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## Regulatory Takings, Private Property Protection Acts, and the Moragne Principle: A Proposal for Judicial-Legislative Comity

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Burton: Regulatory Takings, Private Property Protection Acts, and the Mor

# REGULATORY TAKINGS, PRIVATE PROPERTY PROTECTION ACTS, AND THE “MORAGNE PRINCIPLE:” A PROPOSAL FOR JUDICIAL-LEGISLATIVE COMITY

BRUCE BURTON\*

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## I. INTRODUCTION

Sometimes a court-made legal doctrine approaches the uttermost limit of its own complexity and begins to lose traction with ordinary minds. When this lack of clarity occurs, a period of fallow from further growth of the doctrine may be the most optimal path for a burdened society. In the heady metaphysics of modern Takings Clause jurisprudence, precisely this condition exists.<sup>1</sup>

Despite the general murkiness in this area, various components of a rational formula for the much-needed fallowing are emerging. These components have the potential to improve matters greatly by slowing the growth industry of judicially created takings doctrine. To help realize this potential, this article proposes a synthesis of several discrete concepts.

The present analysis is premised upon a series of four propositions that are axiomatic to those currently working or writing in the often befuddling area of regulatory takings law. First, the Fifth Amendment protections of private property historically are predicated on a very real mistrust<sup>2</sup> of govern-

1. See *infra* note 4 and accompanying text (noting "the crazy-quilt pattern of judicial doctrine").

2. See generally Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 3 (1970) (discussing the history of mob influence in colonial America). Although not generally addressing the mistrust of governments, Alexis de Tocqueville recognized the widespread American fear of loss of property rights.

In no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property.

I have often remarked, that theories which are of a revolutionary nature, since they cannot be put in practice without a complete and sometimes a sudden change in the state of property and persons, are much less favorably viewed in the United States than in the great monarchical countries of Europe: if some men profess them, the bulk of the people reject them with instinctive abhorrence.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 267 (Richard D. Heffner ed., 1984); see also *Missouri v. Jenkins*, 495 U.S. 33, 68-69 (1990) (Kennedy, J., concurring) (quoting Virginia

ment—regardless of whether the governing body is a parliament, congress, king, or executive agency. This mistrust bred an essentially Lockean viewpoint towards governmental power<sup>3</sup> that underlies the pertinent constitutional provisions in the regulatory takings area.

Second, the judicial development of regulatory takings doctrine, particularly since the modern burst of United States Supreme Court activity commenced in 1987, is a murky swamp of illogic, undefined terms, and dicta-riddled opinions.<sup>4</sup> The lack of clarity in the various cases only increases

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Petitions to King and Parliament, Dec. 18, 1764, *reprinted in* THE STAMP ACT CRISIS 41 (E. Morgan ed., 1952)) (“Property must become too precarious for the Genius of a free People which can be taken from them at the Will of others . . .”).

The English also have historically valued private property rights. *Cf.* WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES ON THE LAW 74 (Bernard C. Gavit ed., Wash. Law Book Co. 1941) (1892) (“[T]he legislature alone can interpose, and compel the individual to acquiesce. It does this, not by arbitrarily depriving the party of his property, but by giving him a full indemnification and equivalent for the injury thereby sustained.”).

3. JOHN LOCKE, LOCKE’S SECOND TREATISE OF CIVIL GOVERNMENT 62 (Lester DeKoster ed., 1978) (stating that “the supreme power cannot take from any man any part of his property without his consent”). James Madison also utilized this Lockean worldview. THE FEDERALIST No. 54, at 370 (James Madison) (Benjamin Fletcher Wright ed., 1961) (discussing whether slaves ought to be considered persons or property for tax purposes).

Charles A. Reich best expressed the contemporary metaphysics of the place of property in the ordering of human affairs in *The New Property*, 73 YALE L.J. 733, 771 (1964), as follows:

[P]roperty performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and “antisocial” activities are given the protection of law; the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.

*Id.*

4. Despite the fact that the crazy-quilt pattern of judicial doctrine in this area has not yet yielded a principle upon which the cases can be rationalized, it is now universally recognized that acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking, and that governmental restrictions on the use of property can be so burdensome as to constitute a compensable taking.

*San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975, writ *ref’d n.r.e.*); *see also* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988) (discussing the Supreme Court’s rejection of any single Takings Clause test); Wm. Terry Bray et al., *New Wave Land Use Regulation: The Impact of Impact Fees on Texas Lenders*, 19 ST. MARY’S L.J. 319 (1987) (analyzing the controversial area of developer exactions); Theodore M. Cooperstein, *Sensing Leave for One’s Takings: Interim Damages and Land Use Regulation*, 7 STAN. ENVTL. L.J. 49 (1987-88) (discussing the disputed area of

appropriate remedies for land use planning regulations that cause harm); William A. Falik & Anna C. Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence*, 23 REAL PROP., PROB. & TR. J. 1 (1988) (discussing the implications of Supreme Court decisions limiting land use regulation in uncertain aftermath of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)); William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988) (discussing same implications, but specifically focusing on impact on California law); Robert H. Freilich et al., *State and Local Government at the Crossroads: A Bitterly Divided Supreme Court Reevaluates Federalism in the Bicentennial Year of the Constitution*, 19 URB. LAW. 791, 807 (1987) (describing the "critical period of flux when the state and federal courts will be seeking to develop criteria for the determination of when and under what circumstances a regulatory taking must be found"); Bruce Goldstein & Sharon Buccino, *Is the Bundle Bigger? The Legal and Practical Implications of Nollan v. California Coastal Commission and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 8 STAN. ENVTL. L.J. 46, 62 (1989) (noting "the ambiguity that remains after the [Supreme] Court's recent land-use decisions"); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627 (1988) (discussing whether ultimate control in decision making for land use regulations should rest with the legislature and not with the courts in light of the lack of clarity after *First English*); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtruse*, 88 COLUM. L. REV. 1630, 1630 (1988) (stating that the Supreme Court decisions on land use planning "reveal the continuing instability in this area of law"); Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 390 (1988) (discussing the Supreme Court's desire "for decisive results and predictable boundaries" in takings cases); David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527 (1989) (discussing the lack of predictability associated with the Supreme Court's *ad hoc* approach to takings cases); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988) (attempting to provide some clear indicia for what constitutes a taking); Jack R. White & Farzad Barkhordari, *The First English Evangelical Lutheran Church Case: What Did It Actually Decide?*, 7 UCLA J. ENVTL. L. & POL'Y. 155, 169-70 (1988) (speculating on the meaning of *First English Evangelical* in the wake of a lack of clarity in takings jurisprudence); Edward H. Ziegler, Jr., *Interim Zoning and Building Moratoria: Temporary Taking Claims After First English*, 12 ZONING & PLAN. L. REP. 97, 98 (1989) (discussing "considerable speculation regarding effect of [*First English*]"); *Leading Cases*, 101 HARV. L. REV. 119, 240-41 (1987) (detailing the Supreme Court's long struggle to resolve the "takings conundrum"); cf. Gus Bauman, *The Supreme Court Becomes Serious About Takings Law: The First Church, Keystone and Irving Cases* (pt. 1), 10 ZONING & PLAN. L. REP. 145 (1987) (analyzing recent Supreme Court takings clause jurisprudence and attempting to draw some meaningful legal precepts from it); Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions* (pt. 2), 10 ZONING & PLAN. L. REP. 153, 159 (1987) ("The uncertainty . . . is unavoidable if the principle of fairness embodied in the Fifth Amendment is to remain flexible . . ."); Timothy A. Bittle, *Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988) (discussing how the *Nollan* decision completely eviscerated California takings jurisprudence in the permit exaction context); Linda J. Bozung & M. Randall McRoberts, *Committee on Land Use, Planning and Zoning, Land Use, Planning and Zoning in 1987: A National Survey*, 19 URB. LAW. 899 (1987) (discussing state reactions to various land use regulations and case law); Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus*

litigation when friction points between governmental regulation and private real property rights arise.<sup>5</sup>

Third, notwithstanding the expenditure of great amounts of judicial time, energy, and limited resources, American courts will continue to struggle with the central issues involved in regulatory takings disputes.<sup>6</sup> Accordingly, new mechanisms to minimize, and even replace, judicial activism in this area are sorely needed.<sup>7</sup>

The fourth and most vital premise is that many state legislatures, as well as the United States Congress, currently wrestle with the difficulties inherent in balancing the legitimate governmental interests in land use regulation and the legitimate private interests of property owners in the process of crafting a series of Private Property Protection Acts (PPPAs). Although the approaches

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*Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231 (1988) (attempting to determine the potential reach of *Nollan*); Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988) (discussing two principal competing theories of land use planning law); William Fulton, *A New Era for Private Property Rights*, CAL. LAW., Nov. 1987, at 26, 28 (noting how two Supreme Court rulings have "turned out to be more subtle and more complicated"). See generally Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988) (examining the four takings cases the Supreme Court decided in the 1986-87 term); David L. Callies, *Takings Clause—Take Three*, 73 A.B.A. J. Nov. 1, 1987, at 48, 52-56 (discussing three Supreme Court decisions in the takings area).

5. Alan L. Geraci & Sandra Nabozny-Younger, *Damages for a Temporary Regulatory Taking: First English Evangelical Lutheran Church v. County of Los Angeles*, 24 CAL. W. L. REV. 33, 59-62 (1987-88) (discussing likely generation of increased litigation in land use planning context).

6. *Suitum v. Tahoe Reg'l Planning Agency*, No. 96-243, 1997 WL 539236 (9th Cir. Sept. 4, 1997), currently pending before the Supreme Court, is another chapter in "one of the most complex, confusing, and contentious debates in constitutional law." Patrick C. McGinley, *Land Use Regulation and the Takings Clause*, PREVIEW U.S. SUP. CT. CAS., Feb. 6, 1997, at 335, 335. This area of the law is now entering a metaphysical realm, focusing on such obtuse concepts as whether the government's conferral of a transferable development right to an owner of property whose other uses are 100% taken constitutes a "use" of the fee simple. *Id.*

Much of the dilemma of takings law stems from the intensified urban-industrial complex of the modern American economy. This principle follows from the proliferation of takings cases which arise, at least in considerable measure, from urban and suburban structural dilemmas involved in land use planning and regulation. In short, Thomas Jefferson's prediction that increased urbanization in the cities will yield a vast increase in social evils has been borne out by experience. See David Clarke, *A Better Place to Live: Reshaping the American Suburb*, ASAP, Sept. 1995, at 90, 90 (setting forth Jefferson's viewpoint). A systematic approach for dealing with these structural problems would alleviate the need for court resolutions by a judiciary already overburdened by increasingly crushing caseloads. Unfortunately, the very judiciary that is struggling to resolve problems in the midst of scarce resources is also inhibiting the planning and land use management frameworks (that could provide solutions before even reaching the courts) by propounding vague and uninstructional judicial opinions.

7. See *infra* app. B.

used in many of these statutes and proposed statutes vary among jurisdictions, the attempt to create a more coherent and workable method of resolving such disputes seems both well-intended and well-grounded in the democratic tradition of balancing competing societal interests.<sup>8</sup>

Premised upon the four axioms stated above, this article proposes that the current morass of Takings Clause jurisprudence demonstrates that the process for resolving cases has become more vital to society than seeking to perfect the substantive constitutional doctrines. In fact, the notion that such doctrines can be perfected is a chimera no longer worth pursuing. Thus, creating a plausible means for limiting the opportunity for further appellate decisions—which largely tend to proliferate subdoctrines and chaos-bearing dicta—is a worthy goal.

This article proposes that the problem-solving structures found in many PPPAs, combined with some modified alternative dispute resolution elements, could relieve the proliferating uncertainty of appellate litigation respecting regulatory takings. Courts could utilize the PPPAs' procedures to achieve several desirable social goals: (i) protecting the reasonable economic expectations of private property owners who find their lands subject to governmental regulations; (ii) protecting governmental agencies from fears of unpredictable, perhaps crippling, damage awards predicated on Fifth Amendment-derived just compensation claims; and, most importantly, (iii) ending the exponential growth in confusion, obscurity, and illogic which permeate much of our takings doctrines.

## II. TAKINGS CLAUSE POLICIES

Arguably, the policy reasons undergirding the Fifth Amendment are more compelling today than in the times of John Locke, James Madison, Thomas Jefferson, Lord John Acton, William Blackstone, or even when Oliver Wendell Holmes pushed the first doctrinal snowball down the mountainside in *Pennsylvania Coal Co. v. Mahon*.<sup>9</sup> The sensible mistrust of government power<sup>10</sup> that gave birth to the Bill of Rights, including the Takings Clause, is the same sensible mistrust of government power that informs regulatory takings law today.<sup>11</sup> The historic reasoning holds that government appetites are—by reason of human nature and our political institutions—unlimited,<sup>12</sup>

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8. Julian Conrad Juergensmeyer & Judge Gerald Wetherington, Address at the South Texas College of Law (Oct. 2, 1996).

9. 260 U.S. 393 (1922).

10. See *supra* note 2 and accompanying text.

11. Lord Acton captured the cause for much of this mistrust in his frequently quoted precept that "[p]ower tends to corrupt and absolute power corrupts absolutely." LORD ACTON, *Acton-Creighton Correspondence*, in *ESSAYS ON FREEDOM AND POWER* 335 (Gertrude Himmelfarb ed., 1972).

12. See *supra* note 11; Bruce W. Burton, *Regulatory Takings and the Shape of Things to*

and that the expectation of self-restraint by government to curb effectively its own appetite is a fool's dream.<sup>13</sup> Indeed, this viewpoint, born of the American colonial experience, led our society to place constitutional barriers to obstruct, or at least to impede, all of government's shortcuts in satisfying its varied desires.

This same reasoning created the structure for the balancing of powers among branches of the federal government and between federal and state governments, as well as the more direct personal protections afforded by the Bill of Rights and later amendments. Are these concerns now obsolete? Shall we—who have experienced the realities of the Twentieth Century—seriously conclude that the modern industrial state has now obviated the basis for our historic fear of unchecked governmental power? Or, are the fundamental concerns about government appetites truly timeless?

Within recent memory, our nation witnessed government at various levels engage in severe abuses of public power to restrain citizens from voting or to segregate citizens into separate classifications for purposes of education, housing, access to facilities, and other attributes of a civilized society.<sup>14</sup> We saw nonangelic governments engage in criminal conduct and then use government's most potent police agencies to disguise or conceal the conduct in which some of those same agencies may well have participated;<sup>15</sup> or seek

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*Come: Harbingers of a Takings Clause Reconstitution*, 72 OR. L. REV. 603, 605, 608-10 (1993).

13. Madison's famous exposition on the nonangelic qualities of human nature and the dilemma of democratic government is apropos:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but *experience has taught mankind the necessity of auxiliary precautions.*

THE FEDERALIST No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961) (emphasis added). Thomas Jefferson was far more direct than his fellow Virginian: "[P]rivate fortunes are destroyed by public as well as by private extravagance. *And this is the tendency of all human governments.*" John G. West Jr., *Monticello's New Democrat*, POL'Y REV., Spring 1993, at 58, 59 (emphasis added). Imperial England was not the only European power that frequently expropriated private property for state purposes. All holdings—including the valuable deposits of others—were expropriated by the King of France from the first Christian bankers, the Knights Templar, during the 14th century. *Knights & Armor* (History Channel broadcast, June 16, 1997).

14. See generally Christo Lassiter, *The New Race Cases and the Politics of Public Policy*, 12 J.L. & POL. 411, 415 (1996) (approving "Supreme Court's exercise of restraint in positing neutrality amid the clamor of social and political tribes seeking group rights").

15. Cf. Donald A. Daugherty, *The Separation of Powers and Abuses in Prosecutorial Discretion*, 79 J. CRIM. L. & CRIMINOLOGY 953 (1988) (discussing inevitability of prosecutorial abuses under the independent counsel provision of the Ethics in Government Act); WATERGATE SPECIAL PROSECUTION FORCE REPORT 138 (1975) ("Men with unchecked power and unchallenged trust too often come to believe that their own perceptions of priorities and the



the assassination of leaders of foreign governments;<sup>16</sup> or expropriate most of the value from private shops and homes through predatory regulatory activities so that government may acquire those properties for diminished compensation.<sup>17</sup> On a more global scale, the Twentieth Century does not inspire a ready confidence that human nature has evolved into "angels" in Madison's telling logic<sup>18</sup> or that government power, unchecked by the constitutional barriers of our system, can be entrusted to act justly and moderately upon the less powerful or their property.<sup>19</sup>

All considerations given due weight, a major judicial retreat from the policies underlying the Fifth Amendment is not warranted, but an altered judicial approach for individual cases is required.

### III. THE MORASS OF JUDICIAL DOCTRINE

Regulatory takings doctrines multiply and permutate. Although modern case law has grown and become very complex, seven relatively discrete clusters<sup>20</sup> of recognized takings doctrines have emerged, three based upon a pro-statist approach and four based upon a pro-privatist method.

#### A. *The Statist Perspectives*

##### 1. *Cluster 1: Harm Prevention Doctrine*

Although now suspect, harm prevention doctrine historically insulated governments against claims for just compensation arising in a variety of community-threatening settings.<sup>21</sup> Recent Supreme Court dicta suggests that

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common good coincide with the national will." See generally S. REP. NO. 95-170, at 2-3 (1978), reprinted in 1978 U.S.C.C.A.N. 4216, 4218-19 (discussing such scandals as Watergate and the Teapot Dome).

16. Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1.

17. See *infra* note 38.

18. THE FEDERALIST NO. 51, *supra* note 13, at 356 ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

19. See *supra* notes 2, 13.

20. This theory has been developed in earlier writings. See Bruce W. Burton, *Predatory Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Taking Trilogy."* 44 ARK. L. REV. 65, 77-94 (1991) (identifying four conceptual clusters and proposing a fifth classification of the government's predatory regulatory practices); Burton, *supra* note 12, at 614-54 (discussing a framework of analysis centered on seven conceptual clusters).

21. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (holding that a state regulation to prevent subsidence from undue coal removal is not a taking); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962) (upholding a town's

only the stopping of illegal activities and the creating of firebreaks justify insulating a sovereign's conduct from such takings claims.<sup>22</sup>

## 2. Cluster 2: Euclidean Zoning

Euclidean zoning of urban land usage into discrete areas for residential, industrial, commercial, and other purposes probably continues to protect the sovereign against claims for regulatory takings. This general rule is subject to the two following exceptions: when the zoning regulation was achieved in a manner that violates procedural due process or when one of the pro-privatist clusters<sup>23</sup> trumps the pro-statist<sup>24</sup> doctrine supporting the zoning regulation in question.<sup>25</sup> Although injunctive relief was the thrust of most zoning cases until the 1987 Supreme Court trilogy,<sup>26</sup> this approach did not go unquestioned.<sup>27</sup>

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action to protect its water table by stopping owners' excavation of their property); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (allowing the government's destruction of privately owned and infected red cedars without compensation because such action was aimed at preventing a crop epidemic); *Hadacheck v. Sebastian*, 239 U.S. 394, 408-11 (1915) (affirming the ban of a brick yard's pollution in an urban area as a legitimate regulation under the city's police powers); *Mugler v. Kansas*, 123 U.S. 623, 668-71 (1887) (holding that the closing of an illegal brewery is not a taking when a state legislature has found it to be a hazard to public health and morals).

22. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992) (suggesting that only legislation to abate nuisances effecting inherent restraints on real property under state nuisance law would justify no compensation for governmental action causing diminution of value).

23. *See infra* Part III.B and app. A.

24. *See infra* Part III.A; *cf. Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (affirming "the authority of state and local governments to engage in land use planning"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926) (refusing to scrutinize zoning ordinance which merely threatens to have a negative impact on certain property values); *Welch v. Swasey*, 214 U.S. 91, 107-08 (1909) (deferring to legislative reasoning in building height limitations and finding the property owner not entitled to compensation); *City of Pharr v. Tippitt*, 616 S.W.2d 173, 178-79 (Tex. 1981) (upholding municipality's amendment of a zoning ordinance from a single-family zone to a multi-family zone).

25. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (recognizing city's power to zone where restrictions bear a substantial relation to legitimate government interests, but refusing to find a necessary basis for the government's action here). *See generally* 8 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25.06 (3d ed. rev. vol. 1991) (discussing municipal zoning procedures and amendment of zoning ordinances).

26. *Burton*, *supra* note 20, at 73-77.

27. DANIEL R. MANDELKER, *LAND USE LAW* §§ 2.17-2.18 (2d ed. 1988). For a cogent account of this "Nectow fallacy," see Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 490-93 (1977).

### 3. Cluster 3: Aesthetics

Regulation of aesthetics is by far the most tenuous doctrinal reed in the pro-statist grouping. It may allow some governmental defense to takings claims by private owners, but the core decision<sup>28</sup> has dubious meaning and weight in light of subsequent law and commentary.

#### B. The Privatist Perspectives

##### 1. Cluster 4: The Per Se Rule

Actual physical entry and occupation of the private owner's fee simple interest will be compensated, regardless of the de minimis nature of decreases in the property's fair market value.<sup>29</sup> Although *Loretto* provided a bright line test, some commentators described its outcome as "skewed," "retrograde," and "nineteenth century."<sup>30</sup> Professor Tribe characterized the case as

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28. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 117-18, 138 (1978) (refusing compensation for the denial of a building permit for a new, aesthetically disruptive, 55-story tower in the air space above the landmark architecture of Grand Central Station).

*Penn Central* arguably could stand for any of the following six propositions: (1) the general reciprocity of benefits of historic landmark preservation regulations to affected property owners and to all of society negates the need for compensation of losses by individual property owners, 438 U.S. at 134-35; (2) before judicial relief is appropriate, deciding whether just compensation is necessary must be sufficiently ripe, and all possible local remedies must be exhausted, *id.* at 118-19; *see also* Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality's Ally and the Landowner's Nemesis*, 29 URB. LAW. 13, 17-20 (1997) (detailing ripeness decisions of U.S. Supreme Court); (3) harm prevention notions, *see supra* Part III.A.1, may be broad enough to apply to any and all municipal regulations, including aesthetic or historic preservation regulations, regardless of the impact on private ownership rights, *id.* at 124-26; (4) great procedural deference must be given to a lower court's ruling that the private owners have not met their burden of proof in showing the precise loss of property value, *id.* at 120-21; (5) no compensation need be paid unless the owner's "'reasonable return' on its investment" has been sacrificed as a result of the government's regulations, *id.* at 136; (6) certain tax advantages, *id.* at 118, and transferable development rights, *id.* at 120, which the government allocated to the affected property owners were the financial equivalent of compensation; therefore, the regulation, even if it effectuated a taking of some property rights protected by the Fifth Amendment, had also indirectly paid benefits in lieu of just compensation. *Id.* at 137. *See generally* *Landmark Land Co. v. City of Denver*, 728 P.2d 1281, 1287 (Colo. 1986) (citing *Penn Central* for the proposition that the mere denial of an ability to exploit a property interest is not equivalent to a taking); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 *passim* (1989) (detailing the negative aspects of the Supreme Court's construction of the *Penn Central* factor test).

29. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 441 (1982) (holding, based on *Penn Central*, that "permanent physical occupation" constitutes "a taking to the extent of the occupation").

30. John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking*

“border[ing] on fetishism” and as being an “oddity” and a “lame excuse for abandoning an apparently workable balancing test.”<sup>31</sup> He also scorned *Loretto* for the trivial nature of the amount of property invaded or occupied,<sup>32</sup> emphasizing that he advocated an undefined workable balancing test instead of the per se rule of physical invasion.<sup>33</sup>

These views indicate that property rights protected by the Fifth Amendment are often treated casually by legal thinkers who would never suggest such a cavalier attitude toward other Fifth Amendment protections, such as freedom from coerced self-incrimination. This attitude stands in contrast to Professor Reich’s view of property rights.<sup>34</sup> Although the duration of the government’s occupancy of private property in *Loretto* was permanent, later cases make it clear that temporary takings are equally protected.<sup>35</sup>

## 2. Cluster 5: Exactions

Case law in the exaction context narrowly protects against governments requiring donation of private land rights to public use in exchange for government permits.<sup>36</sup> In order to stand now, “an exaction by government

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*Issue*, 58 N.Y.U. L. REV. 465, 471, 550 n.365 (1983).

31. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 177-78 (1985).

32. The property in question was only 1.5 cubic feet. *Id.* at 177.

33. *Id.* at 178.

34. Reich, *supra* note 3.

35. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987); see also *Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992) (determining that a variety of damages would be available for the temporary deprivation of property use for the period from the passage of the regulation until the order on remand from the United States Supreme Court decision overturning the state court’s prior finding of no taking).

36. See *Dolan v. City of Tigard*, 512 U.S. 374, 391, 394-95 (1994) (holding that a city’s requirement of the dedication of private property for a public flood plain and pathway easements was not roughly proportional to property owner’s proposed building); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 n.2 (1987) (invalidating the requirement of donating certain beachfront easement rights in exchange for a building permit); DANIEL R. MANDELKER & ROBERT A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 544 (3d ed., the Michie Co. 1990) (1979); John M. Groen, *Developer Fees and Exactions*, in 1992 ALI-ABA COURSE OF STUDY MATERIALS, INVERSE CONDEMNATION AND RELATED GOV’T LIABILITY 91. *But cf.* MANDELKER, *supra* note 27, § 9.16. (discussing cases that use special assessments as a basis for supporting exactions against taking objections). See generally Theodore C. Taub, *Update on Exactions, Dedications, and Impact Fees*, in 1 ALI-ABA COURSE OF STUDY MATERIALS, LAND USE INST.: PLANNING, REGULATION, LITIG., EMINENT DOMAIN, AND COMPENSATION 175 (1991) (discussing the majority’s two-part test for upholding exactions); Jerome G. Rose, *Development Fees: To What Extent May Municipalities Shift the Costs of Public Improvements to New Developments?*, N.J. MUNICIPALITIES, Feb., 1988, at 12, 13, 34, 36 (discussing appropriate tests for determining existence of a regulatory taking in the exaction context).

from a private landowner must bear a close nexus to the evils sought to be addressed by the exaction, and such evils must be those arising from the landowner's proposed activities and be clearly identified as such by the municipality."<sup>37</sup>

### 3. *Cluster 6: The Categorical Formulation*

This approach is a recent pro-privatist trump card playable whenever land use regulations have taken all economically beneficial value.<sup>38</sup> When the regulations lead to a total loss of fair market value that also equals the loss of all economically viable use of the property, the taking is always compensable—even in Cluster One cases,<sup>39</sup> where the governmental regulations were designed to prevent harm.<sup>40</sup>

### 4. *Cluster 7: Predatory Municipal Zoning Practices*

Predatory municipal zoning practices cover a wide range of governmental value-destroying behavior that usually results from a government's desire to acquire the regulated property at a bargain price.<sup>41</sup> Even though the cases in this area are fact-sensitive, courts typically rely on a combination of the following elements: "(1) the precondemnation conduct of the government, (2) the actual impact upon property values, (3) the government's timing on

37. Burton, *supra* note 12, at 627 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

38. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (stating categorical rule that regulatory deprivation of "all economically beneficial or productive use of land" is compensable). The *Lucas* decision is riddled with dicta that undermines various pro-statist doctrines and is itself a monument to judicial fog-making in the regulatory takings area.

39. See *supra* text accompanying notes 21-22.

40. Burton, *supra* note 12, at 631.

41. See, e.g., *Amen v. City of Dearborn*, 718 F.2d 789, 795-96 (6th Cir. 1983) (holding a city's acts of denying permits, discouraging repairs, instructing residents that prices paid for property would be decreasing, and requiring installation of items not mandated by building codes were designed to force residents to sell property and thus constituted a taking requiring compensation); *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1198-1200 (8th Cir. 1983) (determining that zoning changes resulted in an uncompensated taking because they prevented an owner from using his property for industrial purposes after he had expended approximately \$140,000 for such purposes); *Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp.*, 468 F. Supp. 609, 612-13 (S.D.N.Y. 1979) (finding a taking violation where a city delayed the acquisition date in order to purchase property at a lower price); *Agins v. City of Tiburon*, 598 P.2d 25, 31 (Cal. 1979) (refusing to find a taking where a zoning ordinance merely limited property use to one-family dwellings, open spaces, or accessory buildings without depriving the landowner of substantially all reasonable use of his property), *aff'd on other grounds*, 447 U.S. 255 (1980), *overruled by* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310-11 (1987).

creating disincentives to tenants, customers, or other users of the property, and (4) the government's abusive use of inspection powers."<sup>42</sup>

### C. Reaction to the Varied Approaches

The resulting doctrinal problems from these seven illustrative approaches have led some to suggest that the courts should abandon regulatory takings doctrine<sup>43</sup> much in the same fashion that they abandoned the doctrine of substantive due process during the New Deal crisis. Although an understandable response to this doctrinal swampland, such a reaction is questionable. Not all instances of judicial activism respecting government regulations that have an economic impact are socially destructive in a *Lochner v. New York*<sup>44</sup> sense. Moreover, neither the current economic and social conditions of the nation, the current make-up of the Court, nor constitutional logic support a New Deal-like abandonment of the Takings Clause by the Court.<sup>45</sup>

Additionally, the very same judicial mind which energetically urged judicial restraint and opposed the Supreme Court's use of substantive due process to strike down reform-minded, economic regulatory legislation is the very same Olympian mind which gave birth to modern regulatory takings law.<sup>46</sup> Hence, no intrinsic violation of judicial restraint is found in the Court's Fifth Amendment activism to protect private property rights against government's purported excesses. Finally, at its core, judicial deference to the legislature's regulatory goals must be, quite rationally, bounded by the explicit language of compensatory protection for individuals and their property as set forth in the Takings Clause.<sup>47</sup>

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42. Burton, *supra* note 12, at 626.

43. Juergensmeyer & Wetherington, *supra* note 8 (question from the floor by Professor Paul McGreal to the two panelists). *But see* James W. Ely, Jr., *The Fuller Court and Takings Jurisprudence*, 2 J. SUP. CT. HIST. 120 (1996) (concluding that "[a] more vigorous application of the Takings Clause was consistent with the broader solicitude for economic freedom that characterized the Fuller era").

44. 198 U.S. 45 (1905) (beginning the Court's retreat from the application of substantive due process to legislative economic policies).

45. For a sampling of the general historical data regarding social conditions in the New Deal era, see ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* (1958); and to compare the New Deal cases to the underlying constitutional logic of the Takings Clause, see *supra* notes 2-3, 12-13 and accompanying text.

46. Compare HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 158 (2d ed. 1985) (discussing Justice Holmes's perspective that courts should defer to the legislature even when the legislative policy makes him want to "vomit"), with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating Holmes's view that the Takings Clause prevents the legislature from going too far in regulating private property rights).

47. See *Pennsylvania Coal Co.*, 260 U.S. at 415-16.

## IV. PRESSURES FOR A CHANGED APPROACH

A. *PPAs as a Symptom*

When legislative activity on a topic is energetic and widespread, it often signals an extensive societal sentiment for reform. Accordingly, the burgeoning legislative growth of PPAs should best be seen as symptomatic of a system in the throes of a dilemma arising out of the intensifying tension between private rights and public needs. The wealth of proposals reflects a wide range of legislative concerns, including an interest in avoiding needless exposure of the public fisc to unintended losses as well as an interest in addressing the grievances of private landowners arising from value-diminishing regulations and exactions.<sup>48</sup>

On a superficial level, any reform which slows the recent tendency of the Court to complicate regulatory takings doctrines<sup>49</sup> might be viewed as a healthy tourniquet for a hemorrhaging system of law. The proposal that the Court should pause in its initiation of new doctrines has precedent in the zoning area where the Court took a hiatus from law-making that lasted two generations.<sup>50</sup> In terms of judicial efficiency, diminishing the sheer number

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48. See *infra* app. B.

49. See Burton, *supra* note 20, at 79 (noting that “no single takings clause principle . . . reconciles . . . the modern cases”); James P. Karp, *An Alternative to the United States Supreme Court’s Economic-Based Rationale in Takings Analysis*, 2 VILL. ENVTL. L.J. 253, 256 (1991) (stating that “[t]he Supreme Court has been unable to establish discernible criteria for drawing [the] line” between constitutional regulations and unconstitutional regulatory takings); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation* (pt.1), 23 URB. LAW. 301, 301 (1991) (stating that “[t]he only thing clear about *Nollan* is that courts are unclear about *Nollan*”); White & Barkhordari, *supra* note 4, at 155 (noting the “great deal of confusion . . . generated” by the Court’s decision in *First English*); Wilkins, *supra* note 28, at 1 (describing Supreme Court takings jurisprudence as “convoluted” and “obscure”); *Leading Cases*, *supra* note 4, at 241 (calling jurisprudence in this context a “takings conundrum”). See generally Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1 (1991) (arguing that legislatures should continue to pass shoreline regulations even after the private property owners’ victories in *Nollan* and *First English*).

50. After its first two zoning decisions, *City of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court did not comment on the zoning doctrine for over a half century—until the regulatory takings activism began in the late 1980s. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* §§ 5A.14-.15 nn.56-57 (1988 rev.). See generally MANDELMER, *supra* note 27, §§ 6.05, 6.08, 6.13-6.15 (discussing general propositions of zoning jurisprudence).

Although the United States Supreme Court avoided zoning decisions for this time period, states developed a very rich body of law with regard to zoning changes. The state decisions demonstrate considerable emphasis on the status of the existing zoning regulations, appropriate terms for the amortization of nonconforming improvements or businesses established in reliance upon previous zoning regulations, and the interaction between private use restrictions

of cases provides an ancillary benefit, especially when the cases are heavily laden with regulatory takings complexities which clog the appellate courts.

Thus, developing a system of interlocking court and statutory procedures which allows an urbanized-industrialized society to regulate and plan its own land uses with greater certainty for all parties should be socially desirable. However, this goal is not readily attainable under present conditions where regulatory takings doctrine is a constitutional growth industry in the courts. Any new system would be imperfect; but, to put an American spin on Churchill's famous dicta about self-government, even a flawed proposal which can at least provide a clear framework to satisfy the competing demands is better than the alternatives.<sup>51</sup>

### *B. The Pattern of Legislative Solutions—PPAs*

The central dilemma addressed by most PPAs rests at the core of a famous phrase deleted from *Pennsylvania Coal Co. v. Mahon*.<sup>52</sup> In that case, Justice Holmes foresaw fiscal and operational problems for government if the Constitution did not freely allow it necessary leeway in land regulation. Originally and ironically, Holmes referred to this problematic limitation as the "petty larceny of the police power."<sup>53</sup> Holmes wisely recognized that if every diminution in property values caused by governmental regulation must be answered with just compensation—perhaps in a court or other forum—regulatory paralysis or insolvency could result.<sup>54</sup>

Legislatures across the nation are grappling with exactly this problem of protecting private property rights against undue regulatory takings while guarding the public purse against insolvency. Thus, we are witnessing an era

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and zoning regulations. Cf. *Snow v. Van Dam*, 197 N.E. 224, 226 (1935) ("The zoning of the land for business in 1927 by the city of Gloucester could not operate to remove existing restrictions."). To a large extent, this body of law reflects a series of accommodations between the public desire for changed land use and respect for private investments made in reliance upon pre-existing land regulations. See generally MANDELKER, *supra* note 27, §§ 5.65, 9.20 (discussing cases finding amortization is constitutional and noting how planned unit development regulations overcome some of these conflicting interests).

51. "Democracy is the worst form of government except for all those other forms that have been tried . . ." JAMES C. HUMES, *THE WIT & WISDOM OF WINSTON CHURCHILL* 28 (1994).

52. 260 U.S. 393 (1922).

53. 1 HOLMES-LASKI LETTERS 457 (Mark DeWolfe Howe ed., 1953).

54. The late William B. Lockhart occasionally put a reverse spin on this perspective in his teaching days, asking his classes why requiring government to pay for petty takings is not equally logical because those are the ones most easily funded out of limited government resources. Lectures by Professor William B. Lockhart, Professor of Constitutional Law, at University of Minnesota Law School (1965-66) (author's recollections). The answer may be that the transactional costs in time and due process or the aggregate cost of infinite numbers of miniscule claims would prove prohibitive to government action.



of nationwide legislative initiatives respecting PPPAs.<sup>55</sup>

Some of these embryonic legislative attempts offer useful procedural tools. State and federal court systems could achieve a number of vital goals by accommodating their procedural approaches to some of the initiatives articulated in the PPPAs. These procedural accommodations can range from mandatory impact reports, appraisals, attorney general reviews, compulsory settlement offers and counteroffers, mediation, and other features designed towards a systematic model for dispute resolution at pretrial levels.<sup>56</sup>

For example, South Carolina is considering a PPPA<sup>57</sup> that would embrace such concepts as providing relief to certain property owners whose reasonable investment-backed expectations (RIBE) are "inordinately burdened" by a law or regulation, or other government action, such as the denial of a permit by the state or its political subdivisions.<sup>58</sup> Importantly, South Carolina was the situs of *Lucas*—one of the most doctrinally troubling regulatory takings cases of recent times.<sup>59</sup> Ironically, the new bill's stated purpose is to afford compensation to a private owner when the government's regulatory action has not risen to a taking under the state or federal constitution.<sup>60</sup> If enacted, such a provision would help resolve the thorny question not settled in *Lucas* and subsequent cases as to when a regulatory taking of less than all of the property's fair market value shall be compensated.

South Carolina House Bill 3591 also contemplates the requirement of a 180-day period prior to filing a court claim under its PPPA, during which the private owner must submit a written claim to the governmental entity which enacted the regulation or otherwise acted to impact the owner's RIBE. The owner would also submit a "bona fide, valid appraisal" supporting any claimed loss in fair market value; and if more than one governmental entity is involved in the regulatory action, all will be presented with the claim.<sup>61</sup> Then a series of procedural steps are triggered, including a written settlement offer from the government that may contain any one or more of eleven flexible settlement devices ranging from government adjustments or modifications in the permit or regulation to land swaps, issuance of variances, or outright purchase of the private property.<sup>62</sup> Also during the 180-day period, the government shall issue a "ripeness decision" identifying all of the allowable

55. *Infra* app. B.

56. *Infra* app. B.

57. H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at S.C. CODE ANN. §§ 28-4-10 to -60).

58. S.C. H.R. 3591 (to be codified at § 28-4-30(A), (B)(5)). See *infra* Part VII for a discussion of the RIBE in this context.

59. See *supra* note 38 and accompanying text.

60. S.C. H.R. 3591 (to be codified at § 28-4-20).

61. *Id.* (to be codified at § 28-4-40(A)).

62. *Id.* (to be codified at § 28-4-40(B), (C)).

uses for the subject property, thus clarifying the often difficult question of exactly when a government's regulatory conduct is ripe for adjudication.<sup>63</sup>

## V. JUDICIAL DEFERENCE: INVOKING THE "MORAGNE PRINCIPLE"

In order to synthesize some PPPA procedures into the courts' systems for adjudicating Takings Clause suits—particularly those arising from regulatory takings claims—a significant level of judicial deference to legislative policy will be necessary. The judicial deference advocated here will be referred to as the "Moragne Principle,"<sup>64</sup> which consists of interweaving new legislative policies into the common law.<sup>65</sup> Essentially, this principle is derived from the dynamics of a system of democratic governance wherein the legislative branch derives its broad law-making power from the people, as contrasted to the court's role as interpreter of those laws. Just as in the physical sciences where a body of great mass exerts powerful influence upon other bodies, so too in the law do actions of legislatures with broad-based powers carry great weight. Judge Calabresi described this tendency as the "gravitational pull" of legislative policies upon judicially created law.<sup>66</sup> Justice John Marshall Harlan best articulated the core notion, which dates back to ancient common law, in the *Moragne* opinion which called upon the judicial branch to identify and respond supportively to widespread legislative expressions of policy:

This appreciation of the broader role played by legislation in the

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63. *Id.* (to be codified at § 28-4-50(A)); cf. Daniel Anderson, *The Texas "Takings" Statute*, TEX. B.J., Jan. 1997, at 12, 14-15 (noting that the state government's failure to issue a Takings Impact Statement is a basis for a landowner to sue to invalidate a regulation). See generally *infra* Part VI.A (discussing requirement of prompt notification to government of a taking claim by the property owner).

64. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

65. *Id.* at 392. Courts have frequently appreciated new legislative policies and sought to "interweave" them into court-made law. Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554 *passim* (1982).

For instance, the modern UCC urges courts to liberally apply the Code by analogy to situations not provided for explicitly in its provisions. Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965); see also *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (showing how UCC policies influence the court); cf. *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 841 & n.10 (Mass. 1973) (demonstrating how landlord-tenant reform statutes occasion a wholesale recasting of prior common law). A striking example of this judicial sensitivity is evidenced by the lengths to which the Minnesota court went in a 1970 opinion to show that the outcome of a case arising under the old Uniform Sales Act was being decided consistently with both prior common law and the "new" UCC. *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 178 N.W.2d 217, 220-22 (Minn. 1970).

66. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 85-86 (1982).

development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions.<sup>67</sup>

Concededly, *Moragne* itself did not deal with any Fifth Amendment takings concerns, but instead it involved maritime law.<sup>68</sup> However, the principle of judicial interweaving is particularly apt in the area of regulatory takings law. A powerful positive element for application of the *Moragne* Principle by the courts is that most of the proposals in the PPPAs are both supportive of private property, but mindful of sovereign needs.<sup>69</sup> This duality is precisely the core balance identified by Holmes's ironic reference<sup>70</sup> when the Court first launched itself into these choppy seas.

Another suggestion for interweaving legislative action into the case law of takings is procedural comity. The author does not suggest that behind the fig leaf of procedural comity to the PPPAs, courts need to retreat from their current array of regulatory takings doctrines under the Fifth Amendment—and similar state constitutional provisions—in any manner akin to the *Lochner* and subsequent New Deal Court retreats.<sup>71</sup> Instead, the courts presently have the inherent power to adapt some PPPA procedures as a part of their judicial rules for administering cases. The courts may comfortably adapt under the ancient doctrine of deferring to sensible legislative social policies wherever the courts have appropriate discretion to do so and then interweave those values into the courts' common-law function.<sup>72</sup>

67. *Moragne*, 398 U.S. at 392 (citation omitted).

68. *Id.* at 392-93.

69. See *infra* app. B. For example, South Carolina's pending bill seeks a balance which would compensate a private landowner for significant value diminution due to a government regulation that would fall short of a categorical taking under Cluster 6, see *supra* text accompanying note 38-40. See H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at §§ 28-4-20, 28-40-60(G)).

70. See *supra* text accompanying note 53.

71. See *supra* text accompanying notes 44-45.

72. Ripeness doctrines and procedural rules are well within the power of the court to establish or modify. See, e.g., FED. R. CIV. P. 1, 11, 13, 64; PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 252 (3d ed. 1988) (stating that federal courts "have some measure of discretion" regarding ripeness issues). But cf. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1286-87 (1993) (discussing how the Civil Justice Reform Act's shift to local rulemaking will lead to a lack of uniformity, describing it as a "counter-reformation of procedural justice").

Thus, in accord with the Moragne Principle, both state and federal court systems could incorporate many of the procedural rules for regulatory takings cases which are the subject of proposed or enacted PPPAs throughout the country—and do so without affecting any of the current substantive regulatory takings doctrines. Specifically, a limited set of procedures found in some PPPAs could be required by the courts of all parties to the litigation whenever a party asserts that a regulatory taking exists and that just compensation must be paid. These additional procedures could readily be incorporated even in states whose PPPAs, at least superficially, deal with the gap between a complete taking of all economically beneficial value and lesser takings of some—but not all—value.<sup>73</sup>

Courts can use their inherent powers to determine ripeness, craft presumptions and burdens of proof, and require pretrial mediation and other measures in order to give the parties serious incentives to comply vigorously with the same procedural requirements in all regulatory takings cases. These uniform requirements would apply whether the action derived from the state PPPA, the state constitution, or the United States Constitution. A number of PPPA procedures are readily available for such judicial craftsmanship.

## VI. A CATALOG OF SOME USEFUL PPPA PROCEDURES

PPPAs cannot preempt vested private property rights protected under the Fifth Amendment, nor can state procedures divest the owner of his claims derived from the Fifth Amendment.<sup>74</sup> Moreover, some of the PPPAs, including Florida's statute and the pending PPPA bill in South Carolina, explicitly recognize that legislative procedures exist independently of the constitutionally-derived regulatory takings claims.<sup>75</sup> The procedural solutions

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73. See *supra* text accompanying note 60 (noting South Carolina's proposed PPPA explicitly states that it is intended to address those regulatory burdens on private property values which do not amount to a taking under the state or federal constitution. This provision is prudent, regardless of its actual validity, because the Supreme Court has made clear that state laws may not impede the private owner's right to a direct cause of action derived from the Fifth Amendment. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310-11 (1987) (overruling state court decisions which held that the Fifth Amendment does not require compensation for temporary takings). Moreover, even de minimis losses in value can be held to be takings in violation of the Fifth Amendment. See *supra* text accompanying notes 29. Pursuant to the plain logic of the situation under current regulatory takings doctrines, whether a particular governmental action that burdens the value of private property will be deemed a taking under the United States Constitution is often unknown until after a final appellate determination is rendered in the case. See *supra* note 4 and accompanying text. This doctrinal uncertainty is all the more reason for courts, such as South Carolina's, to carefully craft a Moragne Principle of accommodation for use in all regulatory takings cases.

74. *First English*, 482 U.S. at 314-15.

75. FLA. STAT. ANN. § 70.001(1), (9) (West Supp. 1997); H.R. 3591, 112th Gen.

supplement, but do not replace, the constitutionally-grounded takings law.<sup>76</sup> Additionally, whether recognized or not by these state procedural provisions, the supremacy of the Fifth Amendment remains unchanged by them.<sup>77</sup>

Notwithstanding the distinction between takings claims derived from the Constitution and those derived from statutes, many of the PPPAs being discussed or enacted around the country offer a variety of procedural matters which may often resolve disputes prior to trial and litigation.<sup>78</sup>

#### A. *Property Owner's Submissions Subsequent to the Governmental Action*

One sensible procedure that may encourage early resolution is requiring discomfited owners of private property to promptly, loudly, and specifically raise their grievances. Florida and South Carolina provisions require that a private landowner send an appraisal to the government showing lost value caused by the new regulation.<sup>79</sup> Mandatory notification from the property owner to the governmental entity or entities efficiently combines several features—notice of alleged injury, a formal appraisal of the property owner's land and buildings demonstrating a loss in the fair market value because of the governmental action, and a demand for a governmental response.

PPPAs may require a fixed period of time to elapse after such notice before the property owner will have a ripened statutory claim justiciable in the courts.<sup>80</sup> This mandatory waiting period minimizes one of the many snarly issues in case law: the determination of ripeness for regulatory takings litigation.<sup>81</sup>

Assembly, 1st Sess. (S.C. 1997) (to be codified at § 28-4-20).

76. § 70.001(9); S.C. H.R. 3591 (to be codified at § 28-4-60(G)); *see also* UTAH CODE ANN. § 63-90-2 (1996) (defining a "Constitutional taking" to include actions under the 5th or 14th Amendments of the U.S. Constitution as well as actions under the Utah Constitution).

77. *Cf. First English*, 482 U.S. at 310-11 (overturning state court decisions as inconsistent with the Fifth Amendment); *see also supra* note 73 (affirming same notion).

78. *See infra* app. B (listing some state approaches); *see also* H.R. 925, 104th Cong., 1st Sess. (1995) (proposing federal takings legislation); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633-38 (1995) (identifying various states which define a taking as a diminution of value of a preset percentage—usually 40 or 50%—to resolve takings disputes). For a typical example, in South Carolina, a detailed set of prelitigation procedures aiming towards a negotiated resolution of the issues without trial, or a pretrial settlement, are mandatory for both the government and the private landowner. S.C. H.R. 3591 (to be codified at § 28-4-40).

79. § 70.001(4)(a). A South Carolina private owner must submit a claim plus a bona fide, valid appraisal to the government entity or entities whose regulations assertedly caused the loss in fair market value, and the 180-day prelitigation ripening period will not commence until the owner has taken this step. S.C. H.R. 3591 (to be codified at § 28-4-40(A)).

80. *See, e.g.,* § 70.001(4)(c) (requiring 180 days). *See generally* Whitman, *supra* note 28 (discussing the complexities of the ripeness doctrine in the takings context).

81. *Supra* Part VI.A. One of the many possible holdings in *Penn Central* is the notion that

### *B. Governmental Response*

PPPAs sometimes require a governmental settlement offer during the fixed period of time.<sup>82</sup> The government's proposed settlement options include modification of the governmental actions giving rise to the claim, an offer to purchase the property interests diminished in value by the governmental action, or even an offer to the private owner of nothing.<sup>83</sup> Additionally, some PPPAs require an owner's acceptance, counterproposal, or rejection (depending on the circumstances) during a fixed time period.<sup>84</sup> If no settlement results during this fixed period, then the case will be deemed ripe for judicial trial and determination.<sup>85</sup>

### VII. THE RIDDLE OF THE RIBE: INTRODUCING LEGISLATIVE PROCEDURES INTO THE DETERMINATION OF "REASONABLE INVESTMENT-BACKED EXPECTATIONS"

As noted earlier,<sup>86</sup> no exact identity of underlying doctrine exists between claims derived directly from the Fifth Amendment (or its state constitutional counterparts) and the statutory procedures of the PPPAs. Furthermore, a mere statutory enactment such as a PPPA cannot deprive a private owner of claims

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a final decision is not ripe until all local administrative and other remedies have been exhausted. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 118-19 (1978); *see also supra* note 28 (detailing six possible interpretations of case). The Supreme Court ended one California gambit which used procedural ripeness as a circularity to frustrate the claims of injured property owners in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312-13 (1987). *Cf. S.C. H.R. 3591* (to be codified at § 28-4-40(A)) (setting forth guidelines intended to facilitate settlement before allowing the issue to be ripe). *See generally* Whitman, *supra* note 28, at 13 n.3 (noting the view that judicial interpretations have created a "ripeness mess").

82. § 70.001(4)(c). In South Carolina's pending PPPA, the governmental entity must (i) provide written notice to all interested parties; (ii) make a written settlement offer which can invoke one or more of 11 possible resolutions ranging from revision or variances of the regulations causing the impact on the private fair market value to outright purchase land swaps, transferable development rights, modification or relocation of the government impact, or nothing. *S.C. H.R. 3591* (to be codified at § 28-4-40(C)).

83. *See supra* text accompanying note 62. This myriad of options has the virtue of causing the parties to discuss at the earliest date a settlement offer that could be tailored to a variety of factors affecting the governmental activities and the values of the land. Obviously, if a settlement agreement can be brought about through this process, it negates the need for trial and appellate litigation.

84. *See, e.g., S.C. H.R. 3591* (to be codified at § 28-4-50).

85. *Id.* A PPPA procedure for fixing ripeness of the claim for trial has the advantage of avoiding unnecessarily complicated disputes about ripeness, thereby adding certainty to the parties' roles.

86. *Supra* text accompanying notes 74-77.

that are constitutionally derived.<sup>87</sup> However, a PPPA can offer the same or greater relief as found under the Fifth Amendment.<sup>88</sup> Relief premised on either statutory or Fifth Amendment grounds requires a determination of the private owner's RIBE.

Commencing with *Penn Central Transportation Co. v. New York City* in 1978,<sup>89</sup> the Court established the need to inquire into the private property owner's RIBE.<sup>90</sup> This major economic component of modern Takings Clause litigation is respected, at least by lip service, from all wings of the current U.S. Supreme Court. All landowners are, by the economics of acquisition and ownership of their property, materially driven by their investment expectations.<sup>91</sup>

87. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 308-11 (1987) (overruling the state delay portions of the regulatory taking decision of *Agins v. Tiburon*, 447 U.S. 255 (1980)).

88. *Supra* text accompanying note 60.

89. 438 U.S. 104 (1978). The decision written by Justice Brennan included a considerable number of useful approaches even though the decision itself offers little internal logic. See *supra* note 28.

90. The RIBE inquiry of a particular case becomes a scrutiny of the laws that affected the owner's use of the land at the time the owners made their capital investments. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992). This investigation introduces a healthy dose of marketplace reality into takings litigation.

For example, when defining the concept of marketable title for purposes of title insurance, the American Land Title Association (ALTA) has devised certain formal exceptions to coverage. These exceptions include all governmental land regulation laws and other property laws which may impact the saleability of the property. See generally SANDRA H. JOHNSON ET AL., *PROPERTY LAW* 528-34 (1992) (discussing general purpose of title insurance and giving examples of title insurance forms). Fundamental to property valuation techniques is the fact that the burden of encumbrances upon a parcel of land directly diminishes property value. *ENCYCLOPEDIA OF REAL ESTATE APPRAISING* 164, 365 (Edith J. Friedman ed., rev. ed., 1968). In many litigated zoning battles, the underlying impetus has historically been the difference in property value between lands subject to a particular use restriction created by governmental ordinance or regulation and lands free of such restriction. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (noting an owner's ability to sell his land for \$63,000 before an ordinance causes a purchaser to later refuse to buy). See generally *Ellickson*, *supra* note 27, at 490-93 (1977) (discussing remedies for landowners harmed by zoning ordinances).

For a discussion of the illogic that engulfs the RIBE concept in Supreme Court decisions, see Bruce W. Burton, *Post-Lucas Regulatory Takings and the Supreme Court's Riddle of the R.I.B.E.: Where No Mind Has Gone Before*, 25 U. TOL. L. REV. 155 (1994).

91. The South Carolina Coastal Council's conduct throughout the whole course of *Lucas v. South Carolina Coastal Council* provides a stunningly informative illustration of some unpleasant, but vital, RIBE-driven truths about capital investment in land and its effects on the landowner's economic behavior. After successive legal defeats, the Council settled the matter and purchased the fee simple title to Lucas's lands for \$1.5 million. Suddenly, the government as landowner eschewed its former regulatory behavior when it had insisted during years of litigation, perhaps correctly, that construction on the shoreland would be catastrophic to the sensitive ecosystem. The Council promptly canceled its open space and erosion control

The RIBE concept creates a baseline for measuring owners' fair market values predicated upon the impact of the legal conditions present at the time owners acquired the real estate or otherwise made a significant capital investment in the land.<sup>92</sup> Zoning, nuisance laws, environmental regulations, deed restrictions, and a host of other legally enforceable rules modify the value of the land at the time of the private investment. Sensible on its face, a RIBE determination, like all other matters dealing with the fair market value of property, obviously involves the expertise of professional real estate appraisal evaluations.<sup>93</sup>

Some PPPAs have borrowed the notion of RIBE without providing a statutory definition—apparently leaving to the judicial doctrines the duty to supply any useful content to the term.<sup>94</sup> Most trial courts are not themselves experts in the financial, commercial, and sociological matters that compose the conclusions of expert property appraisers. Moreover, the universe of expert property appraisers in the private marketplace seemingly is often populated by “guns for hire.” Thus, requiring the courts to be involved in the details of

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regulatory scheme and decided to market the land for private residential development in order to recoup its capital investment. The Council's array of ecology-preserving principles was insufficient once its own capital investment was actually on the line. Burton, *supra* note 90, at 169 & n.45.

92. Any quest for a determination of fair market value, by definition, includes the concept of the marketplace. This determination is identical to the calculation of value at a given point in time pursuant to any possible economic equation used for purposes of determining RIBE. The computation is predicated upon the reasonable, lawful expectations of a property owner at the time in question, and the search is to determine the value of the land which has been lost to governmental regulation, either permanently or temporarily, and for which compensation must be paid pursuant to the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28, *on remand*, 309 S.C. 424, 427-28, 424 S.E.2d 484, 486 (1992).

93. *Cf. supra* note 90 (detailing some of the complex considerations that are involved in real estate appraisals).

94. *See, e.g.,* FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 1997) (defining “inordinate burden” to mean that the use is limited to the extent that “the property owner is permanently unable to attain the reasonable, investment-backed expectation of the . . . property”).

South Carolina's pending PPPA also expressly references the property owner's reasonable investment-backed expectation for the property's existing use or a vested right to a specific use of the property. H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at S.C. CODE ANN. § 28-4-30). However, the legislature does not define RIBE and paradoxically only uses RIBE to define “inordinate burden.” *Id.* This minimal usage may be all that human invention is capable of at this time, given the unsettled nature of the RIBE baseline—whether all pertinent laws applicable to the subject property at the time of the owner's investment apply or only nuisance and zoning laws, and whether any evolving changes in the law determine the RIBE or only the static status of certain laws. *See* Burton, *supra* note 90, at 179. *Compare Lucas*, 505 U.S. at 1029-30 (considering relevant property and nuisance principles), *with* 505 U.S. at 1035 (Kennedy, J., concurring) (“[R]easonable expectations must be understood in light of the whole of our legal tradition.”).



each particular valuation is not an efficient use of judicial resources.<sup>95</sup>

Unfortunately, courts have never clearly resolved the core tenet of the RIBE calculus as a matter of constitutional law: Is the private owner's RIBE a function only of local zoning and land use laws in effect at the time of the owner's investment in the land as some, most notably the Scalia majority opinion in *Lucas*, have held?<sup>96</sup> Or, as Justice Kennedy argued in his concurrence in the same case, is the RIBE a function of all laws that might reasonably impact upon value, not just at the moment of investment, but also including those evolving and changing laws—legislative or judicial—that might foreseeably and reasonably affect the RIBE thereafter?<sup>97</sup>

Until a conclusive Supreme Court decision finally resolves this central

95. This feature leads to the proposal for a special master or mediator. *Infra* Part VIII.

96. *Supra* note 94.

The vast array of RIBE-impacting laws is easily identified by analyzing all those encumbrances upon the fee simple that may surface in the writing of policies of title insurance. Title insurance is a largely standardized industry throughout the nation with ALTA forms being the most popular by a wide margin. ROBERT KRATOVIL, *REAL ESTATE LAW* §§ 268 (6th ed. 1974). One also wonders which value-impacting regulations, that have no relationship to title itself, would be seen as RIBE-determining. For instance, such matters as Federal Housing Administration (FHA) and Veterans Administration (VA) design and subdivision regulations should be relevant to RIBE in residential areas. See *ENCYCLOPEDIA OF REAL ESTATE APPRAISING*, *supra* note 90, at 180. See generally WILLIAMS & TAYLOR, *supra* note 50, § 5A.15 (noting uncertainty of meaning of RIBE).

Among lawyers who specialize in commercial real estate development projects, a common act when acquiring land is to make the acquisition contract conditional upon the buyer's satisfactory investigations into zoning, soil conditions, and potential environmental problems (if not using a straightforward option for these same purposes). Thus, the buyer's RIBE for such projects are nearly defined by the interaction between the seller and purchaser's activities before money even changes hands. In fact, of the scores of such commercial transactions this author has been involved in, virtually none involving sizable investment has been without the use of such RIBE-determining conditions since the late 1970s.

RIBE should also reflect a realistic, lawyer-like inquiry into such value-impacting regulations of land use and development as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund Act), 42 U.S.C. §§ 9601-9675 (1994); Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642 (1994); and similar federal or state laws and regulations which often substantially affect the use (and hence the value) of any parcel of land located in the United States.

Additionally, the U.S. Highway Beautification Act originally anticipated the use of eminent domain by the states to remove billboards, screen junk yards, and otherwise create visual easements along the interstate highway system for aesthetic purposes. 23 U.S.C. § 131 (1994). Many states also seek to use similar police power regulations to amortize billboard investments and remove these "eyesores." KRATOVIL, *supra*, § 537. This interesting confluence of laws of both state and federal origin impact upon RIBE determinations of lands abutting the interstate highway system. Cf. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) (noting how federal constitutional law and state laws predicated on police power "may coexist without conflict"); WILLIAMS & TAYLOR, *supra* note 50, §§ 5A.14-.15.

97. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

question—such an event would be a historic oxymoron in the realm of Takings Clause jurisprudence—various jurisdictions may have varying views. Rather than imposing a Kennedy or a Scalia definition on RIBE-determining law, the courts in individual jurisdictions should make known to the parties and any special mediator whichever tenet is locally preferred. Additionally, the specific RIBE determination, premised on that jurisdictional preference, should be reported back to the court<sup>98</sup> if no pretrial settlement agreement results.

Because of these value-determination complexities, courts should utilize a procedural filter in all regulatory takings cases. The use of special masters or mediators could be such a filter, providing an occasion for the parties to address many issues, particularly the knotty issue of determining the pertinent RIBE in the factual context.

### VIII. COURT-REQUIRED MEDIATION PROCEDURES IN ALL REGULATORY TAKINGS CASES

Many state courts, including Florida, already have power at the trial level to require mandatory mediation.<sup>99</sup> This power also may extend to requiring nonbinding arbitration.<sup>100</sup> Mandatory proposals for settlement and counter-proposals by the private property owner are possible and desirable if the owner rejects the government's proposed settlement.<sup>101</sup> This proposal benefits society by adding some new levels of coherence to the needed economic analysis in such cases and, perhaps frequently, expedites settlement.<sup>102</sup> Just as society would not wish a serious dyslexic to be in charge of continually codifying and promulgating the rules of spelling and syntax or desire a system that placed the regulating of the Internet into the hands of persons who are computer illiterate, society also should not be satisfied with a system of regulatory takings law adjudication which continually compounds the uncertainty, illogic, and intellectual dishonesty growing throughout the doctrines.

Perhaps the stanching of this hemorrhage in and of itself is a sufficient

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98. *Infra* Part VIII.A.

99. Wetherington, *supra* note 8. In addition, South Carolina's pending PPPA and Florida's current PPPA encourage the government entities to utilize alternative dispute resolution ("ADR") techniques, including mediation and arbitration, to resolve takings claims. FLA. STAT. ANN. § 70.001(8) (West Supp. 1997); H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at S.C. CODE ANN. § 28-4-60(F)). These laws would also recognize the results of such ADR outcomes. *See* § 70.001(8); S.C. H.R. 3591.

100. Juergensmeyer & Wetherington, *supra* note 8.

101. *See, e.g.*, S.C. H.R. 3591 (to be codified at § 28-4-50) (outlining South Carolina's position in pending bill).

102. *See generally* RICHARD A. POSNER, THE PROBLEM OF JURISPRUDENCE 209-14 (1990) (discussing the contrast between the flawed determination of difficult factual matters by a court or jury versus the special expertise of arbitration methods).

justification for the courts to abandon the current flawed system of disposing of such matters for a more systematic and coherent methodology. The use of comity between legislative proposals for ADR mechanisms on one hand and court-required pretrial ADR on the other, in its highest sense, should be seen as an attempt by the separate organs of government to harmonize their approaches to the solving of significant social and commercial issues. The regulatory takings dilemma is exactly such an issue. Because some PPPAs incorporate a series of mandatory, front-loaded steps which are designed to remove as much of the controversy from judicial determination as possible, these steps could be blended by court rule into special procedures in all regulatory takings cases.

### *A. Mediator's Report to the Court*

At the end of the special mediation process, if settlement does not result, the court could receive the following data and recommendations:

1. Special mediator's assessment of the RIBE, premised upon locally recognized RIBE elements of pertinent laws, which represent the capital investment of the private property owner at the time of acquisition of the property interest subject to the litigation;<sup>103</sup>
2. The special mediator's determination and recommendation of the percentage of loss of value which results from the alleged regulatory taking;<sup>104</sup>
3. The two parties' settlement offers, which were analyzed by the special mediator, together with any supporting data submitted to the special mediator;<sup>105</sup>
4. The most realistic settlement offer of those submitted by government and the property owner as designated by the special mediator based upon her analysis of the mandatory settlement offer from government or the mandatory settlement counteroffer from the private landowner.

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103. The assessment of the RIBE is already included in the provision defining "inordinate burden" in both Florida and South Carolina. *Supra* note 94.

104. *See infra* text accompanying notes 120-22.

105. South Carolina's pending PPPA only encourages, but does not require, mediation or arbitration during the 180-day ripening process. S.C. H.R. 3591 (to be codified at § 28-4-60(F)). However, the PPPA does require certain offers, notices, and responses between the government and private landowner; and the court has access to all of this information. *Id.* (to be codified at §§ 28-4-40 to -50). Upon completion of any trial, the court can assess whether a party failed to offer or accept a reasonable bona fide offer during the 180 days, and this determination can be used for imposing costs and attorney's fees against such a party. *Id.* (to be codified at §§ 28-4-60(C)(1), (2)).

5. The mediator's issuance of a Florida-like ripeness certificate.<sup>106</sup>

The PPPAs of many states are rightly concerned to present themselves as not supplanting the Fifth Amendment's right of a direct cause of action for the private owner.<sup>107</sup> However, little danger exists that the court's requirement of a special mediator procedure would be similarly at risk. If such a system were adopted, the use of a special mediator to determine such facts and then report them to the court would not likely be held to run afoul of any of the constitutional provisions protecting private property because of the famous "Hughes paradox" respecting judicial power.<sup>108</sup> Moreover, shaping the burdens of proof and presumptions, and mandated use of pretrial mediators or special masters are historically within the province of the courts.<sup>109</sup> Beyond these determinations, to the extent that no pretrial settlement results, the parties remain as free to introduce in court the same factual evidence and legal argument as they were before such pretrial procedures were instituted.

*B. Special Mediator's Report: Determining the Burden of Proof at Trial*

The courts' inherent powers to establish presumptions and allocate burdens of proof should be harnessed to the Moragne Principle by courts which embrace PPPA procedures in regulatory takings cases. The courts should be urged to place the various burdens of proof at trial upon that party which has failed to present the most reasonable proposal in the special mediation procedures. For instance, the court could place such burdens upon the party whose offer or counterproposal is deemed to be lacking in good faith or is found to be unreasonable or the least accurate by the special mediator. This shift seems particularly apt because it is not predicated upon ideological or

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106. § 70.001(5)(a).

107. See *supra* text accompanying notes 74-77. South Carolina's proposed PPPA is particularly careful in this respect. S.C. H.R. 3591 (to be codified at §§ 28-4-20, 28-4-60(G)).

108. "It is true that we live under a constitution, but the Constitution is what the judges say it is." THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 139 (David J. Danelski & Joseph S. Tulchin eds., 1973). A long-established principle holds that the fundamental powers and authority of federal courts are grounded in the Constitution and in those acts of Congress lawfully effectuating the Constitution. See *Hanna v. Plummer*, 380 U.S. 460, 472 (1965); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS §§ 1-16 (4th ed. 1983).

Similarly, state courts and their powers derive from a mix of state constitutions, statutes, and common law. Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 29-40 (1952). Because the legislatures and the courts themselves are the two branches involved with defining the scope of judicial powers, any procedures shaped by courts who give comity to PPPA statutes in takings cases are insulated against effective challenge. Legislatures are not apt to oppose such court-granted comity to legislative policies, and a constitutional challenge to such court-established procedures brought by an aggrieved landowner would be thwarted the famous *Hughes* dicta *supra*.

109. See Juergensmeyer & Wetherington, *supra* note 8.

theoretical presumptions embedded in the case law. It has no policy preferences on the virtue or villainy of government and its regulations nor on the presumed victimhood or profiteering of the private party, but would rest squarely on a rational procedure for making an objective economic analysis during the pretrial level. South Carolina and others would assess costs and attorney's fees at the conclusion of trial upon a party who failed to make, or accept, a bona fide offer of settlement during the ripening period.<sup>110</sup> The proposal here would place added consequences of shifting burdens of proof upon such conduct during the trial itself.

Consequently, if the case is not settled in mediation and proceeds to trial, the court could effectively shift certain material burdens of proof to that party whose proposal was not selected by the special mediator as closest to the mark during the pretrial process. Such a shift is consistent with the expanded willingness of the courts to alter traditional presumption or burden of proof formulae—a shift which is beginning to emerge at common law in regulatory takings cases.<sup>111</sup> Moreover, this shift is independent from the PPPAs.<sup>112</sup> Since 1987, the Supreme Court has increasingly gravitated towards shifting the traditional proof burdens, at least under certain regulatory takings circumstances, away from the private property owner and onto government.<sup>113</sup> By using courts' inherent power of establishing presumptions and burdens of proof, pretrial PPPA-like procedures would be greatly strengthened.

Accordingly, to the extent that some cases not resolved at the pretrial level proceed to full trial, the lines of factual dispute would be drawn with greater clarity than under the present system. Moreover, the burdens of persuasion and proof could be crafted to rest upon that party which resisted the pretrial procedures.

No doubt, greater incentives to settle during the pretrial period could be created by court control over its own rules and procedures,<sup>114</sup> particularly mechanisms addressing the need to post bonds, awards of attorney's fees and court costs, and other techniques. These incentives, in turn, moot the need for case management at trial because as the number of cases settling increases, the number of trials and appeals decreases, effectuating the goal of *Moragne* comity.<sup>115</sup>

110. S.C. H.R. 3591 (to be codified at § 28-4-60(C)(1)-(2)).

111. See *Dolan v. City of Tigard*, 512 U.S. 374, 392-95 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992). See generally *Burton*, *supra* note 20, at 94-119 (discussing the need for and mechanics of the new burdens of proof and presumptions).

112. *Burton*, *supra* note 20.

113. *Id.* at 102-05.

114. FED. R. CIV. P. 1 (stating the general purpose of rules is "to secure the just, speedy, and inexpensive determination of every action").

115. See, e.g., FED. R. CIV. 11 (imposing sanctions for filing frivolous claims or other pleadings solely for the purpose of delay).

### *C. Special Mediator and the RIBE Determination*

In a similar fashion the courts could eventually receive at least an informed analysis of the mixed questions of law and fact which underlie the value of the property from the RIBE perspective. Although RIBE is not statutorily defined in most cases<sup>116</sup> and remains tangled and unresolved in the Supreme Court's case law,<sup>117</sup> a special mediator applying a local common-law definition would likely offer a more reliable, economic determination than a judge or jury.<sup>118</sup> Special mediators could form their views based on jurisdictional preferences.<sup>119</sup> These views could be generated pretrial and submitted to the trial court. From such pretrial materials, the court could make an informed determination of the competing RIBE valuations.

### *D. Determining the Fair Market Value Before and After the Alleged Regulatory Taking*

Similar to the determination of the RIBE, special mediators could receive and ultimately report back to the court their recommendations pertaining to the diminution in market value arising out of the alleged regulatory taking by the governmental body. Necessarily, any such report would require two separate determinations.

#### *1. Percentage Diminution*

Some PPPAs are predicated upon a sort of Holmesian "tripwire" which would define an actionable regulatory taking as a certain percentage of the fair market value caused by subjecting the property to the regulation. Many proposals set the range from 20% to 40%,<sup>120</sup> essentially constituting a legislative attempt to redefine the notion of a taking in such a way as to eliminate from the scope of litigation those which, in Justice Holmes's classic calculus, are government's permissible petty larceny.<sup>121</sup> Under the proposal, special mediators would report to the court a finding on the percentage of lost fair market value attributable to the governmental regulation. This information would be particularly useful in those states which have established a percent-

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116. *Supra* note 94.

117. *See supra* text accompanying notes 96-97.

118. POSNER, *supra* note 102, at 209-14.

119. *Supra* text accompanying notes 98.

120. *See infra* app. B. South Carolina's proposed PPPA opts for a standard of inordinate burden rather than a fixed percentage. H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at §§ 28-4-20, 28-4-30(B)(5)).

121. *Supra* note 53. Professor Juergensmeyer believes that this position is merely a bad joke. Juergensmeyer & Wetherington, *supra* note 8.

age tripwire.

But such a report would also be highly useful in another, more subtle, respect. Some courts may well find agreeable the notion to adopt in Takings Clause litigation—as a matter of comity pursuant to the Moragne Principle—the exact legislative definition of percentage diminution if it comports with that court's notion of going too far in the economic impact of a regulation on the affected private property.<sup>122</sup> This approach is particularly attractive because the baseline for Fifth Amendment doctrine is so evasively fluid under current case law.

## 2. *Dollar Value of the Diminution*

In addition to the percentage of diminution, special mediators could be used to determine and report to the trial court the dollar value of the diminution. If the necessary percentage threshold had been exceeded in the special mediator's analysis of the facts, then the court would receive that determination and also the estimated dollar amount of the actual loss suffered, which should prove to be useful in computing the ultimate just compensation payable pursuant to the Fifth Amendment and similar state constitutional provisions.

### *E. Regulatory Takings and the 100% Rule*

Although a Rubik's Cube of dicta and circular definitions, the current status of Takings Clause doctrine starts from a baseline that, in cases where the government has not actually occupied the private property, all or substantially all of the value must be taken from a parcel of land before the property owner has a categorical claim for just compensation.<sup>123</sup> On first blush this holding seems to be no more than a legal platitude: If 100% of the entire fee simple is taken, then compensation must be paid. For this reason, some members of the Court view this 100% element as a meaningless requirement.<sup>124</sup> However, elaborate dicta in the *Lucas* case indicates that a taking of 100% of the fair market value of the property could mean (i) a taking of all of the value of one of the twigs of property rights within the large

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122. The Texas legislature chose a very high percentage in its PPPA. This provision may create the problem of thwarting a common-law definition of "going too far" to the extent that the legislature may have been too generous towards government, at least from a Texas court's viewpoint. In other words, if the court believes that 40% is too much and cannot be accorded de minimis treatment, the court is free to adjust the common law to some other level, thus adding predictability to the system although at a different threshold than the overly generous legislature might have done. See Anderson, *supra* note 63, at 14; see also *infra* app. B.

123. See *supra* text accompanying notes 38-40.

124. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting).

bundle of rights customarily designated as a fee simple;<sup>125</sup> (ii) a taking of 100% of a portion only of the fee simple of a larger tract;<sup>126</sup> or (iii) a taking of all of a single strand of property rights from only a portion of the larger tract of Greenacre.<sup>127</sup> Moreover, Takings Clause cases involving exactions, per se invasions or occupancies of private land, or temporary takings are not measured by the ephemeral 100% rule. Thus, given such esoterically entangled law and dicta, current Takings Clause case law obviously permits payment of compensation of less than 100% value diminution. However, the path to the result too often is dim, twisted, and needlessly abstract.<sup>128</sup>

Although, if viewed most favorably to government, the categorical rule of *Lucas* would grant compensation only if 100% of the bundle of twigs were taken from 100% of the fee simple of Greenacre, state PPPAs are often more protective of private rights.<sup>129</sup>

#### F. The PPPAs' Less-Than-100% Rule

By contrast to the dicta-riddled constitutional case law, a statutory claim under some of the PPPA proposals could be directly achieved where less than 100% of any of the above interests were taken or less than 100% of the entirety of Greenacre.<sup>130</sup> For instance, the current Florida PPPA and the pending South Carolina bill both create a statutory cause of action where the acts of a governmental agency have inordinately burdened the property—apparently meaning that the owner has lost some measurable magnitude of value or has otherwise been required to bear a disproportionate share of a burden imposed for the good of the public at large.<sup>131</sup>

Notably, the Florida statute and the South Carolina proposal do not create statutory claims for temporary burdens on property rights due to governmental regulation, but only those impositions which permanently create the inordinate

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125. For example, a taking of 100% of the air rights might give rise to a successful claim—notwithstanding that all of the value of the remaining strands in the bundle of rights continued without significant loss. *Id.* at 1016 n.7.

126. An example of this interpretation is a regulation which affected only a strip of land within Greenacre rather than all of Greenacre, if that regulation arguably diminished the fair market value of the affected strip by 100% even though the overall fair market value of Greenacre was not significantly diminished. *Lucas*, 505 U.S. at 1016 n.7.

127. Taking the air rights from our hypothetical strip of Greenacre would be an appropriate illustration. *Id.*

128. See Burton, *supra* note 90, at 160 & n.20.

129. For instance, 50% in Texas or an inordinate burden in Florida and the pending South Carolina bill are the trigger points, rather than 100%. See *supra* notes 120, 122.

130. See *infra* app. B.

131. FLA. STAT. ANN. § 70.001(d)(1), (2) (West Supp. 1997); H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997) (to be codified at S.C. CODE ANN. § 28-4-30(B)(5)).



burden.<sup>132</sup> Naturally, those takings that are of a temporary nature would continue to be covered by Takings Clause claims derived directly from the Constitution.<sup>133</sup> Accordingly, such a PPPA statute, when combined with claims pursuant to the Fifth Amendment, would inevitably cover all cases where a governmental regulation imposes a significant burden upon the private property, measuring less than 100% diminution of value, regardless of whether the burden is permanent or temporary.

In summary, the adoption by courts in all regulatory takings cases of the procedures proposed in various of the PPPAs could not only promote pretrial disposition of as many cases as possible, but would also cover all significant instances of regulatory takings cases—whether derived directly from the Takings Clause or arising solely under various PPPA statutory provisions for which the filtering procedures were crafted.

### *G. Compulsory Settlement Proposals*

The requirement that the private property owner must, within a prescribed period of time, submit to the government a settlement proposal accompanied by a credible appraisal respecting the alleged loss of fair market value for which just compensation is sought is a matter of prudent judicial structuring in harmony with the Moragne Principle.<sup>134</sup> Failure to submit the proposal would affect the ripeness issue and preclude the landowner's commencing suit. Such an incentive ought to spur landowner compliance.

Similarly, pursuant to some PPPAs, the government must make an offer of settlement within a relatively short period of time following the notification and appraisal from the owner and stands at risk if it fails to do so in a reasonable, bona fide manner.<sup>135</sup> Following the Moragne Principle, trial courts could readily interweave this PPPA element into their procedures for handling regulatory takings cases. For instance, a court rule could be established that the failure of the government to submit such an offer could be deemed as a presumption of correctness of the private owner's position. Such a presumption would shift to government the major burdens of proof—principally, that a regulatory taking had not occurred or that the loss in market value was not of the magnitude asserted by the landowner.<sup>136</sup> The

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132. § 70.001(d)(1), (2); S.C. H.R. 3591 (to be codified at § 28-4-30(B)(5)).

133. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

134. Some commentators submit that the inherent power of the equity court to require mutuality and reciprocity among the parties is probably sufficient to establish such a court procedure. *See supra* note 109; *see also supra* text accompanying note 85 (discussing such requirements in the ripeness context).

135. § 70.001(4)(c); S.C. H.R. 3591 (to be codified at § 28-4-40(c)).

fear of such a shift in the presumption and resulting burdens of proof would help assure government's attention to addressing realistically the economic facts as asserted by the private owner.

In fact, if the landowner rejects the government's settlement proposal, a reasonable, bona fide counterproposal should ideally be required by court rule before ripeness for trial is achieved. In some instances, the mere submission of such appraisals, settlement offers, and counteroffers might resolve the issue by focusing attention on the valuation questions early in the process, thereby averting the social costs of lengthy trials, delayed settlement negotiations, as well as the additional private costs of expert testimony and appeals. Moreover, the failure of the parties to agree to a settlement offer within some time period could be made a threshold precondition to further pursuit of judicial remedies by court-embraced comity with some of the PPPA statutes.<sup>137</sup>

#### *H. Special Tools of Mediation*

Tools of court-mandated mediation before a special mediator experienced in valuation questions could be an important filter in avoiding the need for trials and appeals of regulatory takings cases.<sup>138</sup> If the parties have not agreed prior to the action being filed in district court, the court's inherent power to require mediation can be invoked at this point in time.<sup>139</sup>

If court-ordered mediation is required, the special mediator, under such circumstances, would have the advantage of using (i) the formal appraisal submitted with the property owner's claim at the beginning of the ripening period; (ii) the settlement offer from government; and (iii) any counterproposal from the owner. Working from such a baseline, for a court-determined period of time, the mediator may be able to bring about an agreement and avoid trial and appellate litigation between the parties.

Naturally, if this entire series of procedural filters fails to resolve the

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136. Under classic common-law doctrine, the judiciary's deference to the legislature was the root cause of placing the burden of proof upon the private party who challenges a statute or regulation affecting private land rights. MANDELKER, *supra* note 29, § 1.11. The presumption of constitutionality found in land use regulation cases currently favors government. D. Mandelker, *Revising the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Needed?*, 30 WASH. U. J. URB. & CONTEMP. L. 5 (1986); MANDELKER, *supra* note 27, §§ 1.12-1.14. A close reading of the Supreme Court's opinions in *Nollan* and *Lucas* reveals that the stage is set for a formal shift in the presumption of governmental correctness in certain regulatory takings cases. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992); *see also* Burton, *supra* note 20, at 96-100 (discussing the reversal of the presumption of constitutionality of government land use regulation).

137. *See* § 70.001(4)(c); S.C. H.R. 3591 (to be codified at § 28-4-40 to -50).

138. Juergensmeyer & Wetherington, *supra* note 8.

139. *Id.*

claims, then litigation, often including a jury trial and subsequent appeals, becomes inevitable, but the trial court would also have at its disposal a report of the special mediator on the salient questions.

One incidental gambit that should be mentioned borrows from other areas of ADR tactics. The procedures of the special mediator involved in such cases could include a mediator's ultimate recommendation to the court as to which of the party submissions—the mandatory settlement proposal by government or the initial mandatory claim or any settlement counterproposal by the private landowner if the government's proposal is rejected—is deemed closest to the special mediator's view of the actual loss of fair market value caused by the regulation.<sup>140</sup>

Arbitrators sometimes use a similar device to deter "splitting the difference:" where one party submits a highball proposal and the other party submits a lowball proposal, each fully expecting that the arbitrator will award the average of the two proposals. To avoid difference splitting, the arbitrator may be empowered to pick the submitted proposal closest to the arbitrator's determination of a just result.<sup>141</sup> This theory as applied here is that, by adopting a process for selecting the proposal closest to the special mediator's view, each party will seek to make its proposal as realistic—whether high or low—as it believes the special mediator's informed viewpoint will ultimately lead to setting the values involved.

In a hypothetical regulatory takings instance, suppose the government proposed a settlement for \$10,000 and the private landowner counterproposed at \$20,000. Among other tasks, the special mediator could be required to decide which of these amounts comes closest to her own determination of lost fair market value, based upon the expert evidence of appraisals received and also based upon her personal expertise in the area. If mediation ultimately fails, the mediator could report this information to the court for its consideration in adjusting burdens of proof, setting presumptions, and awarding costs and attorney's fees. Such pressures towards realism might eliminate a considerable amount of highballing and lowballing by the parties when the stakes of such excesses could later prove to be vital to the client's cause. This process would also provide more realistic grist for the mediator's mill in trying to bring the parties together in a result.

### *I. The Winnowed Case: An Example*

Suppose a hypothetical county government enacts land use regulations that have an impact on Greenacre. The following scenario could be required before a final regulatory takings adjudication by the courts. First, the owner of

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140. BERTHOLD H. HOENIGER, COMMERCIAL ARBITRATION HANDBOOK § 2.08 (1991).

141. *Id.*

Greenacre submits a notice or demand and an appraisal of lost property value to the county. Then, the government submits a response and an offer of settlement or other form of resolution. Next, the owner accepts the offer or makes a counteroffer. If these steps fail, then the court orders compulsory mediation, including value and RIBE determinations by the mediator. If no settlement is reached, the mediator reports to the trial court. In response, the trial court fixes burdens of proof, and it retains power to assess fees and costs upon any party whose pretrial posture was not bona fide and reasonable.

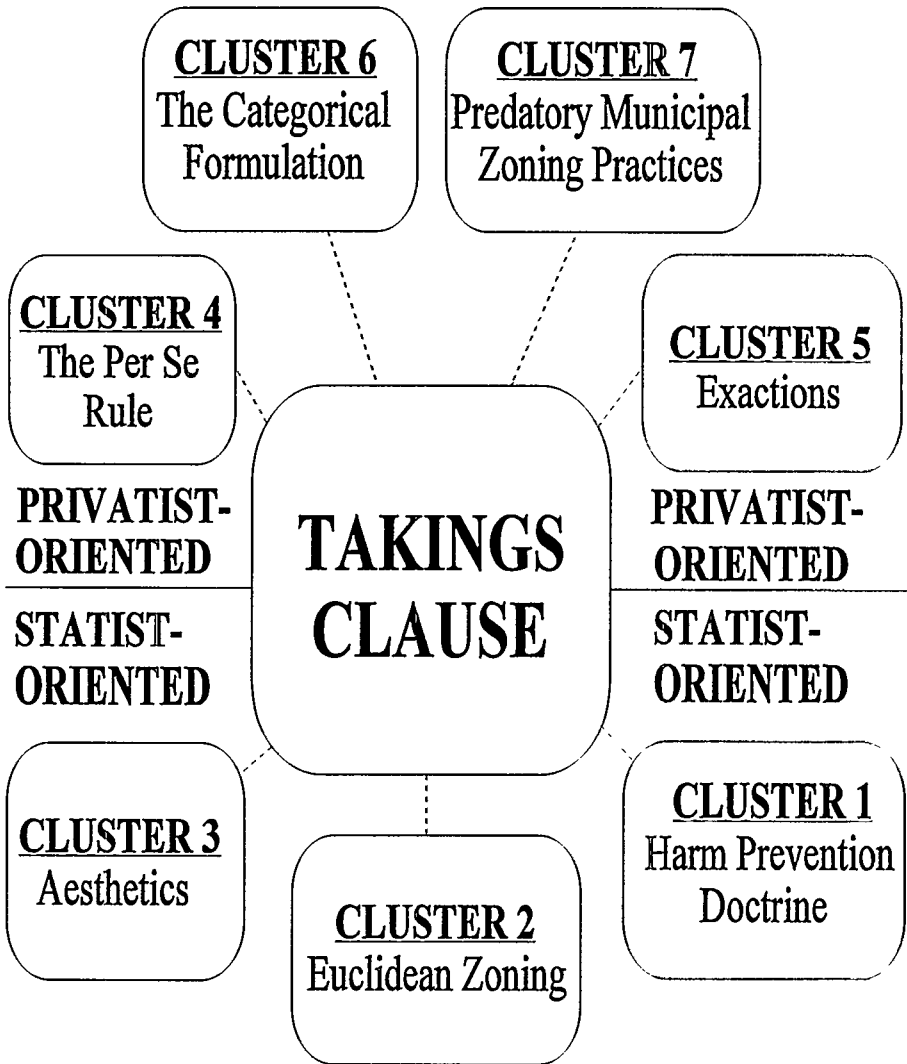
Such winnowing down of claims could help with maximizing judicial resources; but most importantly, it will diminish the number of appellate cases that may invite further doctrinal proliferations. This curtailment would be particularly true if appellate courts attach heavy deference to the lower court results in such a comity-based system.

### IX. CONCLUSION

By accomodating by means of the Moragne Principle, new pretrial procedures for regulatory takings cases can readily be created by the state and federal courts using the PPPAs as models. These new procedures would add considerable fairness, clarity, and efficiency to regulatory takings litigation. The procedure could incorporate the use of special masters or mediators with expertise in property valuation. Moreover, the procedures could incorporate some of the elements of the PPPAs that attempt to add some systematic logic to the economic analysis in such cases. Thus, the courts could use filtering devices from these acts which establish the significance or insignificance of the alleged regulatory taking, the RIBE of the property owner in its capital expenditures to acquire or develop the property in question, and the likeliest estimate of the fair market value lost to the private property owner.

This revised process would create a coherent atmosphere and provide some useful working determinations for each case as to what is deemed, by the special master using these procedures, to constitute just compensation in the constitutional sense or, alternatively, PPPA damages in the pertinent statutory sense.

## APPENDIX A



## APPENDIX B

## STATE REGULATORY TAKING STATUTES

\*Pending Legislation on Private Property Protection Acts--Not Enacted as of January 1996

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Alabama	"just compensation," ALA. CONST. art. I, § 23.  *H.R. 525, Reg. Sess.. (Ala. 1996).		Historic preservation-- ALA. CODE §§ 11-68-1 to -15 (1994). Parks & preserves-- ALA. CODE § 9-2-3 (1987).
Alaska	"just compensation," ALASKA CONST. art. I, § 18.  Not by statute.		
Arizona	"just compensation," ARIZ. CONST. art. II, § 17. Not by statute (Private Property Rights Protection rejected at general election Nov. 8, 1994).	Ombudsman for Private Property Rights, ARIZ. REV. STAT. §§ 41-1311 to -1313 (Supp. 1996).	Historic preservation--ARIZ. REV. STAT. § 42-164 (Supp. 1996).
Arkansas	"just compensation," ARK. CONST. art. 2, § 22.  Not by statute.		
California	"just compensation," CAL. CONST. art. 1, § 19.  *A.B. 1319, Reg. Sess. (Cal. 1995). *S. 635, Reg. Sess. (Cal. 1995). *S. 747, Reg. Sess. (Cal. 1995).		Setbacks along waterways & streams--CAL. WATER CODE § 55-5 (West 1968).

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Colorado	"just compensation," determined by a board of commissioners or by jury-COLO. CONST. art. II, § 15.  *S. 136, 60th Gen. Assembly, 1st Sess. (Colo. 1995). *H.R. 1171, 60th Gen. Assembly, 1st Sess. (Colo. 1995).	The Attorney General ("AG") creates and maintains guidelines for agency takings. *S. 136, 60th Gen. Assembly, 1st Sess. (Colo. 1995). *H.R. 1171, 60th Gen. Assembly, 1st Sess. (Colo. 1995).	
Connecticut	"just compensation," CONN. CONST. art. 1, § 11.  *S. 1016, Reg. Sess. (Conn. 1995).		
Delaware	"compensation," DEL. CONST. art. I, § 8.  *S. 52, 138th Gen. Assem., Reg. Sess. (Del. 1995).	AG reviews all rules or regulations promul- gated by any state a- gency and informs the issuing agency in writ- ing as to the potential of the rule to result in a taking of private property. DEL. CODE ANN. tit. 29, § 605(a) (Supp. 1996).	
Florida	"full compensation," FLA. CONST. art. 10, § 6.  Not by statute.		Beach & shore preservation-FLA. STAT. ch. 161.141 (Supp. 1997). Restrictions on natural resource development- FLA. STAT. ch. 369.- 305 (1997).

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Georgia	"just and adequate compensation," GA. CONST. art. 1, § 3, ¶ 1(a).  Not by statute.		
Hawaii	"just compensation," HAW. CONST. art. I, § 20.  *S. 2660, 18th Leg., Reg. Sess. (Haw. 1996).		
Idaho	"just compensation," IDAHO CONST. art. I, § 14.  Idaho Regulatory Takings Act, IDAHO CODE §§ 67-8001 to -8004 (1995).	AG will create system for state agencies to evaluate proposed actions. IDAHO CODE § 67-8003 (1995).	
Illinois	"just compensation," ILL. CONST. art. 1, § 15.  *S.R. 1433, 89th Gen. Assembly, Reg. Sess. (Ill. 1996).		Preservation of historical areas-ILL. COMP. STAT. ch. 65, para. 5/11-48.2-2 (West 1993).
Indiana	"just compensation," IND. CONST. art. 1, § 21.  Not by statute.	AG will alert governor as to any potential regulatory takings. IND. CODE § 4-22-2-32 (1996).	
Iowa	"just compensation ... assessed by a jury," IOWA CONST. art. 1, § 18.  *H.R. 582, 76th Gen. Assembly, Reg. Sess. (Iowa 1995).		



STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Kansas	*H.R. 2015, 76th Leg., 1st Sess., 1995 Kan. Sess. Laws 170.	AG will create guidelines to be updated annually.  *H.R. 2015, 76th Leg., 1st Sess., 1995 Kan. Sess. Laws 170.	
Kentucky	"just compensation," KY. CONST. § 13.  *H.R. 255, Reg. Sess. (Ky. 1996). *S. 98, Reg. Sess. (Ky. 1996).		
Louisiana	"just compensation," LA. CONST. art. I, § 4.  *H.R. 1832, 21st Reg. Sess. (La. 1995).		
Maine	"just compensation," ME. CONST. art. I, § 21.  *H.D. 867, 117th Leg., 1st Sess. (Me. 1995).		
Maryland	"just compensation," MD. CONST. art. III, § 40.  Not by statute.		
Massachusetts	"reasonable compensa- tion," MASS. CONST. pt. 1, art. 10.		
Michigan	"just compensation," MICH. CONST. art. 10, § 2.  *H.R. 4433, 88th Leg., Reg. Sess. (Mich. 1995).		

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Minnesota	<p>"just compensation," MINN. CONST. art. 1, § 13.</p> <p>*S. 475, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*S. 634, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*S. 635, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*S. 636, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*S. 1115, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*H. 709, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*H. 716, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*H. 718, 79th Leg., Reg. Sess. (Minn. 1995).</p> <p>*H. 719, 79th Leg., Reg. Sess. (Minn. 1995).</p>		
New Jersey	<p>"just compensation," N.J. CONST. art. I, ¶ 20.</p> <p>*S. 1935, 206th Leg., 2d Sess. (N.J. 1995).</p> <p>*A.B. 3088, 206th Leg., 2d Sess. (N.J. 1995).</p> <p>*A.B. 2106, 206th Leg., 1st Sess. (N.J. 1994).</p>		

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
New Mexico	"just compensation," N.M. CONST. Art. II, §20.  Not by statute.		
New York	"just compensation," N.Y. CONST. art. 1, § 7.  *A.B. 4502, 218th Gen. Assem., 1st Sess. (N.Y. 1995). *S. 5077, 218th Gen. Assem., 1st Sess. (N.Y. 1995).		
North Dakota	"just compensation," N.D. CONST. art. I, § 16.  N.D. CENT. CODE § 28-32-02.5 (Supp. 1997) (requiring assessment of takings).		
Ohio	"compensation . . . assessed by a jury," OHIO CONST. art. I, § 19.  Not by statute.		
Oklahoma	"just compensation," OKLA. CONST. art. 2, § 24.  Not by statute.		
Oregon	"just compensation," OR. CONST. art. I, § 18.  Not by statute.		

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Pennsylvania	"just compensation," PA. CONST. art. 1, § 10.  *S. 805, 179th Gen. Assembly, Reg. Sess. (Pa. 1995).		
Rhode Island	"just compensation," R.I. CONST. art. I, § 16.  *S. 509, Jan. Sess. (R.I. 1995).		
South Carolina	"just compensation," S.C. CONST. art. I, § 13.  *H.R. 3591, 112th Gen. Assembly, 1st Sess. (S.C. 1997).		
South Dakota	"just compensation," S.D. CONST. art. VI, § 13.  Not by statute.		
Tennessee	"just compensation," TENN. CONST. art. I, § 21.  Government Taking of Private Property, TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1996).		
Texas	"adequate compensation," TEX. CONST. art. 1, § 17.  *H.R. 665, 74th Leg., Reg. Sess. (Tex. 1995).	AG is to create and maintain guidelines to help agencies identify actions that will effectuate takings. *H.R. 665, 74th Leg., Reg. Sess. (Tex. 1995).	

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Utah	"just compensation," UTAH CONST. art. I, § 22.  UTAH CODE ANN. §§ 63-90-1 to -4 (Supp. 1997).	Each political subdivision is to adopt guidelines. UTAH CODE ANN. § 63-90a-3 (Supp. 1996).	
Vermont	"equivalent in money," Vt. CONST. ch. 1, art. 2.  H.R. 108, Reg. Sess. (Vt. 1995).		
Virginia	"just compensation," VA. CONST. art. I, § 11.  *H.J.R. 526, Reg. Sess. (Va. 1995).		
Washington	"just compensation," WASH. CONST. art. 1, § 16.  *H.R. 2223, 54th Leg., Reg. Sess. (Wash. 1995). *H.R. 1925, 54th Leg., Reg. Sess. (Wash. 1995). *S.R. 5261, 54th Leg., Reg. Sess. (Wash. 1995). *H.R. 1026, 54th Leg., Reg. Sess. (Wash. 1995).	AG is to create a process enabling state agencies to evaluate proposed regulatory actions. WASH. REV. CODE § 36.70A.370 (Supp. 1997).	
West Virginia	"just compensation," W. VA. CONST. art. 3, § 9.  Not by statute.		

STATE	COMPENSATION REQUIRED	"AWARENESS" SECTION	ALL OR SOME GOVERNMENT REGULATION
Wisconsin	<p>"just compensation," WIS. CONST. art. 1, § 13.</p> <p>*S. 298, 92d Leg., Reg. Sess. (Wis. 1995). *A.B. 521, 92d Leg., Reg. Sess. (Wis. 1995).</p>		
Wyoming	<p>"due compensation," WYO. CONST. art. 1, § 32; "just compensation," <i>id.</i> § 33.</p> <p>WYO. STAT. ANN. §§ 9-5-301 to -305 (Michie 1997).</p>	<p>AG is to create guide- lines to help identify agency takings. WYO. STAT. ANN. § 9- 5-303 (Michie 1995).</p>	

