proposed agency rules and regulations.⁶³ Other states go beyond this basic requirement by subjecting a broad range of other government actions to review.⁶⁴ Finally, others require assessments for such minute procedures as decisions concerning the approval or rejection of licenses and permits.⁶⁵

In practice, these differences blur together because the debate over assessment provisions is consistent regardless of the details of

57. See Emerson & Wise, *supra* note 1, at 414 (citing takings laws of Indiana, Delaware and Tennessee).

58. See Cordes, *supra* note 19, at 206 (“[These] statutes are unlikely to impose a significant burden on the attorney[s] general, who are skilled at making legal judgments and who typically must already make other legal determinations about the rules.”).

59. See, e.g., Emerson & Wise, *supra* note 1, at 414 (citing takings laws of Missouri, Montana, Utah, Kansas, Wyoming, North Dakota, and Texas). For a discussion of the criticisms of this type of law, see *infra* text accompanying notes 66-70.

60. See W. VA. CODE § 22-1-1 (1994) (requiring Department of Environmental Protection to make TIA assessment); MICH. COMP. LAWS ANN. § 24.423 (West Supp. 1997) (requiring Department of Environmental Quality or State Department of Transportation, as appropriate, to make TIA assessment in conjunction with attorney general); see also Cordes, *supra* note 19, at 208 (comparing statutes).

61. See Cordes, *supra* note 19, at 208 (“[O]ne-half of the states impose the assessment requirement on all state agencies but not on political subdivisions.”).

62. See *id.* at 208 (citing Washington, Idaho, Louisiana, and Texas statutes).

63. See *id.* at 209.

64. See *id.* (stating that permit approvals, license grants, and adjudicatory decisions can each be subject to takings analysis).

65. See *id.* (citing Montana and Michigan codes).

any particular proposed bill.⁶⁶ As previously mentioned, Reagan's Order is the original model for assessment bills proposed over the last seven years. In that time, the opponents of Reagan's Order developed a series of criticisms; some of these criticisms have been adopted by assessment opponents in state legislatures.

In 1988, when Reagan's Order was drafted, opponents contended that the administrative burden of conducting TIAs would bankrupt the government.⁶⁷ In 1994, when Arizona citizens voted to repeal the state's takings law, supporters of repeal made similar arguments criticizing the assessment provision contained in the law.⁶⁸ The fear was that, in an effort to avoid bankruptcy, the government would abandon its efforts to protect the environment and other resources of the state.

A second criticism of both Reagan's Order and state assessment laws concerns uneven enforcement. Despite noble intentions, neither the assessment laws nor Reagan's Order contain assurances that the TIAs called for will actually be conducted.⁶⁹ As a result, assessments are performed more or less vigorously depending on the inclinations of governors and state attorneys general. A few states have tried to remedy this deficiency in their assessment laws by, among other things, creating a private right of action.⁷⁰ However, the majority of states fail to adequately address this deficiency; as a result, their laws face the same practical problems as Reagan's Order.

Not all criticisms of Reagan's Order, however, are applicable to state legislation. For instance, in 1988, it was claimed that by forcing

66. See Emerson & Wise, *supra* note 1, at 415 (“[U]nless state attorneys general are more successful in sorting out the nettlesome dilemmas posed by the judicial takings doctrine than the U.S. Justice Department was in forming the attorney general’s guidelines issued to implement the executive order, the agencies are likely to be confronted with considerable ambiguity that is unlikely to reduce risk or costs.”). For a criticism of Reagan’s Order, see Jerry Jackson & Lyle D. Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 ENVTL. L. REP. 10463 (1988).

67. See Jackson & Albaugh, *supra* note 66 (discussing delay and costs associated with conducting assessments).

68. See Vickory & Diskin, *supra* note 10, at 596-97.

69. See, e.g., *McKinley v. United States*, 828 F. Supp. 888, 893 (D.N.M. 1993) (“[Reagan’s Order] is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law . . .”) (quoting Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988)). See also *Hearings*, *supra* note 39 (testimony of New Hampshire State Sen. Richard L. Russman) (“[U]nder a 1992 Delaware takings impact assessment law, the State Attorney General’s Office conducted a ‘canned’ regulatory review. This review routinely noted that virtually all regulations involving real property might result in a taking and that a more meaningful analysis can only be done on a property-specific basis.”).

70. See Cordes, *supra* note 19, at 210-12.

the attorney general to draft guidelines intended to avoid future takings, Reagan's Order was asking an agency to do what the Supreme Court had been unable to do.⁷¹ Arizona citizens did not have this argument at their disposal in 1994 because the Arizona legislation, like many of the assessment bills passed towards the end of the Second Wave, included a compensation measure.⁷² This portion of the law, as explained below, offered a bright-line rule as to when a taking actually occurred, so the attorney general was left with the task of merely advising state agencies on how to avoid crossing that threshold.

2. *Compensation Measures*

While assessment provisions seek to provide ex ante protection of property rights, compensation measures aim to accomplish this same goal ex post.⁷³ The essential feature of the compensation model is the creation of a threshold denoting the point at which a regulatory taking occurs. By doing so, a state legislature accomplishes, albeit in a prophylactic way, what the Supreme Court has been unable to do in the last seventy-five years.⁷⁴ Early proposals offered a "fifty percent solution"; each time government action resulted in a fifty percent drop in the fair market value of someone's property, a regulatory taking would be found and that landowner would be entitled to compensation.⁷⁵

Since 1993, twenty-five states have considered compensation bills.⁷⁶ The rate of passage of such bills, however, pales in comparison to that of assessment bills. Currently, only five states have compensation legislation in effect.⁷⁷ However, because compensation bills offer a bright-line definition of a taking, they are increasing in popu-

71. See generally Emerson & Wise, *supra* note 1, at 419 (stating that assessment statutes, by merely requiring that guidelines be developed, "assume that whoever is developing them . . . will be able to achieve greater clarity without increasing the risk of public liability. Thus the problem that has confounded the judiciary for the last 70 years is now shifted to state administrative officials.").

72. See ARIZ. REV. STAT. ANN. § 37-223(B)(3) (West 1993); see also *infra* text accompanying notes 82-86.

73. See Emerson & Wise, *supra* note 1, at 416.

74. Interestingly enough, this technique is borrowed from the Supreme Court. The Court has often used a prophylactic rule to safeguard a constitutional right it has found difficult to quantify. For instance, in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Court created such a rule to protect an individual's right against self-incrimination.

75. See Marzulla, *supra* note 12, at 634-35.

76. See Cordes, *supra* note 19, at 212.

77. See Emerson & Wise, *supra* note 1, at 416 (citing Florida, Louisiana, Mississippi, North Carolina, and Texas laws).

larity and are proposed far more often than their assessment bill counterparts.

Despite the fact that each proposed compensation measure shares this general “diminution in value” characteristic, the measures differ significantly from one another in detail and application.⁷⁸ Three variable factors are significant. First, and perhaps most obvious, is the degree of diminution in value which must occur before a regulatory taking will be found.⁷⁹ North Dakota chose the fifty percent figure, but other states like Mississippi (forty percent), Texas (twenty-five percent), and Louisiana (twenty percent) are more protective of property owners.⁸⁰ Some states (Florida first among them) now look to more qualitative measures of diminution such as the “inordinate burden” standard.⁸¹

Second, states differ on how to estimate the fair market value of property.⁸² As the classic analogy instructs, property is considered a bundle of rights rather than a parcel of land. Through “owning” land, the property owner controls entrance, exit, use, and the like. Diminution, therefore, can occur whenever the owner loses any of these rights. Legislative drafters differ on how to value the individual rights and whether or not certain rights should be considered in the mix. For instance, some laws have a nuisance exception whereby the government is always allowed to regulate an owner’s use of his land if such a regulation is intended to prevent a public nuisance, despite the resulting diminution in the property’s value.⁸³

The third difference evident among current compensation statutes is very similar to a variation that exists among assessment laws, namely the scope of actions affected. Some laws, like the Louisiana and Mississippi compensation statutes, only apply to owners of agricultural or forest land.⁸⁴ Other states restrict government actions that can be considered to diminish a property’s value.⁸⁵ Finally, still other

78. See Cordes, *supra* note 19, at 212.

79. See *id.*

80. For a comparison between the various percentage statutes, see Emerson & Wise, *supra* note 1, at 416.

81. See FLA. STAT. ANN. § 70.001 (Supp. 1998). For a definition of “inordinate burden,” see *infra* note 109.

82. See Cordes, *supra* note 19, at 213.

83. See *id.*; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992) (explaining nuisance doctrine and application by Supreme Court).

84. See Cordes, *supra* note 19, at 214 (citing LA. REV. STAT. ANN. §§ 3:3601-02 (Supp. 1997), which extends heightened takings protections for agricultural land, and MISS. CODE ANN. §§ 49-33-1 to -19 (West 1996), which provides heightened protection from takings for agricultural and forest property).

85. See Emerson & Wise, *supra* note 1, at 416-17.

states allow for the diminution percentage to be calculated after considering the cumulative diminution in a property's value, resulting from multiple government actions over time.⁸⁶

3. *Hybrid Laws*

Although compensation and assessment schemes are two very different models of legislation which evolved during the Second Wave, often laws were passed that combined the two schemes.⁸⁷ Part of the reason for this combination was to alleviate the burden imposed on the agency responsible for conducting the TIA. By giving these agencies a bright-line definition of a regulatory taking, it was easier to anticipate when a proposed regulation actually had takings implications. In addition, by combining the two models, legislators could avoid selective enforcement by governors and state attorneys general who might support the property rights movement less enthusiastically than their predecessors. Because of their *ex ante* and *ex post* protections, the laws combining compensation and assessment provisions were often hailed as providing sweeping property rights protection.

Towards the end of 1994, however, the hybrid model began to come under serious attack. First, Arizona citizens repealed their hybrid law by referendum just two years after it was passed.⁸⁸ Then in 1995, less than a year after the Washington legislature passed its second property rights bill, this one patterned after the hybrid model, Washington voters recalled the measure.⁸⁹ The debate in both states was seen by scholars as a culmination of increasing dissatisfaction with the hybrid model and the general form of state takings laws altogether.⁹⁰ Voters feared the administrative burden of the assessment model, but were also unsatisfied with the remedy provided by the compensation model. State legislators have attempted to address these concerns during the current wave of legislation.⁹¹

C. *The Current Wave of State Legislation: 1995-Present*

Property rights activists have three consistent aims for shaping court enforcement of the Takings Clause: the first is to decrease the number of takings that occur; the second is to specifically define what

86. *See id.*

87. *See Cordes, supra* note 19, at 204.

88. *See Vickory & Diskin, supra* note 10, at 597.

89. *See id.* at 598.

90. *See id.* In addition, for a lengthy discussion on the debate and vote to repeal both the Arizona and Washington laws, *see id.* at 596-98.

91. *See id.* at 598.

actions constitute a taking; and the third is to provide property owners with remedies and a suitable forum for adjudicating their claims.⁹² The hybrid model, appearing first during the Second Wave, addressed the first two concerns, but often ignored the third. Legislators seem to have thought that if they accomplished the first two goals, the third would be rendered moot. In other words, if state takings law could ferret out potential takings *ex ante*, as well as provide a bright-line notice as to when takings occur, any backlog or delay in prosecuting claims would disappear. However, this has not been the case.

Takings laws passed during the Second Wave did provide increased protection of property rights in spirit, but that protection was lacking in practice. The laws often failed to include measures that would ensure enforcement.⁹³ For instance, laws enacted by Idaho, Kansas, and Washington are each limited to self-enforcement and therefore fail to provide any protection of property rights beyond that which the government chooses to offer.⁹⁴ Absent an opportunity for property owners to challenge violations of the law, these measures, if not voluntarily enforced by the government, offer no more protection than the symbolic measures of the Initial Wave.

Beginning in 1995, and through the present (the “Current Wave”), states have made proposals which recognize that any property rights measure must include a provision guaranteeing an enforceable remedy for the landowner. These measures, discussed below, either create a private right of action for violations of the law, include some other form of judicial review, or create a series of procedures designed to facilitate the adjudication process. Unlike its predecessors, this new model recognizes that takings will occur regardless of *ex ante* protections and focuses instead on resolving conflicts to the satisfaction of both the property owners and the government.

Challenging a government action as a taking of private property can be extremely burdensome for the landowner. Not only do the varied and ad hoc inquiries offered by courts make victory uncertain, but even prior to reaching a courtroom, there are economic and procedural obstacles that aggrieved property owners must overcome to get their grievances addressed.⁹⁵ These hurdles are frequently more burden-

92. See William L. Inden, Comment, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL'Y 119, 129-31 (1996).

93. See *supra* text accompanying notes 51-86.

94. See Cordes, *supra* note 19, at 210-11.

95. See David Spohr, Note, *Florida's Takings Law: A Bark Worse than Its Bite*, 16 VA. ENVTL. L.J. 313, 321-22 (1997) (contending that, due to litigation costs, takings cases are rarely brought unless devaluation exceeds \$100,000).

some than the alleged taking; thus, property owners often make the pragmatic choice not to challenge the government action.⁹⁶ In the Current Wave, these barriers are the prime targets for reform initiatives.⁹⁷

Cost is the primary barrier a property owner must overcome to bring a takings claim. Property owners must give up time and money securing often expensive appraisals in order to begin the process of petitioning the government for compensation. If the government disputes the claim, the owner must sacrifice additional time and money to hire an attorney to take up the cause. Often this expense and inconvenience outweigh the value of the taking itself, and property owners, discouraged by dim prospects for success, opt not to seek relief.⁹⁸

The second obstacle is procedural in nature and concerns what has become known as a “finality” or “ripeness” determination.⁹⁹ Prior to hearing a case, judges are required to make a preliminary finding that a claim is ripe for judicial review. This requirement means that the claimant must exhaust all potential avenues of relief before a court will decide a takings claim.¹⁰⁰ Unfortunately, the specific avenues to pursue are not laid out in discernible form, so that obtaining a finding that a takings claim is ripe is often quite difficult. According to one author, this obstacle alone prevents nearly ninety-four percent of all takings claims filed in federal court from ever reaching a judge.¹⁰¹

A third major obstacle concerns the forum within which takings claims can be properly raised. For instance, federal courts found that Reagan’s Order did not include a private right of action.¹⁰² Therefore, the very government engaging in the protested action was the only party responsible for the Order’s enforcement.¹⁰³

96. *See id.*

97. *See generally Hearings, supra* note 39 (testimony of Professor Harvey Jacobs) (discussing increasing appeal of conflict resolution laws).

98. *See Spohr, supra* note 95, at 322; *see also Hearings, supra* note 39 (testimony of Nancie Marzulla, President and Chief Legal Counsel for Defenders of Property Rights) (detailing numerous examples of costly takings cases).

99. *See Spohr, supra* note 95, at 321 (defining “ripeness determination”).

100. *See id.* at 321.

101. *See id.*

102. *See, e.g., McKinley v. United States*, 828 F. Supp. 888, 892-93 (D.N.M. 1993).

103. An additional forum problem on the federal level was the subject of a recent debate in the United States House of Representatives. The Tucker Act requires property owners who seek compensation from the federal government for alleged takings to bring claims in the United States Court of Claims. However, because the Act does not provide for injunctive relief, those who wish to seek equitable relief from the government (i.e., a repeal of the regulation) must file their actions in federal district court. As a result, federal district courts often dismiss takings claims on the ground that the property owner should seek compensation in the Court of Claims, and the

Since 1995, states have begun to recognize that these enormous burdens present a larger threat to private property rights than any government rule making authority. The current logic is that if property owners are unable to adjudicate their claims in an efficient manner, protections cannot be enforced. In the Current Wave, states are evaluating various methods by which to remedy this situation, and at least four states have successfully enacted legislation addressing these concerns.¹⁰⁴

Arizona, the first to respond, met the takings dilemma with a law that created an ombudsman for private property rights.¹⁰⁵ This official is responsible for easing the economic burden on landowners by receiving their initial complaints, investigating the legality of the government's action, and even representing the claimant in proceedings against the government. By incurring some of the costs of pursuing takings claims and steering property owners through the process, Arizona removed many of the obstructions to bringing a claim.

Other states have attempted to address the economic burden in a different manner. These states offer property owners inexpensive forums within which to raise their claims. The forums, in turn, are designed to foster settlements between landowners and the government rather than merely prepare the parties for court. This aspect of the conflict resolution measure is the essence of its practical appeal. Unlike the models from the Second Wave, where the law simply overburdens one party at the expense of the other, these statutes look to resolve disputes to the satisfaction of both parties. An example of this approach is offered in Maine's "Land Use Mediation Program" that provides landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions.¹⁰⁶

Court of Claims dismisses on the ground that the property owner should seek equitable relief in the district court. See H.R. REP. No. 105-323 (Oct. 21, 1997) <<ftp://ftp.loc.gov/pub/thomas/cp105/hr323.txt>>. In 1997, Congressman Lamar Smith introduced legislation to remedy this "Tucker Act Shuffle." His bill, which recently passed the House prior to the winter recess, would allow property owners to choose the forum within which to bring their claims. See H.R. 1534, 105th Cong. (Oct. 22, 1997).

104. See *Hearings*, *supra* note 39 (testimony of Professor Harvey Jacobs explaining that Arizona, Florida, Maine, and Montana each have conflict resolution statutes which were passed in 1995 or earlier).

105. See ARIZ. REV. STAT. ANN. § 41-1313 (West 1997).

106. A landowner may apply for mediation under this law if that landowner: (1) has suffered significant harm as a result of a governmental action regulating land use; (2) applies for mediation within the time permitted under all applicable laws or rules of the court; (3) has sought and failed to obtain a permit, variance, or special exception and has pursued all reasonable avenues of administrative appeal; and (4) has sought and failed to obtain governmental approval for land use and has the right to judicial

The most noteworthy conflict resolution bill proposed during the Current Wave has been the Bert J. Harris, Jr. Private Property Rights Protection Act ("Harris Act") enacted by the state of Florida at the end of 1995.¹⁰⁷ Like Maine's law, the Harris Act attempts to ease the procedural and economic burdens on landowners by creating a specialized process to foster out-of-court settlements.¹⁰⁸

Specifically, the Harris Act requires the government to pay just compensation any time one of its regulations imposes an "inordinate burden" on a landowner.¹⁰⁹ Consistent with current jurisprudence, a property owner must secure a ripeness determination before obtaining judicial review.¹¹⁰ However, rather than acting as a bureaucratic barrier to takings claims, the ripeness determination in Florida is designed to resolve the conflict between the property owner and the government.¹¹¹ The Harris Act outlines the procedures for each party to follow in order to make a claim ripe for adjudication.¹¹² Because each party has a better understanding of the other side's motives, they can often work together toward a settlement rather than stand opposed in anticipation of a court battle.

Regardless of their practical appeal, conflict resolution bills do not lack opposition and many of the criticisms mirror those directed at other types of takings bills. For instance, it was predicted that the Harris Act would make it prohibitively expensive for the government

review because of either a final agency decision or the failure or refusal of an agency to act. ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 1997).

107. See FLA. STAT. ANN. § 70.001 (West 1997).

108. See Cordes, *supra* note 19, at 239 ("The statute creates a settlement process to resolve issues prior to litigation.").

109. See FLA. STAT. ANN. §70.001(2) (West 1997). An "inordinate burden" can be loosely defined as arising whenever government action: (1) leaves a property owner with existing or vested uses that are unreasonable, such that the property owner bears permanently a disproportionate share of a burden imposed for the public good; or (2) renders a property owner permanently unable to attain the reasonable, investment-backed expectation for the existing use of the property. See *Hearings, supra* note 39 (testimony of Professor Steven J. Eagle, George Mason University School of Law); see also Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247, 250-59 (1997) (discussing various cases in Florida where courts have attempted to forge workable definition of "inordinate burden").

110. See FLA. STAT. ANN. § 70.001(5)(a) (West 1997).

111. See Butts, *supra* note 109; Spohr, *supra* note 95, at 329-31.

112. Florida's "ripeness" procedures all occur during a 180-day notice period required prior to filing an action for compensation in state court. The Act uses this time to require the government entity to assemble a settlement offer for the property owner. The parties may negotiate from that point, but if talks break down, the suit may go forward. See *Hearings, supra* note 39 (testimony of Professor Steven J. Eagle).

to enact new land use regulations.¹¹³ Additional arguments, however, have been specific to the conflict resolution model itself. During the debate over the Harris Act, it was charged that by encouraging out-of-court settlements, the law would dilute the state's takings jurisprudence, leaving future jurists without sufficient guidance.¹¹⁴ Further, opponents of the Harris Act contended that decentralized procedures could result in inequitable results where two similar cases settle very differently.¹¹⁵

Despite these criticisms, the practical appeal of the conflict resolution model has had its greatest effect on the bills considered during the Current Wave. In fact, almost half the states debating takings proposals during the 1997-98 legislative session considered bills of this kind. Some are modeled after the Harris Act, while others are more unique. In addition, the vast majority of legislators incorporated minor conflict resolution remedies into their proposals. As the following discussion reveals, all the bills reflecting Second Wave models either create a private right of action or specifically define the requirements for obtaining a ripeness determination.

III

1997-98 STATE TAKINGS PROPOSALS

As of this writing, sixteen states had considered twenty-five takings bills during their most recent legislative session (the "Current Bills"). For most states, these bills represent second or third attempts to codify the protections of the Takings Clause. However, other states are attempting to improve laws enacted during a previous session. Of the twenty-five Current Bills, one is an assessment bill, six are compensation bills, four are hybrids, and fourteen are conflict resolution proposals. Despite the fact that these proposals are inspired by different waves of state legislation, there are many similarities among them. Regardless of the general format, the Current Bills demonstrate legislators' desire to craft practical laws (with objective standards) that seek to remedy takings disputes to the satisfaction of both landowners and state governments.

113. See, e.g., Sylvia R. Lazos-Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315, 380, 386 (1995) (explaining that cost of bringing claim will be high even under conflict resolution scheme). See also Cordes, *supra* note 19, at 240.

114. See, e.g., Lazos-Vargas, *supra* note 113, at 397-98 (recommending theoretical framework for interpreting "inordinate burden" test).

115. See *id.* at 391.

A. *Pure Assessment or Compensation Bills*

In 1997, seven states considered pure assessment or compensation proposals.¹¹⁶ These bills mirror those passed primarily during the late months of the Initial Wave and throughout the Second Wave of state takings legislation, with one stark difference: previously, assessment bills were, by far, the most popular measures proposed and signed into law. Nonetheless, during the 1997-98 session, only Alaska considered a pure assessment bill.¹¹⁷

Alaska House Bill 154 mimics Reagan's Order in that it calls for TIAs prior to government action and requires the State's Department of Law to craft guidelines to aid officials in performing their analyses.¹¹⁸ Unfortunately, like Reagan's Order, Alaska House Bill 154 calls upon administrative officials to define that which has baffled both state and federal judges—what constitutes a taking. As discussed below, however, some of the differences between Alaska House Bill 154 and Reagan's Order may serve to keep the former proposal from suffering the same fate if enacted into law.

In contrast to Alaska, six states have proposed pure compensation bills. Five of the states chose to define a regulatory taking according to a specific reduction in fair market value.¹¹⁹ The most far-reaching state legislation is that of Montana, which proposes a mere five percent diminution before triggering the right to inverse condemnation proceedings.¹²⁰ Massachusetts is one of the few states to consider a non-percentage bill.¹²¹ Massachusetts House Bill 1224 requires compensation any time a government regulation "imposes a restraint of

116. The seven states were: Alaska, H.B. 154, 20th Leg., 1st Sess. (Alaska 1997); Arkansas, H.B. 1977, 81st Gen. Assembly, Reg. Sess. (Ark. 1997); Maine, H.B. 914, 118th Leg., 1st Sess. (Me. 1997); Massachusetts, H.B. 1224, 181st Gen. Ct., Reg. Sess. (Mass. 1997); Minnesota, H.F. 2773, 80th Leg., Reg. Sess. (Minn. 1997); Montana, H.B. 306, 55th Reg. Sess. (Mont. 1997); and New Mexico, H.B. 1281, 43d Leg., 1st Sess. (N.M. 1997). The latter six proposed compensation provisions.

117. See Alaska H.B. 154.

118. See *id.* § 3-2.

119. See Ark. H.B. 1977 (requiring twenty percent diminution); Me. H.B. 914 (requiring fifty percent diminution); Minn. H.F. 2773 (requiring ten percent diminution); Mont. H.B. 306 (requiring five percent diminution); N.M. H.B. 1281 (requiring twenty-five percent diminution).

120. See Mont. H.B. 306 § 3(2).

121. See Mass. H.B. 1224. Minnesota's legislature also considered a non-percentage bill during this session. See H.F. 2216, 80th Reg. Sess. (Minn. 1997). This bill found a regulatory taking any time the government action restrained a land use existing when the property owner originally purchased the property. The bill was introduced on May 14, 1997, by Rep. Tunheim. However, in 1998, rather than re-introducing H.F. 2216, Rep. Tunheim accepted the less radical, but more substantive, Minnesota House Bill 2273.

land use on such portion or parcel of property for public benefit.”¹²² While this bill seems quite sweeping in theory, in practice it will likely offer landowners no better remedy than the current judicial process, as courts struggle to quantify a “restraint of land use.”¹²³

Whether assessment or compensation, the “pure” bills share three characteristics. First, the bills make clear that they are not expanding the instances when regulatory takings occur; instead, they are merely creating circumstances in which takings can be easily recognized and therefore avoided. Second, each bill includes a declaration that in no instance shall a taking be found where the restraint imposed constitutes regulation of a public nuisance. This latter point, previously made clear by a majority of court decisions, is codified in the bills.¹²⁴

The third universal characteristic of the Current Bills is the creation of a private right of action.¹²⁵ By rejecting self-enforcement, these bills afford property owners the added assurance that the government will comply with the bill’s requirements before, or at least after, it takes any intrusive action. Unfortunately, the existence of a right of action is not a guaranteed solution. While it may serve to ensure property owners a forum in which to air grievances, it often fails to guarantee an efficient or speedy process. The hybrid bills recently proposed succeed, in part, to remedy this deficiency.

B. Hybrid Proposals

In 1997, three states introduced hybrid proposals.¹²⁶ Two of the states, New York and Illinois, opted for a percentage provision calling for compensation any time government regulation causes a diminution

122. Mass. H.B. 1224 § 19K(1)(a).

123. Mass. H.B. 1224 § 19K(9). Massachusetts House Bill 1224 defines “[r]estraint of land use” as “any action, requirement, or restriction by a governmental entity, other than actions to prevent or abate public nuisances, that limits the use or development of private property.” See *id.* Since this definition is quite broad, courts will likely disagree on its reach and property owners will be left without much more protection than they currently have.

124. The majority of the bills contain language declaring that they are not offering more protection to landowners than that afforded by the federal and the respective state’s constitution. See Alaska H.B. 154, 20th Leg., 1st Sess. § 3 (Alaska 1997); Ark. H.B. 1977 § (b); Me. H.B. 914 § 846; Minn. H.F. 2773 § 4; Mont. H.B. 306 § 2; N.M. H.B. 1281 § 5; Mass. H.B. 1224 § 19K(1)(b).

125. See Alaska H.B. 154 § 3; Ark. H.B. 1977 § 8; Me. H.B. 914 §§ 844, 846; Minn. H.F. 2773 § 7; Mont. H.B. 306 § 3(4); N.M. H.B. 1281 § 5; Mass. H.B. 1224 § 19K(10).

126. As discussed, hybrid bills combine the assessment requirement with a compensation model. The result is an attempt to ease the administrative burden of conducting TIAs by offering a bright-line definition of a regulatory taking. The three states to consider such bills in 1997 were Illinois, New York, and Utah.

of fifty percent in fair market value.¹²⁷ Utah's bill is analogous to Massachusetts's pure compensation measure, Massachusetts House Bill 1224, because it requires compensation for any "restraint of land use."¹²⁸ In considering the assessment provisions, both Illinois and Utah mimic Reagan's Order by requiring that TIAs be conducted by the regulatory bodies designated by the states' respective departments of law.¹²⁹ New York chose instead to require its attorney general to specifically approve any proposed land use regulation prior to enactment.¹³⁰ All three states require state-conducted TIAs to be made public and to include an evaluation of alternative options. Only Utah and Illinois impose this obligation on local governments.¹³¹

During the Second Wave, the addition of a compensation provision to the popular assessment model assuaged concerns that a takings law would bankrupt the government. This adaptation limited the expense of conducting TIAs without sacrificing property rights protection.¹³² During the Current Wave, as the debate focuses on conflict resolution schemes, the hybrid bills are not the most practical and innovative remedies available. As a result, they are proposed less frequently. However, the Illinois, New York, and Utah bills do reflect attempts to combine practicality with comprehensive property rights protection.

Two noteworthy provisions evidence this fact. First, similar to the pure bills, all three hybrids offer a private right of action to enforce their provisions.¹³³ Illinois limits this right to the compensation portion of its bill, but New York and Utah allow property owners to sue the government for violating either protection.¹³⁴ In addition, New York and Illinois go one step further than simply providing a forum by including a second very practical provision. Like the Harris Act, these bills codify the requirements for a ripeness determination and therefore minimize some of the procedural obstacles and bureaucratic entanglements obstructing property owners' path to court. Both laws

127. See H.B. 212, 90th Gen. Assembly, Reg. Sess. § 10-5 (Ill. 1997); A.B. 5090, 220th Leg. Sess. § 447-D 2(B) (N.Y. 1997).

128. See H.B. 391, 52nd Leg., Gen. Sess. § 2 (Utah 1991). See *supra* notes 121-23 and accompanying text for an explanation of Massachusetts House Bill 1224.

129. See Ill. H.B. 212 § 5-15; Utah H.B. 391 § 3-2.

130. See N.Y. A.B. 5090 § 447-C.

131. See *id.* § 447-C; Ill. H.B. 212 § 5-15; Utah H.B. 391 § 3-2.

132. See *supra* text accompanying notes 83-86.

133. See Ill. H.B. 212 § 10-10; N.Y. A.B. 5090 § 447-E; Utah H.B. 391 § 7-1.

134. See Ill. H.B. 212 § 10-10; N.Y. A.B. 5090 § 447-E; Utah H.B. 391 § 7-1.

explain that a suit is “ripe for adjudication upon the enactment” of the regulation or other government action in question.¹³⁵

However, while these hybrid bills do reveal a shift towards provisions that ease the burden of the regulatory process, their real substance lies in their *ex ante* and *ex post* protections. Despite the aforementioned two practical provisions, the hybrid bills would do little to resolve the conflict between property owners and the government with respect to regulatory takings. By outlining a right of action and attempting to define ripeness, they are more resolution-oriented than the current pure bills. Nevertheless, because they make court battles more likely, the result is to shift the burden of resolving takings disputes to the very institution that has struggled with the issue for most of the century—the judiciary.

In addition, these proposals ignore that the initial purpose of state takings legislation was to decrease the role of the courts.¹³⁶ Assessment bills were popular because they would, in theory, inhibit governmental action that would result in takings. Similarly, compensation bills were proposed because they made takings more recognizable. In practice, however, these proposals, even when combined into a hybrid law, have failed to accomplish their stated purpose. The current hybrids, even with their added practicality, do not offer enough to really break the pattern of their predecessors. Only with the development of the conflict resolution scheme have legislators discovered a model for legislation with the potential for actually eliminating the backlog of takings conflicts.

C. Conflict Resolution Bills

Almost half of the bills introduced during the most recent legislative sessions were conflict resolution schemes. In total, nine different proposals were under consideration in seven states.¹³⁷ These states represent all regions of the country and, in some circumstances, include those states that passed takings laws during earlier sessions. Specifically, the bills can be sorted into two distinct groups: those

135. Ill. H.B. 212 § 10-15(c); N.Y. A.B. 5090 § 447-E.

136. *See supra* Part I.

137. These states were: Alabama, H.B. 485, Reg. Sess. (Ala. 1997); Colorado, S.B. 47, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997); Florida, H.B. 1889, Reg. Sess. (Fla. 1997); Idaho, H.B. 487, 54th Leg., 2d Reg. Sess. (Idaho 1998), H.B. 220, 54th Leg., 1st Sess. (Idaho 1997); Minnesota, S.F. 2272, 80th Leg., Reg. Sess. (Minn. 1997); South Carolina, H.B. 3591, 112th Gen. Assembly (S.C. 1997); and Washington, S.B. 5765, 55th Leg., Reg. Sess. (Wash. 1997), H.B. 1837, 55th Leg., Reg. Sess. (Wash. 1997).

analogous to the Harris Act and those that offer their own innovative remedies for resolving takings conflicts.

Of the bills, four should be included in the former of the two categories above. The first was introduced in Florida and actually builds on the protections afforded by the Harris Act.¹³⁸ This bill would expand the protections of the present law by applying its provisions to government regulations passed since May of 1990.¹³⁹ The three remaining bills were introduced in Idaho, Minnesota, and South Carolina.¹⁴⁰ These bills are virtually textual replicas of the Harris Act. Each bill calls for compensation any time government regulation imposes an inordinate burden on a property owner, creates very specific procedures on how to achieve a ripeness determination (designed to arrive at an out-of-court settlement to the conflict), and outlines the responsibilities of both property owners and the government under the new procedures. Therefore, despite its recent enactment, the Harris Act has already made its mark on the state takings law debate.¹⁴¹

The remaining five proposals, from four states, are quite varied. Bills offered in Idaho, Colorado, and Washington chose to incorporate some Harris Act provisions within their own innovative schemes.¹⁴² Others considered by the Alabama and Washington state legislatures achieve conflict resolution goals by combining some basic procedural changes with one of the Second Wave models.¹⁴³ In addition, all five bills differ in both the depth and scope of their provisions.

The most far-reaching bill was proposed in the Idaho House of Representatives.¹⁴⁴ Idaho House Bill 487 creates a new chapter in the Idaho Code, entitled "Protection of Real Property Rights."¹⁴⁵ This new chapter outlines in detail the path a property owner must follow to challenge a government action as an unconstitutional taking. That path includes a series of mediation procedures designed to impel set-

138. See Fla. H.B. 1889.

139. See *id.*

140. See Idaho H.B. 220; Minn. S.F. 2272; S.C. H.B. 3591.

141. See *Hearings, supra* note 39 (testimony of Rep. Chip Campsen) ("[South Carolina House Bill 3591] strikes a balance between property rights and the State's exercise of its police powers in land use planning by building upon established legal principles, while remaining flexible enough to afford the type of case by case analysis needed in this area of law.")

142. See Colo. S.B. 47 (passed by state legislature but vetoed by governor); Idaho H.B. 487; Wash. S.B. 5765.

143. See H.B. 485, Reg. Sess. (Ala. 1997); H.B. 1837, 55th Leg., Reg. Sess. (Wash. 1997).

144. Idaho's legislature considered two bills. The first, Idaho House Bill 220, is a virtual replica of the Harris Act. See *supra* text accompanying note 140. The second, broader bill is Idaho House Bill 487.

145. Idaho H.B. 487 § 2.

tlement, a special master hearing should mediation fail, and finally, a private right of action if the conflict persists.¹⁴⁶ The bill further imposes strict time limits upon each party for complying with the procedures as well as on the mediation process itself.¹⁴⁷ These “screens” are designed to remedy most takings claims well before parties need to consider going to court.

In addition, the drafters of Idaho House Bill 487 addressed some of the criticisms raised during previous debates over conflict resolution schemes. As mentioned, those opponents often contended that the laws would dilute the states’ takings jurisprudence, ultimately leading to inequitable resolutions of takings conflicts.¹⁴⁸ In response, the Idaho bill creates a public Internet repository for all reports filed under the new chapter and also specifically explains the allegations which will suffice to raise a takings claim.¹⁴⁹ These provisions virtually ensure an open process which can be fairly accessed by aggrieved property owners.

The four remaining bills are more limited, either in scope or complexity, than Idaho House Bill 487. For instance, rather than applying to land use regulations, Colorado’s bill restricts a local government’s ability to require a landowner to dedicate land to the public as a condition for approval of a land use permit.¹⁵⁰ The bill creates a series of settlement procedures for a property owner to follow which are intended to resolve the conflict, but limits the use of those procedures to these conditional dedications.¹⁵¹ Alabama also chose to limit the scope of its bill. The “Alabama Right to Farm and Forest Act” offers a remedy only to owners of agricultural and forestry land.¹⁵² Furthermore, the Alabama bill limits the reach of its conflict resolution procedure. Alabama House Bill 485 leaves it to the discretion of the trial court to decide whether the parties should attempt mediation or any other mutually agreeable alternative dispute resolution.¹⁵³

Alabama House Bill 485 is also one of three bills to combine conflict resolution procedures with a Second Wave model. These bills

146. *See id.*

147. *See id.*

148. *See supra* text accompanying notes 113-15.

149. *See* Idaho H.B. 487 § 1.

150. *See* Colorado, S.B. 47 § 1-2-29-20-203, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997).

151. *See id.* § 1-2-29-20-204.

152. *See* H.B. 485 § 2(b), Reg. Sess. (Ala. 1997).

153. *See id.* § 6(c).

offer a Current Wave version of a hybrid bill.¹⁵⁴ The Alabama bill opts for an assessment provision that, although limited to agricultural and forestry land, is similar to Reagan's Order.¹⁵⁵ However, unlike typical hybrid bills, Alabama's integration of two takings legislation models offers property owners no more remedy than if the bills were proposed individually.¹⁵⁶ The conflict resolution scheme does not build on the assessments, but instead outlines how to go about resolving a conflict should the government opt for the intrusive action despite the TIA's contraindication.

Conversely, Washington considered two different proposals that combine conflict resolution schemes with Second Wave models and create more protection through their integration. The first bill, proposed in the Washington House of Representatives, integrates a percentage provision with a very basic and somewhat weak conflict resolution provision.¹⁵⁷ It requires the property owner to request compensation from the specific entity and imposes time limits on that entity for responding to the claim.¹⁵⁸ It further allows the property owner the option of pursuing further mediation procedures or to invoke a right of action should the property be devalued by more than twenty percent.¹⁵⁹ The Washington Senate considered a bill that incorporates its House counterpart, but strengthens the conflict resolution provision by including additional innovative remedies.¹⁶⁰

Washington Senate Bill 5765, the "Private Property Protection Act," offers property owners an innovative *ex ante* protection designed to achieve the typical goal of a conflict resolution scheme: to remedy the grievance to the satisfaction of both parties, out-of-court. The new protection prohibits a government entity from "enact[ing] state or local land use legislation without holding a public hearing on the proposed land use legislation."¹⁶¹ The hearing must be publicized well in advance and copies of the proposed legislation must be available to the public prior to the date of the hearing.¹⁶² In addition, the hearing

154. If the typical hybrid bill combines assessment and compensation measures, then Current Wave hybrids combine one or both of these with conflict resolution schemes.

155. *See* Ala. H.B. 485 § 5.

156. Whereas the typical hybrid bill constitutes a stronger protection of property rights because of the interplay between the assessment and compensation models, in this case, no such strength is achieved. In effect, when considering Alabama House Bill 485, the whole is not greater than the sum of its parts.

157. *See* H.B. 1837, 55th Leg., Reg. Sess. (Wash. 1997).

158. *See id.* § 4(2).

159. *See id.* § 4(3).

160. *See* S.B. 5765, 55th Leg., Reg. Sess. (Wash. 1997).

161. *Id.* § 3(2).

162. *See id.*

must offer affected landowners the opportunity to raise alternative courses of action that they believe would accomplish the same purpose as the action proposed, and those alternatives must be addressed both at the hearing and in writing.¹⁶³ Furthermore, the landowners are granted a private right of action if the government fails to hold the hearing or address their concerns.¹⁶⁴

Unlike the Alabama bill, Washington Senate Bill 5765 uses its *ex ante* provision to enhance its conflict resolution proposal. The public hearing allows for the government and property owners to come together to air their grievances before any irreversible action is taken, allowing the protection *ex ante* to contribute to the resolution of the conflict. Alabama's proposed assessment requirements, like those proposed during the Second Wave, fail to include the landowners in the process before the taking occurs and therefore offer no different resolution to the conflict than would have occurred otherwise. Unfortunately, the public hearing will still be susceptible to criticism due to the high administrative costs and delays associated with embarking upon government action. However, the costs will likely be lower than those associated with TIAs. In addition, these costs will probably be outweighed by the benefits of averting some possible takings claims without causing an unintended moratorium on government action.

CONCLUSION

While predicting the prospects for success of the state legislative proposals introduced during the 1997-98 legislative session is beyond the scope of this note, an analysis of their content is not. The pure bills introduced in Alaska, Arkansas, Maine, Massachusetts, Montana, Minnesota, and New Mexico contain many of the same inequities as their predecessors, but because of their simplicity and mere symbolism, legislators will continue to debate their merits for years to come. The addition of a private right of action may alleviate some barriers to raising claims, but these bills are still based on inherently flawed models. They look to alleviate the conflict over regulatory takings by restricting the government to the benefit of property owners. The result is the substitution of one inequity for another. A similar critique can be made of the three hybrid bills recently considered. New York and Illinois have been quite progressive in offering courts a definition of "ripeness." By itself, however, such a provision fails to address many of the most burdensome issues facing property owners.

163. *See id.* § 3(4).

164. *See id.* § 5.

Fortunately, conflict resolution bills are increasingly favored in state takings proposals, making it more likely that, in future sessions, property owners will see more practical measures enacted into law. These bills may fail to offer property owners the most comprehensive protection, but they do provide effective means for resolving regulatory takings disputes. In addition, unlike pure and hybrid bills, these bills offer a solution to the present conflict without taking sides. Consequently, both the government and property owners can appreciate their effect.

The drafters of Idaho House Bill 487 and Washington Senate Bill 5765 seem to have tapped into the innovative spirit that created the Harris Act in the first place. If patterns hold, in the future, a greater number of bills will build upon these measures and thus include the creation of an Internet depository and/or require a public hearing prior to the enactment of land use regulations. As the takings debate continues, it is possible that these bills will usher in a new wave of legislation and produce an even more practical model for reform.

Regardless of what new ideas emerge and are enacted into law, at least one thing is certain: they will be debated in state capitals rather than in Washington, D.C. Acknowledging this trend, on September 23, 1997, the House of Representatives Judiciary Subcommittee on the Constitution held hearings on proposed state takings legislation.¹⁶⁵ Perhaps accepting the fact that their institution, like the judiciary, has been unable to craft a suitable remedy to the takings issue, federal representatives turned to state officials for guidance. Testifying on the panel were legislators, civil servants, and academics, each with their own slant on the takings debate. Unfortunately, what emerged was still a confused and muddled message as to the successes and failures associated with the different models of state takings legislation. In fact, the most notable finding was that the debate is far from over. Yet, considering that just a few years ago Congress was debating legislation without regard to its takings implications, the recent shift in the debate is itself an enormous victory for property rights activists.

165. See *Hearings*, *supra* note 39.