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"Taking Reform" and the Process of State Legislative Change in the Context of a "National Movement"

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Hubbard: "Taking Reform" and the Process of State Legislative Change in th

“TAKINGS REFORM” AND THE PROCESS OF STATE LEGISLATIVE CHANGE IN THE CONTEXT OF A “NATIONAL MOVEMENT”

F. PATRICK HUBBARD*

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I. INTRODUCTION

In recent years, a push for legislative “reform” of “takings law” to provide greater protection for land owners has been referred to as a national “movement.” As evidence of this movement, it is common to note that various types of legislative proposals have been introduced in Congress and in virtually every state, and that many states have adopted some type of reform. This national pattern of legislative action raises specific issues about takings reform. It also raises more general questions concerning how a national movement for reform develops, and how this movement is shaped by the unique circumstances of each state.

This Article addresses these two types of questions by considering both the national and South Carolina experiences with takings reform proposals. Part II presents the doctrinal background by summarizing and discussing three “facts of life” concerning the constitutional takings doctrine. Part III provides further understanding of what the national movement means in terms of state legislation by reviewing the response to reform proposals throughout the states. Part IV places the South Carolina experience within this national experience by discussing the takings reform proposals considered by the South Carolina legislature. Part V makes several observations concerning takings reform proposals in general and illustrates these by reference to South Carolina.

II. THE CONSTITUTIONAL FRAMEWORK OF “TAKINGS” LAW

A. The Requirement of Compensation for a “Taking”

The right to compensation for a governmental taking of property is based on both the federal and state constitutions. The Fifth Amendment of the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.”¹ This mandate has been deemed incorporated into the Fourteenth Amendment and thus applies to state governments.² In addition, state constitutions generally contain equivalent protection. For example, the South Carolina Constitution provides that “private property shall not be taken . . . for public use without just compensation being first made therefor.”³ These compensation provisions are relatively easy to

1. U.S. CONST. amend. V; *see also* JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (2d ed. 1998) (offering a historical perspective on the Just Compensation Clause in terms of property rights in the United States).

2. *See* *Chicago, Burlington, & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

3. S.C. CONST. art. I, § 13.

apply in situations involving a straightforward, physical appropriation of land for a public use like a highway.

However, difficulties arise when governmental action consists only of rules and regulations that impose limitations on an owner's *use* of land. In most situations, these impositions are viewed as burdens an individual is subject to as a citizen and land owner.⁴ From this perspective, the exercise of the "police power" of the government, which has traditionally been used to prohibit public and private harms, does not involve a taking of property, even if the restriction involved results in a substantial loss in the economic value of the land.⁵ For example, zoning restrictions on land generally do not constitute takings.⁶ However, under some circumstances, the imposition of restrictions and burdens on land use can constitute a "regulatory taking" if the restrictions are unwarranted or too extensive. Such burdens "should be borne by the public as a whole"⁷ The problem is thus one of line-drawing: How does one distinguish mere regulations from a regulatory taking?

B. Three Basic "Facts of Life" About Regulatory Takings

Anyone attempting to answer this question soon encounters three basic facts of life about regulatory takings. First, no set formula, test, standard, or guideline provides a reasonably easy and reliable method for identifying a taking. Second, the legal process of identifying a regulatory taking question can be very expensive and time-consuming. Third, regulations can have substantial negative impact on a property owner but still not constitute a taking.

4. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987) (citations omitted):

Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are "properly treated as part of the burden of common citizenship." Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

5. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-95 (1926) (holding that alleged reductions in value as a result of a zoning ordinance from \$10,000 per acre to \$2,500 per acre and from \$150 per front foot to \$50 per front foot were not an unconstitutional taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (holding that the prohibition against brickyard operation that allegedly resulted in a reduction in value from \$800,000 to \$60,000 was lawful).

6. See, e.g., *Ambler*, 272 U.S. at 384-95 (holding that zoning ordinance did not amount to a taking).

7. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

1. *There Is No "Set Formula" for Identifying a Regulatory Taking*

The United States Supreme Court summarized the lack of a substantive test for identifying a taking as follows:

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."⁸

This lack of a set formula has not resulted from a lack of effort on the part of judges and scholars. "Thousands of square miles of our nation have been deforested to provide the paper to print the thousands—probably hundreds of thousands—of books, articles, notes, comments, seminar papers, newsletters, etc., dealing with *regulatory takings*."⁹ Nor has the lack resulted from a lack of intelligence.

[N]o one is likely to discover a *Loretto* stone, so to speak, that will unlock the secrets of the takings issue. The judges and scholars who have addressed the issue in the twentieth century are as intelligent a group as is likely to address it in the twenty-first. The takings issue is muddy because it is inherently hard to deal with, not because the people who have addressed it haven't been smart enough to see the light.¹⁰

8. *Id.* at 123-24 (citations omitted).

9. Julian Conrad Juergensmeyer, *Florida's Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 FLA. L. REV. 695, 696 (1996); *see, e.g.*, CAROL M. ROSE, *PROPERTY AND PERSUASION* 49 (1994) ("Scholars have joined judges in spilling a great deal of ink over takings . . .").

10. WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 325 (1995); *see, e.g.*, James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1150 (1997) (noting that the meaning of "taking" is inherently uncertain, which creates a problem in the takings area because "[a]mbiguity and uncertainty . . . are likely to provoke unusual anxiety when we sense them at the heart of our political-economic system."). The phrase "*Loretto* stone" in the textual quote above is a reference to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which attempted to provide a test of regulatory taking based

a. Problems Causing Lack of a Set Formula

Regulatory takings are “inherently hard to deal with”¹¹ for three reasons. First, the matter is complex because regulations affecting the use of property are extremely diverse. Second, takings decisions require a prior determination of what rights are included in ownership. By definition, no taking results if a regulation does not limit or interfere with any of the rights involved in ownership. Thus, “in order to say when governmental action ‘takes’ someone’s property, we must have some idea about what rights are included in property in the first place.”¹² Third, any formula that addresses the problems of complexity and ownership rights must be adopted by a majority of judges on a given court. In particular, a formula for interpreting the Fifth Amendment must be adopted by at least five Supreme Court justices both at the time of a particular decision and, if the formula is to be effective across time, as new takings cases are decided.

(1) Complexity

Legal restrictions affect property in so many diverse ways that it is impossible to devise a rule or set of rules which is both precise enough to provide relatively clear, certain answers and general enough to cover the variety of regulations that affect property values. This diversity in restrictions can be illustrated by considering the following examples of ways the law regulates land use:

- (1) agricultural use regulations, including such diverse restrictions as: (i) prohibitions on growing marijuana, even though this crop would be significantly more profitable than any other crop;¹³ (ii) requirements concerning the use of pesticides and herbicides, even though these requirements substantially reduce profitability;¹⁴ and (iii) expensive requirements that livestock waste be contained in a particular way on site so that rain water will not carry it off site;¹⁵
- (2) common zoning techniques such as: (i) restrictions on an owner’s use of property, which can substantially reduce property value;¹⁶ (ii) set-

on whether a physical invasion was involved. *FISCHEL, supra* at 318. However, Fischel indicates that, in his view, the attempt failed and “[t]he lesson of *Loretto* is that there is no refuge in making a ‘bright-line’ distinction between regulations and physical invasions.” *Id.* at 320.

11. *FISCHEL, supra* note 10, at 325.

12. *ROSE, supra* note 9, at 49.

13. *See, e.g., S.C. CODE ANN. § 44-53-370(a)* (Law. Co-op. Supp. 1997) (making it unlawful for a person to manufacture or distribute narcotics and other controlled substances, including marijuana).

14. *See, e.g., S.C. CODE ANN. §§ 46-13-10 to -240* (Law. Co-op. 1976 & Supp. 1997) (codifying South Carolina’s Pesticide Control Act).

15. *See, e.g., S.C. CODE ANN. § 47-20-60* (Law. Co-op. Supp. 1997) (setting forth specifications and requirements for animal waste storage ponds).

16. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-95 (1926) (upholding zoning use restriction despite a 75% reduction in property value); *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (upholding restriction prohibiting use of property as a

- back requirements, which effectively prohibit use of significant portions of one's land for construction;¹⁷ and (iii) landscaping requirements, which force a property owner to enhance the aesthetic pleasure of those looking at the property;¹⁸
- (3) environmental rules barring: (i) water or air pollution;¹⁹ (ii) the destruction of wetlands and the beach/dune system;²⁰ or (iii) the destruction of habitat for an endangered species.²¹

Complexity also results from the problems of identifying the "property" or "property interest" at issue. There are two dimensions to this problem. First, if a regulation prohibits the development of part of an owner's large tract of land, what is the property at issue: the whole tract (in which case, only a partial restriction is involved) or only the part subject to regulation (in which case, a total restriction is involved)?²² Second, given the common conceptualization of property rights as "sticks in a bundle,"²³ if a regulation totally eliminates one stick, is the regulation viewed as a total taking of this stick or as a partial taking of the bundle of sticks?²⁴

brickyard despite a 92.5% reduction in property value).

17. Set-back regulations require that construction be "set back" a certain distance from the property line. The result is that the owner must have a front, back, and side yard so that the community will have more open space. The Supreme Court found set-back requirements to be a constitutional exercise of the police power in *Gorieb v. Fox*, 274 U.S. 603, 610 (1927).

18. The power to use zoning to impose landscaping requirements is explicitly granted in the South Carolina Local Government Comprehensive Planning Enabling Act of 1994. See S.C. CODE ANN. § 6-29-720(A)(6) (Law. Co-op. Supp. 1997) (authorizing regulation of "aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts"). Such restrictions appear to be constitutional. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978) ("[T]his Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. . . ."); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (citation omitted) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

19. See, e.g., S.C. CODE ANN. § 48-1-100 (Law. Co-op. Supp. 1997) (requiring permits for the additional discharge of wastes or air contaminants).

20. See, e.g., S.C. CODE ANN. § 48-39-260 (Law. Co-op. Supp. 1997) (recognizing the importance of preserving the beach/dune system).

21. See, e.g., S.C. CODE ANN. § 48-39-250(1)(c) (Law. Co-op. Supp. 1997) (noting various policy reasons for conservation of beach/dune system, including habitat preservation).

22. See *infra* notes 57-58 and accompanying text.

23. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) ("[The regulation] accords with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.").

24. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 500-02 (1987) (refusing to accept the argument that total taking resulted because regulatory statute "entirely destroys the value of their unique support estate," which was essentially a distinct stick in the owner's bundle of property rights); *infra* notes 57-58 and accompanying text.

(2) *Determining Rights and Limitations Relating to Property Ownership*

In order to determine whether a particular regulation is a taking of a property “right,” one must first determine what the property owner’s rights are. This determination is necessary because ownership, in itself, does not mean that the owner has a right to do all things with the property. Property rights are not absolute; they are, and always have been, subject to limitations. The problem is that there is no general test for identifying these limitations. As a result, the line between permitted and prohibited uses must be drawn on a case-by-case basis. This lack of a test for defining rights presents a fundamental problem: How can property rights serve as a limit on governmental power if we have no standard for identifying property rights? Several possible approaches can be used to address this problem, but each has shortcomings.

First, it is possible to avoid recognizing the problem by stating a question-begging “rule” that covers all cases. For example, for centuries many courts have avoided the problem in nuisance cases by resorting to a “rule” that subjects the right to use land to the maxim, *sic utere tuo ut alienum non laedas* (“one should use his own property in such a manner as not to injure that of another”).²⁵ In the takings context, the Supreme Court has noted:

Long ago it was recognized that “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community,” and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.²⁶

Such maxims have been widely recognized as question-begging because they do not provide guidance until one first answers the question: What is an injury?²⁷ For example, if Ronald Rocker likes to listen to loud music in his yard, and Nancy Nature loves to listen to the birds in her yard, the maxim about rights is useless in a dispute between the two until one first determines whether Rocker “injures” Nature because Rocker’s music is so loud that Nature cannot

25. BLACK’S LAW DICTIONARY 1380 (6th ed. 1990).

26. *DeBenedictis*, 480 U.S. at 491-92 (citations omitted); *see also* *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667-68 (1878) (stating that the restraint of nuisances through the exercise of the police power “rests upon the fundamental principle that every one shall so use his own [property] as not to wrong and injure another. . . . ‘Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others.’” (quoting *Coates v. Mayor of New York*, 7 Cow. 585, 605 (N.Y. 1827))).

27. *See, e.g., Lucas*, 505 U.S. at 1031 (1992) (To win a takings case, the state “must do more than proffer the legislature’s declaration that the uses . . . [at issue] are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.”); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964) (criticizing “noxious use” analysis on the ground that it is question-begging).

hear the birds.²⁸

Second, it is possible to avoid addressing the problem by allowing the government to set its own limits. From this perspective, property rights are defined by the law of the state. As a result, an owner's rights are always subject to a governmental determination of whether any particular use of the property "harms" the public good or "harms" another person. The problem with this approach is the lack of an independent standard for determining what constitutes a proper exercise of the police power. Property rights become simply a matter of "positive law"—*i.e.*, what the legislature or courts say they are. Such a result is contrary to the notion that the Fifth Amendment's Taking Clause is designed to limit the government and thus protect property owners from government abuse.

A third alternative to the problem is to adopt the view that there is some "natural law" standard, separate from and independent of the positive law of legislation and judicial opinions, that can be used to define property rights. This approach has the advantage of providing substantive content to the Takings Clause thus providing a limit on the government. However, this approach presents a new problem: How does one identify the property rights independent of the legal system?

One common answer to this question is to refer to expectations embedded in cultural tradition.²⁹ Unfortunately, tradition provides only limited guidance. In a pluralistic, dynamic society like the United States, agreement on the content of tradition is hard to achieve. For example, both Justice Scalia and Justice Kennedy agree that, in the context of regulatory takings, tradition provides a standard that: (1) is independent of the statutes or judicial decisions of a state; and (2) provides a workable guide to rights of ownership in the context of regulatory takings. But they cannot agree what that tradition is.³⁰

In *Lucas v. South Carolina Coastal Council*³¹ Justice Scalia noted that even a loss of all economically viable use of land is not a taking if the proscribed uses were never "part of . . . [the owner's] title to begin with."³² Scalia bases his position on "our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the

28. See, e.g., F. Patrick Hubbard, *Taking Persons Seriously: A Jurisprudential Perspective on Social Disputes in a Changing Neighborhood*, 48 U. CIN. L. REV. 15, 19-21 (1979) (using similar hypothetical in context of discussing the difficulty of awarding entitlements).

29. Numerous other approaches have been proposed in addition to those discussed in the text. For a sense of the diversity and complexity of the approaches to constitutional interpretation, see Symposium, *Fidelity in Constitutional Theory: Editor's Foreword*, 65 FORDHAM L. REV. 1247 (1997).

30. See *Lucas*, 505 U.S. at 1027, 1032 (1992).

31. *Id.* For a more detailed discussion of *Lucas*, see *infra* Part II.B.1.b. Justice Scalia took a similar position about preexisting rights independent of state law in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), in which he asserted that, if a particular right is inherent in property ownership, notice to a prospective buyer of a limit on that right is not a bar to a future takings challenge. *Id.* at 833-34 n.2. For a more general takings argument in terms of preexisting rights, see, for example, Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387-89 (1993).

32. *Lucas*, 505 U.S. at 1027.

State's power over, the 'bundle of rights' that they acquire when they obtain title to property."³³ This "constitutional culture"³⁴ provides a reasonable expectation standard: Some limits are reasonably expected by citizens and are therefore proper;³⁵ other limits are not reasonably expected and are therefore improper.³⁶ As to the content of this cultural tradition, Justice Scalia refers to "relevant property and nuisance principles."³⁷

[R]egulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.³⁸

In his concurring opinion in *Lucas*, Justice Kennedy also adopts a culturally based standard, which he expresses in terms of "reasonable, investment-backed expectations" to be used "[w]here a taking is alleged from regulations which deprive the property of all value."³⁹ This approach is necessary to avoid "an inherent tendency towards circularity . . . for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."⁴⁰ The cultural expectation standard provides an independent test that makes it possible to avoid this circularity because "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."⁴¹ However, Justice Kennedy disagrees with Justice Scalia's emphasis on the common law as the basis for

33. *Id.*

34. *Id.* at 1028.

35. *Id.* at 1027.

It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Id. (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

36. *Id.* at 1030 ("When . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

37. *Id.*

38. *Id.* at 1029 (footnote omitted).

39. *Id.* at 1034 (Kennedy, J., concurring).

40. *Id.*

41. *Id.* at 1035.

reasonable expectations as to property rights.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment.⁴²

The relative merits of the respective positions of Justice Scalia and Justice Kennedy are beyond the scope of this Article. For present purposes, the point is that they cannot agree. Given this lack of agreement, it is unreasonable to expect that cultural tradition can serve as an independent standard of property rights.

The inadequacy of tradition as a standard to determine an owner's rights is particularly important in the context of proposals for takings reform. Many criticisms of existing takings law have arisen in situations where there is no cultural agreement concerning where to draw the line between the rights of ownership and the proper limits on those rights.⁴³ For example, there is considerable disagreement over whether a property owner has a right to build an ugly parking lot; to demolish a unique historic structure; to build a strip mall in a pretty, wooded area along the highway; or to fill in wetlands. To the extent that legal regulations limiting these rights have been adopted and upheld, at least one segment of society views the limits as a proper exercise of the police power. However, not all people share this view. Much of the push for property rights reform can be understood as a reaction to the impact on property rights that has resulted from expanding the definition of "harm" to include such values as aesthetics, historic preservation, and the preservation of the "environment" (broadly defined to include such things as wildlife habitat and natural scenery).⁴⁴

(3) *Multimember Appellate Courts*

The requirement for majority agreement among appellate court members presents another obstacle to establishing a set formula for takings. A central feature of appellate courts in the United States is the use of the technique of

42. *Id.* (citation omitted).

43. See, e.g., FISCHER, *supra* note 10, at 352-57 (adopting a perspective in which limits on property rights are measured largely by "standards exhibited by the community"); cf., e.g., Peter Karsten, *Cows in the Corn, Pigs in the Garden, and "the Problem of Social Costs": "High" and "Low" Legal Cultures of the British Diaspora Lands in the 17th, 18th, and 19th Centuries*, 32 L. & SOC'Y REV. 63 (1998) (presenting position that cultural views of rights are central to resolution of disputes over trespassing animals).

44. See *infra* notes 79-82 and accompanying text.

“group decision.”⁴⁵ The United States Supreme Court and the state supreme courts are all multimember courts that operate as a group and reach decisions based on the principle that the majority rules in applying constitutional limits like the Fifth Amendment. Justice Brennan’s law clerks report that he conducted an annual drill to advocate that the most important rule in constitutional law is the “rule of five.”⁴⁶ This rule was understood by the clerks to mean either that “it takes five votes to do anything, . . . [or] with five votes you could do anything.”⁴⁷ Thus, if one is concerned with having a multimember court adopt a test or formula to apply to a general type of case, one must get a majority to agree not only on the result in a particular case, but also on the test. Moreover, one must get a *consistent* majority that will, over time, continue to adopt the formula and apply it consistently to all cases falling within its scope.

b. Illustration of Problems—Lucas v. South Carolina Coastal Council

The problems with developing a test determining when a regulation becomes a taking can be illustrated by considering *Lucas v. South Carolina Coastal Council*.⁴⁸ *Lucas* notes that the Supreme Court has generally eschewed any “‘set formula’ for determining how far is too far” and has, instead, preferred to “‘engag[e] in . . . essentially ad hoc, factual inquiries.”⁴⁹ However, *Lucas* also asserts that the Supreme Court has

described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical “invasion” of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . .

The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.⁵⁰

45. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 31-32 (1960).

46. Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

47. *Id.*

48. 505 U.S. 1003 (1992).

49. *Id.* at 1015 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

50. *Id.* As an example of the first type of per se taking, the Court refers to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The *Lucas* opinion asserts that *Loretto* holds: “New York’s law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, even though the facilities occupied at most only 1½ cubic feet of the landlords’ property.” 505 U.S. at 1015 (citation omitted).

The dispute in *Lucas* involved two coastal lots that could not be developed because of a regulation designed to halt new construction between the beach and an administratively determined erosion "baseline."⁵¹ Lucas had purchased the lots before the enactment of the regulatory scheme, and the trial court held that the lots had become valueless because of the development prohibition.⁵² Given this impact on the utility and value of the land, the Supreme Court held that a taking existed under the second category of per se takings.⁵³

Regardless of one's views as to whether a taking occurred in *Lucas*, the two per se categories identified by the majority opinion in *Lucas* do not provide a "set formula" for even a limited class of regulatory takings. The first category—physical invasions—does not provide a formula because many physical invasions are not viewed as takings. These invasions, which are often termed "exactments," include a wide range of constitutionally permissible physical invasions of land.⁵⁴ For example, *Dolan v. City of Tigard*⁵⁵ recognizes that, as a condition for permission to expand a retail store, a city may exact a dedication of land from a land owner so long as the city makes "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."⁵⁶

As to the second category, *Lucas* itself recognizes that the "total takings" situations require case-by-case adjudication for two reasons. First, "the rule does not make clear the 'property interest' against which the loss of value is to be measured."⁵⁷ The importance of this uncertainty regarding the interest at stake can be illustrated by considering how to apply this per se rule if Lucas had owned a large, unsubdivided tract of land. Would a total taking have been involved if the regulations resulted in a reduction in the number of developable lots from twenty to eighteen when the tract was subdivided?⁵⁸ Second, a total

51. *Id.* at 1006-09; S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Supp. 1997).

52. *Lucas*, 505 U.S. at 1006-07.

53. *Id.* at 1031-32.

54. See, e.g., DANIEL R. MANDELKER, LAND USE LAW §§ 9.11 to 9.23 (4th ed. Lexis Law Publ'g 1997) (describing on and off-site improvements, impact fees, and other considerations that municipalities may "exact" from builders); cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that shopping center must accommodate person exercising right of free speech granted by state in exercise of its police power).

55. 512 U.S. 374 (1994).

56. *Id.* at 391.

57. *Lucas*, 505 U.S. at 1016 n.7. For critiques of this aspect of *Lucas*, see, for example, William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1407 (1993) (arguing that nuisance law is too vague to clarify takings doctrine); William Funk, *Revolution or Restatement? Awaiting Answers to Lucas' Unanswered Questions*, 23 ENVTL. L. 891, 898 (1993) (arguing that reliance on state nuisance doctrines may lead to divergent applications of the takings doctrine in different states); John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 13 (1993) (arguing that adoption of common law nuisance standard provides few "objective parameters" for legislative conduct); John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 815 (1993) (arguing that adoption of nuisance standard usurps proper legislative role of determining regulatory legitimacy). For further discussion of the uncertainty resulting from the difficulty in defining the property at issue, see *supra* notes 22-24 and accompanying text.

58. For an example of such a problem, see *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179-82 (Fed. Cir. 1994).

loss of the economic value of the owner's land is not a taking if the proscribed uses were never "part of . . . [the owner's] title to begin with."⁵⁹ Because of this limit, the "total loss" per se category cannot be applied until after one has determined what uses were permitted prior to the adoption of the challenged regulation.

Both Justice Scalia and Justice Kennedy offer a cultural standard for this determination;⁶⁰ however, they disagree as to how one determines the content of this standard. Arguably, Justice Scalia's narrow standard would not require a case-by-case adjudication because it operates by reference to the existing law of nuisance.⁶¹ However, nuisance law cannot provide an objective guide to cultural standards of property rights. In an oft repeated phrase, Prosser referred to nuisance law as an "impenetrable jungle."⁶² Justice Scalia's opinion refers to a series of sections in the RESTATEMENT (SECOND) OF TORTS, apparently believing that these will provide guidance into the "impenetrable jungle."⁶³ But these sections merely list factors to be considered; they do not provide a test. Moreover, they rely on vague terms like "harm," "social value," and "suitability."

The problems of the multimember nature of courts also limit the usefulness of *Lucas* in providing a clear standard. Only five judges joined the majority opinion. Justice Kennedy concurred in the result, but disagreed as to the standard to be applied.⁶⁴ Justice Souter was of the view that the writ of certiorari in *Lucas* should not have been granted.⁶⁵ Justices Blackmun and Stevens dissented on the merits.⁶⁶ Justice White has now retired. Thus, only four sitting justices joined in the majority opinion in *Lucas*. As a result, it is uncertain as to how future courts will treat *Lucas* as precedent.⁶⁷

59. *Lucas*, 505 U.S. at 1027.

60. See *supra* notes 31-42 and accompanying text.

61. See *supra* notes 37-38 and accompanying text.

62. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984). The authors note:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a "nuisance," and there is nothing more to be said.

Id. at 616-17 (footnotes omitted).

63. *Lucas*, 505 U.S. at 1030-31.

64. See *supra* notes 39-42 and accompanying text.

65. *Lucas*, 505 U.S. at 1076-78 (statement of Souter, J.).

66. *Id.* at 1036-61 (Blackman, J., dissenting); *id.* at 1061-76 (Stevens, J., dissenting).

67. See Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1140 (1997) (footnote omitted) ("The *Lucas* majority view does not solve the puzzle; that decision is not even likely to be weighty

2. *The Procedures for Identifying a Regulatory Taking Are Expensive and Time-Consuming*

Determining whether a taking has occurred is expensive and time-consuming for two reasons. First, given the lack of a set formula for identifying a taking,⁶⁸ each case must be addressed upon its particular facts. Such case-by-case adjudication results in lack of predictability and involves substantial time and costs. Second, in order to avoid being overwhelmed with the task of reviewing legislative and administrative decisions, courts have devised a number of doctrines that have the effect of making it difficult to challenge regulations on a takings theory.

One set of these doctrines consists of standards of review that favor the validity of regulation. For example, courts usually give deference to legislative determinations that a particular concern merits restricting the use of a particular parcel of property.⁶⁹ Though these deferential standards of review are justifiable as a means of defining the proper role of courts, they also make it more difficult and costly to prevail on a takings claim.

Another set of these doctrines is designed to force the owner to receive a final decision by the regulatory agency involved before seeking judicial review. These doctrines are justifiable for two reasons. First, until such a final decision is rendered, it would be wasteful to review it, given that the final result might be sufficiently different so that no appeal or impropriety would result. Second, until the agency has rendered its final decision, the court has no case or controversy to adjudicate; the agency's final decision may satisfy the owner. Consequently, there are constitutional problems with review of a decision before it is final. For these reasons, courts refuse to review the decision until the matter is "ripe" for review.⁷⁰ In practice, the ripeness requirement can be a substantial impediment to judicial review because land use regulation is often very flexible. For example, a takings challenge to a denial of a particular density for a residential development might be deemed not ripe for review because the owner had not requested a variance from the rules.⁷¹ Even with a denial of a specific request for a variance, the city can argue that the owner should have sought a lesser variance or should have sought rezoning. The net result may be that an owner spends time and money seeking a judicial

precedent before the current court.").

68. *See supra* Part II.B.1.

69. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). In the context of "exactions," which are requirements imposed on an owner as a condition of receiving permission for a use that a governmental entity might otherwise prohibit, no such deference is granted. Instead, the burden is on the government to show that the exaction is not a taking. *See Dolan v. City of Tigard*, 512 U.S. 374, 395-96 (1994).

70. *See, e.g., MANDELKER, supra* note 54, at §§ 2.21 to 2.27 (chronicling ripeness and finality rules in the context of takings litigation); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-10 (2d ed. 1988) (discussing ripeness doctrine generally).

71. *See, e.g., Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-94 (1985) (holding takings claim not ripe because of difficulty determining individualized impact of regulatory scheme given that the owner had not sought a variance).

determination only to be told to go back to the regulators.⁷²

These difficulties of seeking review are further complicated in the federal courts due to federalism concerns. As a result, federal courts often abstain from hearing a takings case unless the federal right to compensation has been clearly violated.⁷³

3. *Regulations Can Severely Reduce Economic Value Yet Not Be a Taking*

Because property use is viewed as subject to the police power, a person has no right to a specific use, even an actual, existing use, if that use is lawfully restricted by an exercise of the police power. As a result, it is often said that ownership does not include the right to continue or undertake any particular use.⁷⁴ Therefore, because owners have no right to a particular use, any use may be lawfully prohibited by a valid exercise of the police power. “The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”⁷⁵ But these are only relevant, and not dispositive, considerations. Severe economic impact, in itself, does not matter so long as the land still has some value.⁷⁶ For example, the owner of an existing lawful brickyard has not suffered a taking when a city, acting in lawful exercise of the police power, prohibits the use of any land in the city for a brickyard and thus causes the owner’s land to decrease in value from \$800,000 to \$60,000.⁷⁷ Though this result is logically consistent with the view that rights are limited by the police power, its impact on investment is extremely harsh and arguably unfair in many circumstances. For this reason, the government does not ordinarily exercise its power in this manner. For example, the “grandfathering” of actual, existing uses is common.⁷⁸ Nevertheless, the power exists, and there can be situations where owners have no right to compensation even though a new regulation has a tremendous negative effect on an owner’s investment—for example, where there is no grandfathering of existing uses or where there is no existing use as yet, but the owner has made an investment decision on the basis of a permitted use.

72. See Michael K. Whitman, *The Ripeness Doctrine in the Land-Use Context: The Municipality’s Ally and the Landowner’s Nemesis*, 29 URB. LAW. 13, 35-39 (1997).

73. See, e.g., *Pomponio v. Fanquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) (“We also have reiterated that state and local zoning and land use law is particularly the province of the State . . .”).

74. See *supra* notes 31-36 and accompanying text.

75. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

76. The Supreme Court recently stated: “[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe & Prod., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (involving approximately 75% diminution in value) and *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (involving 92.5% diminution in value)).

77. See *Hadacheck*, 239 U.S. at 405.

78. See, e.g., MANDELMER, *supra* note 54, at §§ 5.68 to 5.76 (discussing treatment of non-conforming uses by both courts and government).

III. "TAKINGS REFORM" LEGISLATION IN THE UNITED STATES

A. Reasons for Reform Proposals

Property rights "reform" of some sort has been considered in recent years both in Congress⁷⁹ and in virtually all of the states.⁸⁰ In retrospect, this widespread phenomenon is understandable given a shift in basic cultural values that began several decades ago as the importance of environmental, aesthetic, and historical concerns increased in society. Legislators and administrators responded to this shift by adopting a wide range of new limits on land use in order to protect the environment, to improve the appearance of communities, and to preserve historic structures. By and large, the courts have recognized this consensus and endorsed these limits as proper exercises of the police power.

Not surprisingly, not all segments of society have shared the new consensus. In particular, real estate developers and certain types of industries felt the economic impact of the regulations more than most of society. As a result, they had reason to disagree with the view that it was justifiable to limit their economic benefit in order to pursue broad public goals, no matter how laudable those goals might be. Though these corporate interest groups have

79. For discussions of federal statutory proposals, see, for example, Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 189 (1997); Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings"*, 46 *S.C. L. REV.* 613, 630-33 (1995); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 *FORDHAM ENVTL. L.J.* 409 (1995); Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 *OKLA. L. REV.* 191, 211-13 (1995); Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 *ECOLOGY L.Q.* 509 (1996); David A. Thomas, *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 *URB. LAW.* 223, 254-56 (1996); Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 *FORDHAM ENVTL. L.J.* 637 (1995).

The federal regulatory programs have also been the subject of an executive order. Exec. Order No. 12,630, 53 *Fed. Reg.* 8,859 (1988). The Order states that takings occur where regulations "substantially affect" property values. *Id.* at 8,860-61. The Order also requires federal agencies to prepare a takings implications assessment that evaluates the takings impacts of an action. *Id.* at 8,862. Additionally, the Order requires the Attorney General to issue guidelines for implementing the Order entitled *Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings* (1988). *Id.* at 8,859. For discussion of the Order, see, for example, Marzulla, *supra* at 629-30, where she notes that the Order appears to have had little effect.

80. For discussion of state statutory proposals, see, for example, Bruce Burton, *Regulatory Takings, Private Property Protection Acts, and the "Moragne Principle": A Proposal for Judicial-Legislative Comity*, 49 *S.C. L. REV.* 83, 119-27 app. B (1997) (containing an appendix with a tabular review of proposals by state); Cordes, *supra* note 79, at 190-92; Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 *FORDHAM L. REV.* 787 (1997) (containing an appendix summarizing state statutes); Marzulla, *supra* note 79, at 633-35; Organ, *supra* note 79, at 199-211; Thomas, *supra* note 79, 224-54 (summarizing and comparing legislation adopted in fourteen states at the time article written); Frank A. Vickory & Barry A. Diskin, *Advances in Private Property Protection Rights: The States in the Vanguard*, 34 *AM. BUS. L.J.* 561 (1997); Thomas G. Douglass, Jr., Note, *Have They Gone "Too Far"? An Evaluation and Comparison of 1995 State Takings Legislation*, 30 *GA. L. REV.* 1061 (1996); *infra* Part III.B.

played a major role in fighting the increase in regulation, there has also been a more populist dimension in some states. For example, workers who make their living in the logging industry have opposed environmental regulation that would result in a loss of their jobs.⁸¹ As the courts approved increasingly restrictive land use limitations based on the new goals, these interest groups had more incentive to challenge the new consensus and to seek a political solution. Moreover, these interest groups had sufficient resources to make legislators listen to their views. The net result is that these groups have been able to push for “reform” in the guise of increased protection of property rights, at both the national and state levels.⁸²

In addition, these interest groups were able to gain some public support for their position because the three “facts of life” about regulatory takings provide a context where reform rhetoric can flourish. As a result, the proponents of this reform have been able to package their arguments in terms of a “rhetoric of rights,” as opposed to arguments based on mere self interest. More specifically, it is easy for those who desire change to make three types of argument, each of which parallels one of the facts of life:⁸³

- (1) *Clarity*. The right to compensation for a taking is too important to lack a clear, set formula. A predictable standard for identifying a taking is needed to guide both citizens and regulators.
- (2) *Administrative efficiency*. It is wasteful and unfair to citizens for takings decisions to be so unpredictable, expensive, and time consuming. A simpler, cheaper, and faster system is needed.
- (3) *Fairness*. It is unfair for only a small segment of society to suffer substantial economic losses because of a regulation designed for the public good. If land use is limited because of a legitimate public need, then the public should pay for the economic impact on the owner.

These arguments are often buttressed by more general libertarian and

81. Donald Snow, *The Pristine Silence of Leaving it All Alone*, in A WOLF IN THE GARDEN 27, 29-30, 35 (Philip D. Brick & R. McGreggor Cawley eds., 1996). Other accounts of populist support of property rights reform have been written. See, e.g., Philip D. Brick & R. McGreggor Cawley, *Epilogue to A WOLF IN THE GARDEN*, *supra*, at 303 (noting that one populist objection to environmentalism is that environmentalists are viewed as snobbish “elitists” and “outsiders”); *infra* notes 126, 128, 249 and accompanying text (citing to sources arguing that the reform movement has been a populist, grass roots development). Accounts of *lack* of populist support for property rights reform also exist. See, e.g., Glenn P. Sugameli, *Environmentalism: The Real Movement to Protect Property Rights*, in A WOLF IN THE GARDEN, *supra*, at 62-63 (discussing rejection of takings bills); *infra* note 127 and accompanying text (discussing public rejection by referendum of property rights reform); *infra* note 248 and accompanying text (discussing public indifference in Texas). For discussion of the role of corporate interests in providing funding for populist support of reform, see Snow, *supra*, at 32-33.

82. For further discussion of this push for reform, see Kirk Emerson, *Taking the Land Rights Movement Seriously*, in A WOLF IN THE GARDEN, *supra* note 81, at 115 and *infra* Part III.B.2.

83. For examples of persons making one more of these arguments, see JAMES V. DELONG, *PROPERTY MATTERS* (1997); Marzulla, *supra* note 79; *infra* note 84; *infra* note 208 and accompanying text.

efficiency positions that favor increased protection of rights.⁸⁴ The libertarian perspective is based on a two-part argument: (1) the right to private property is essential to liberty, particularly where land is involved;⁸⁵ and (2) this essential right has been, or will be, seriously eroded if more restrictive limits on regulatory takings are not adopted.⁸⁶ Efficiency arguments stress the impact on competitive markets resulting from a regulatory system that does not respect reasonable investment decisions and that separates the costs of regulation from

84. For discussion of early works in this vein, see, for example, Harvey M. Jacobs & Brian W. Ohm, *Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals*, 2 WIS. ENVTL. L.J. 173, 179-85 (1995). Perhaps the most influential book in the theoretical development of the reformers' position is RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). For discussions of the role of Epstein's views in the takings reform movement, see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 183 (1991); Jacobs & Ohm, *supra*, at 181; and Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 6-7 (1996). Fried notes:

Attorney General Meese and his young advisers—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so severe an obligation, there would be, to say the least, much less regulation.

FRIED, *supra*, at 183 (endnote omitted). For criticisms of Epstein's position, see, for example, Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 24, 47 (1986) (noting that Epstein's views are "likely to find a wide and receptive audience in today's political climate," but characterizing Epstein's views as a "travesty of constitutional scholarship" and "stark nonsense"); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1669-70 (1988) (arguing that Epstein's position rests on "naïve conceptualism" and "semantic reductionism"); Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279, 293 (1986) (stating that Epstein "has become the prisoner of an intellectual style so confining and of a philosophy so rigid that he has disabled himself from seeing problems as beyond the grasp of mere formalism"). For a more recent example of Epstein's position and of criticisms of it, see Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 22 (1997) (criticizing the Supreme Court for giving inadequate weight to the right to exclude others from property); Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 59 (1997) (criticizing Epstein's position as contrary to the "country's actually prevailing, historical understandings and commitments").

85. See, e.g., Paul J. Boudreaux, *The Quintessential Best Case for "Takings" Compensation—A Pragmatic Approach to Identifying the Elements of Land-Use Regulations That Present the Best Case for Government Compensation*, 34 SAN DIEGO L. REV. 193, 214-23 (1997) (giving reasons why real property is different).

86. See, e.g., Loren A. Smith, *Life Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056 (1996) ("[A] free society cannot exist without the strong protection of individual property rights and the mechanism for their jealous protection.").

the benefits. For example, because community members who enjoy the benefits of open spaces under a restricted-development-zoning scheme do not bear the costs of the restrictions, it is very likely that the consumption of open spaces will be higher than it would be in an efficient market scheme where the community members would have to pay to enjoy the open spaces.

It is important to note that all of these arguments are only arguments, not inevitable moral conclusions or facts of life. More specifically, these arguments are subject to counterarguments like the following:

- (1) The values of clarity, predictability, and efficiency must be balanced against concerns like accurate, fair, and just decisionmaking. Achieving predictability by mechanical, arbitrary, or unfair rules is not desirable.⁸⁷
- (2) It is neither fair nor efficient for individuals to seek selfish private gain at the expense of their neighbors, of the environment, and of our unique historical treasures. As a matter of history and current practice, land use has always been subject to police power, which often has the effect of forcing land owners to address the costs of development rather than externalize these costs to society. Thus, owners have neither a “right” nor a “reasonable expectation” to use their property as they wish.⁸⁸
- (3) Liberty is not dependent upon the constitutional requirement of compensation; the European democracies function quite well without a “takings clause.”⁸⁹ Moreover, property rights are a social construct subject to a wide range of theoretical interpretations; no single view of the proper amount of protection is necessarily right or just.⁹⁰
- (4) Regulatory schemes often create property value because each owner has both reciprocal burdens and benefits as a result of the scheme.⁹¹

87. See, e.g., Michelman, *supra* note 79, at 420-21 (suggesting that the results of such rules would be unacceptable to the American people).

88. See, e.g., Cordes, *supra* note 79, at 230-34 (examining nature of property interests); John A. Humbach, *Should Taxpayers Pay People to Obey Environmental Laws?*, 6 FORDHAM ENVTL. L. J. 423, 431-32 (1995) (arguing that environmental policy considerations should prevent land owners from having such absolute rights); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 267 (1996) (discussing how the “new takings measures” seek to upset the traditional balance between private and public property rights).

89. See, e.g., Juergensmeyer, *supra* note 9, at 701 (noting that takings legislation “is almost exclusively an [American] obsession”).

90. See, e.g., Michael C. Blumm, *The End of Environmental Law?: Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171 (1995) (discussing various cases that have led to “a judicial property rights revolution”); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 361-63 (1990) (“Our very notion of private property depends upon societal recognition of the concept because society protects the interests of the owner.”); Cordes, *supra* note 79, at 230 (“[P]roperty is a social construct whereby society in essence recognizes and maintains property rights.”).

91. See, e.g., Coletta, *supra* note 90, at 363-64 (endorsing reciprocity analysis as basis of new approach to regulatory takings); Cordes, *supra* note 79, at 234-38 (discussing several ways governmental restrictions can increase property value); FISCHER, *supra* note 10, at 81

For example, an owner of commercially zoned property benefits from zoning in general and from the effect on the value of his land that flows from the limitations on those parcels of land that can be used for commercial purposes.⁹²

Of course, these counterarguments are *also only arguments*. The point is not that one side is right and the other is wrong. Instead, the point is that the identification of when a person has a right to compensation involves choices about values and conceptions of justices.

Four things are clear concerning these choices. First, they have tremendous economic and symbolic importance. Determining when compensation for a regulatory taking is required tells us a lot about ourselves as a society. In particular, it tells us about the distribution of wealth and responsibility.⁹³ Expanding requirements for compensation increases the wealth of property owners at the expense of society and frees owners from social responsibility in the use of their property. Decreasing requirements for compensation has opposite results. Second, it is clear that substantial disagreement about social values and property rights abounds. Third, in a democratic society, one proper forum for resolving such basic disputes is the legislature.⁹⁴ Fourth, when this disagreement occurs within the legislative context, "horror stories" and sound bites can overwhelm the subtleties and complexities of the opposing arguments. In the political arena, the arguments can become reduced to rhetorical phrases like "rights need more protection" or "ownership involves responsibility."⁹⁵

(discussing how such an increase in value can result in a "benefit-offset"). The reciprocal relationship between benefits and burdens has been a recurring theme in Supreme Court treatment of takings claims. *See, e.g.,* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (citing *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 144-50 (1978) (Rehnquist, J., dissenting) ("While each of us is burdened somewhat by such restrictions [on the use of property], we, in turn, benefit greatly from the restrictions that are placed on others.")); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (An owner claiming that a taking had resulted from regulation at issue "will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer."); *Penn. Cent. Transp. Co.*, 438 U.S. at 133 (recognizing appellants' concern for "fair and equitable distribution of benefits and burdens of governmental action"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[A]verage reciprocity of advantage . . . has been recognized as a justification of various laws."). The cases have not required that benefits equal burdens. Instead, they view the existence of some benefit as one factor among many that is relevant to whether a taking has occurred.

92. *See infra* text accompanying note 302.

93. *See, e.g.,* Torres, *supra* note 84, at 3 ("[A]ny regulation that rearranges the distribution of rights and liabilities can be understood as a redistribution of wealth.").

94. Because the proponents of property rights reform have sought legislative action, it would seem that they agree with this view. Logically, opponents of reform would appear to be committed to it as well because opponents rely on the police power to justify legislatively adopted land use schemes. The text above uses the phrase "one proper forum" in recognition of the fact that the courts obviously have a role in resolving this dispute through the interpretation and application of the Takings Clause.

95. For analyses of use of rhetorical positions in support of property rights reform, see, for example, Jon Christensen, *War of Words, in A WOLF IN THE GARDEN*, *supra* note 81, at 151; Jonathan I. Lange, *The Logic of Competing Information Campaigns: Conflict over Old*

Such rhetoric clouds analysis at best and replaces analysis at worst.

B. *Variations Among the States*

1. *Types of Reform Proposals*

Three types of reforms of takings law have been proposed. The first type requires that regulators assess the impact of new rules on property owners before imposing the rules. The second type of reform consists of new procedural devices that are designed to simplify the process of determining whether a taking has occurred. The third type of reform consists of substantive changes that make it easier to identify a taking and that, as a general rule, provide greater protection to property owners than that provided by current constitutional doctrines.

In considering the various schemes that have been considered by the states, it is important to note that all of them exclude federal regulatory schemes. Such an exclusion is obviously necessary; no state can require the federal government to follow procedural rules or to compensate under a state's takings statute. Nevertheless, this obvious exclusion is important because federal environmental and wildlife protection schemes are frequently the catalysts of calls for reform. As a result, reform effort is often directed at the adoption of a state statute which may have no effect on the regulatory scheme that motivated the desire for reform.⁹⁶ As indicated below,⁹⁷ this type of disjunction between concerns and goals *vis-à-vis* particular legislation is a recurring theme in property rights reform.

a. *Assessment Schemes*

Assessment statutes require regulators to assess the potential takings impact of restrictions on land use. By executive order, the federal government has such a scheme,⁹⁸ and over a dozen states have adopted statutory assessment schemes.⁹⁹ Generally, these schemes simply adopt current constitutional doctrine concerning what constitutes a taking.¹⁰⁰ It is hard to generalize further because assessment requirements vary considerably from state to state in the following ways: (1) how the assessment is done, (2) which governmental entities must do it, (3) which types of decisions are affected, and (4) whether the process is subject to some sort of judicial review.¹⁰¹

There appear to be no published studies of how these statutes have been

Growth and the Spotted Owl, in *A WOLF IN THE GARDEN*, *supra* note 81, at 135.

96. See, e.g., Wolf, *supra* note 79 (providing examples of this tendency).

97. See *infra* notes 129, 210, 238-41 and accompanying text.

98. See *supra* note 79 (discussing Exec. Order No. 12,630 and its mandates).

99. See, e.g., Burton, *supra* note 80, at 119-27 (providing a chart of regulatory schemes considered in 43 states); Cordes, *supra* note 79, at 204 ("[A]t least fifteen states have enacted some type of assessment statute and assessment legislation has been introduced in numerous other states . . .") (footnote omitted).

100. Cordes, *supra* note 79, at 204.

101. *Id.* at 205-12.

implemented or of whether they have had any effect on the regulatory process. Nevertheless, it is likely they have little effect. An initial problem is that no simple, easily applied test for identifying a taking exists.¹⁰² Given this lack of a test, how is the assessment to be done in a meaningful manner? Another problem is that if regulators are merely told to *consider* the possibility of constitutional takings, the assessment requirement is unnecessary. Rational regulators already consider the possibility of takings; irrational regulators will not become rational by legislative fiat. If the legislature requires not only consideration but also extensive findings and reports, one of the following two results is likely: either a superficial approach will be used or regulation will be reduced. Given their limited personnel and budgets, regulators will not have a third choice.¹⁰³ Moreover, given the likely commitment by the regulators to the goals of reform, the regulators presumably will choose the option of superficial compliance. Thus, it is not surprising that one commentator has concluded that "the overall value of assessment requirements is highly questionable."¹⁰⁴ This conclusion also seems applicable to the federal scheme because it appears that the federal assessment requirement has had little, if any, impact on the regulatory process.¹⁰⁵ However, some commentators think that a carefully drawn assessment scheme can provide a useful tool for protecting rights and preventing costly payouts for compensation under the constitutional standard.¹⁰⁶

In all likelihood, this limited effectiveness is one reason for the relative popularity of assessment schemes. To the extent that it appears that an assessment scheme can be satisfied by relatively simple, pro forma measures, opponents of property rights reform are going to be less concerned about this type of scheme. Consequently, adopting an assessment scheme can provide an approach that enables reformers to claim victory while regulators are able to proceed with business as usual. Such compromise and symbolic victories can be an important part of the legislative process. However, the nature of such legislation must be understood.

b. Process Statutes

Several states have adopted schemes designed to simplify and expedite the process of takings challenges.¹⁰⁷ Though these schemes vary enormously, most are designed to give an alternative to judicial review by providing administrative resolution of a takings claim or mediation. In addition, at least one scheme provides that a land use decision is ripe for judicial review within

102. See *supra* notes 7-67 and accompanying text.

103. See *infra* note 267 and accompanying text.

104. Cordes, *supra* note 79, at 225.

105. See Marzulla, *supra* note 79, at 629-30.

106. See, e.g., John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. LAW. 327, 343-44 (1994) (providing a positive review of the Washington scheme, which requires the state attorney general to promulgate a process and guidelines for assessment review).

107. See, e.g., Drees, *supra* note 80, at 798-99 (summarizing several such state schemes).

180 days of the owner's challenge on a statutory takings ground.¹⁰⁸

These process reform schemes are so few, so diverse, and so new that it is not possible to reach conclusions about their effect. Clear, short ripeness periods may be beneficial because existing ripeness rules can have harsh effects on owners.¹⁰⁹ However, whatever salutary effect those process changes have will likely be limited for two reasons. First, the regulatory process, particularly in zoning, already has numerous procedural rights for property owners. The incremental effect of one more procedural right is likely to be minimal. Second, property owners may conclude that a clearer, shortened ripeness approach has only limited value in seeking compensation for a taking, given that the substantive rules will still be subject to the facts of life about takings.¹¹⁰ As a result, there will still be no set formula, the regulation will still be presumed valid, the process will still be lengthy and expensive (though perhaps a little less so in some cases), and it will still be possible to suffer a substantial economic loss without having a right to compensation.

c. *New Standards for Compensation*

A number of states have adopted statutes that establish a new, statutory right to compensation based upon a standard that is different from the constitutional test for a taking.¹¹¹ These statutes vary considerably in terms of their standards for mandating compensation. Several statutes define the right in terms of a loss in value above a certain percentage.¹¹² The Mississippi and Louisiana statutes apply only to agricultural and forest uses and require compensation for a loss in value of forty percent or more (Mississippi),¹¹³ or twenty percent or more (Louisiana).¹¹⁴ Texas has a broader, though still somewhat limited,¹¹⁵ scheme requiring compensation for governmental action that reduces the value of property by twenty-five percent or more.¹¹⁶ The Florida statute appears to require compensation for any government action that

108. FLA. STAT. ANN. § 70.001(5)(a) (West Supp. 1998).

109. For discussion of the "ripeness" requirement as a barrier to judicial review, see *supra* notes 70-72 and accompanying text.

110. See *supra* Part II.B.

111. See, e.g., Burton, *supra* note 80, at 119-27 (providing chart of various state standards); Cordes, *supra* note 79, at 225-41 (discussing percentage-based compensation statutes); Drees, *supra* note 80, at 836-41 (discussing various state compensation and remedial process schemes).

112. See Cordes, *supra* note 79, at 214-18, 225-41. North Carolina has an extremely limited scheme that permits "takings" type claims for interference with certain rights in navigable waters. See Cordes, *supra*, at 214 n.164; Organ, *supra* note 79, at 203.

113. MISS. CODE ANN. §§ 49-33-7 to -9 (Supp. 1998).

114. LA. REV. STAT. ANN. §§ 3:3601-02 (West 1987).

115. For example, cities are exempted. See TEX. GOV'T CODE ANN. § 2007.003(b)(1) (West Supp. 1998).

116. See *id.* at § 2007.002(5)(B). For a general discussion of the Texas scheme, see George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557 (1996).

results in a loss of property value.¹¹⁷

Though all these statutes have a list of exceptions, the list varies from state to state.¹¹⁸ To the extent that the statutes agree, they include the following exceptions: (1) activities that threaten harm to public health and safety;¹¹⁹

117. See FLA. STAT. ANN. §§ 70.001(2), (3)(b)-(g) (West Supp. 1998). The South Carolina House of Representatives adopted a bill that was extremely similar to the Florida statute. For detailed discussion of the language in the South Carolina bill, see *infra* notes 170-73 and accompanying text. The Florida act contains language suggesting that no compensation is required unless the burden imposed on the owner by the regulating limitation is "inordinate" or "unfair." See FLA. STAT. ANN. §§ 70.001(2), (3)(e) (West Supp. 1998). However, the definitions accompanying the act indicate: (1) that an owner is entitled to compensation if the owner is "unable to attain the reasonable, investment-backed expectation for the existing use of the real property," *id.* § 70.001(3)(e); and (2) that "existing" use includes not only "actual, present use" but also "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property." *Id.* § 70.001(3)(b). Thus, unless the terms "reasonably foreseeable, nonspeculative land uses" and "compatible with adjacent land uses" are construed very narrowly, owners are entitled to compensation for any reduction in the "fair market value" of the property. For an argument that this entitlement was the goal of the act, see David L. Powell et al., *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 266-68 (1995) (The three authors were involved in drafting the act.). For criticism of the statute's definition of "existing use" as development-biased "doublespeak," see Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 FLA. L. REV. 709, 717 (1996).

The inclusion of the phrase "reasonably foreseeable, nonspeculative land uses" in the definition of "existing use" was accomplished by the adding of an amendment to this complex legislative compromise by a development-oriented lobbyist just before the legislature voted on the bill. See David Spohr, Note, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 VA. ENVTL. L.J. 313, 328 (1997) (citing Elizabeth Willson, *Property Act Fences Out the Government*, ST. PETERSBURG TIMES, July 5, 1995, at 1B).

For further discussion of the Florida act, see, for example, Robert P. Butts, *Private Property Rights in Florida: Is Legislation the Best Alternative?*, 12 J. LAND USE & ENVTL. L. 247 (1997); Jane Cameron Hayman & Nancy Stuparich, *Private Property Rights: Regulating the Regulators*, 70 FLA. B.J. 55, Jan. 1996, at 55, 89 (critical review of the Harris Act by authors who worked for Florida League of Cities, Inc.); Hunt, *supra* (critical review); Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411 (1995) (focusing on and praising changes in ripeness rules); Powell, *supra* (praise of act by authors involved in drafting act); Sylvia R. Lazos Vargas, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. 315 (1995) (generally positive assessment of the act combined with criticisms and proposals for improvement); Michael Murphy, Note, *Property Rights and Growth Management in Florida: Balancing Opportunity and Responsibility in a Changing Political Climate*, 14 PACE ENVTL. L. REV. 269 (1996) (predicting that the act will "frustrate Florida's efforts to achieve its growth management goals"); Spohr, *supra* (examining the act's impact on "Florida's unique natural environment").

118. See, e.g., FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 1998) (limiting the term "inordinate burden"); LA. REV. STAT. ANN. § 3:3602(12) (West 1987) (noting that the term "inverse condemnation" does not include certain actions, such as actions resulting from police power or from an order resulting from a violation of state law); MISS. CODE ANN. § 49-33-7(e) (Supp. 1998) (limiting the definition of "inverse condemnation"); TEX. GOV'T CODE ANN. § 2007.003(b) (West Supp. 1998) (listing governmental actions to which the chapter does not apply).

119. See, e.g., LA. REV. STAT. ANN. § 3:3602(12)(h) (West 1987) ("[A]ctivities that are harmful to the public and health."); MISS. CODE ANN. § 49-33-7(e)(ii) (Supp. 1998) (activities noxious and harmful to the public and health); TEX. GOV'T CODE ANN. § 2007.003(b)(7) (West

- (2) noxious activities constituting public nuisances at common law;¹²⁰ and
 (3) violations of state law.¹²¹

It is too soon to assess the effects of these substantive compensation statutes. The use of a reduction in market value as a standard for determining when compensation is due certainly addresses the three basic facts of life about the constitutional doctrine of regulatory takings.¹²² More specifically, these market value standards provide a set formula for identifying a taking, are less expensive and time-consuming in application than the constitutional standard, and provide compensation for substantial reductions in economic value. However, it is not clear what these compensation schemes will entail in terms of administrative costs,¹²³ compensation payouts, and the costs of regulations not adopted. Not surprisingly, supporters of reform claim that these schemes provide increased fairness and justice with no substantial costs to the public good,¹²⁴ while opponents argue that the schemes involve considerable costs, particularly as a result of regulators being “chilled” from adopting fair and necessary limitations upon land use.¹²⁵

Supp. 1998) (“[A]n action taken out of a reasonable faith belief that . . . [it] is necessary to prevent a grave and immediate threat to life or property.”).

120. See, e.g., FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 1998) (exempting public nuisance or noxious use); MISS. CODE ANN. § 49-33-7(e)(ii) (Supp. 1998) (exempting public nuisance); TEX. GOV’T CODE ANN. § 2007.003(b)(6) (West Supp. 1998) (exempting public or private nuisance).

121. See, e.g., LA. REV. STAT. ANN. § 3:3602(12)(e) (West 1987) (“An order issued as a result of a violation of law.”); MISS. CODE ANN. §§ 49-33-7(e)(iii) (Supp. 1998) (order resulting from violation of law); TEX. GOV’T CODE ANN. § 2007.003(b)(3) (West Supp. 1998) (“[A] lawful seizure of property as evidence of a crime or violation of law.”).

122. See *supra* Part II.B.

123. The reduction in costs for an individual challenge in a particular case could raise the overall administrative costs for regulations because the lower costs to each challenger might result in an overall increase in takings claims.

124. See, e.g., *Subcommittee on the Constitution: Hearing on “State Approaches to Protecting Private Property Rights,”* 112th Legis., 1st Sess. (S.C. 1997) (testimony of Dean Saunders, former member, Fla. House of Rep.) (stating that only 12 cases have been filed); Letter from Sen. Charlie Bronson, Florida Senate, to Rep. James H. Harrison, Chairman, South Carolina House of Representatives Judiciary Committee (May 13, 1997) (on file with author) (stating that only 12 claims had been filed under Florida act).

125. See, e.g., Hunt, *supra* note 117, at 718-19 (listing examples of “chilled” regulation to protect the environment and to protect historic areas and buildings as a result of the Florida act). In the context of the South Carolina debate, the South Carolina Coastal Conservation League alleged:

In Florida, a virtually identical law took effect in October 1995. Since then, Florida’s state and local officials have had to contend with a new “inordinate burden” claim nearly every two weeks. In West Palm Beach, for example, citizens voted to limit the height of new buildings on the waterfront to five stories. The city has since received over \$25 million in “inordinate burden” claims from waterfront property owners. Furthermore, the mere threat of such claims has prevented Florida’s state and local governments from enacting reasonable laws that have broad public support. In Palm Beach County, for example, officials abandoned a draft growth management ordinance

It is not easy to assess these arguments. Both sides are biased, and proving or disproving whether these compensation schemes "chilled" regulators is extremely difficult. Nevertheless, it seems some tension exists between two propositions in the proponents' arguments. The first proposition is that substantive changes are needed because: (1) regulatory limits are imposed in a significant number of instances with no requirement of compensation under the constitutional standard; and (2) it is unfair to adopt these restrictions unless owners are compensated. The second proposition is that the substantive changes requiring compensation where it is not constitutionally mandated will not impose significant costs—either in the form of compensatory payouts or of regulations not adopted. It is somewhat counterintuitive to think that both propositions are true. In other words, it seems logical to assume that substantive changes involve substantial costs, even though such costs cannot be precisely calculated.

2. *The Meaning of a "National Reform Movement"*

Because the approach to reform has been fundamentally different from state to state, it is appropriate to ask what it means to speak in terms of a "national movement." Insofar as property rights reform is involved, a national movement cannot mean that there is a coherent scheme of common legislative proposals or enactments. Instead, the movement is characterized by a wide variety of proposals, ranging from "window dressing," in the form of mild assessment requirements, to radical substantive reform like that adopted in Florida. Moreover, the legislative treatment of the proposals varies widely. Some states have not adopted any reform legislation, and where legislation has been adopted, the content varies from state to state. The response of voters has also been diverse. For example, opponents of reform agreed to the Florida scheme partly out of concern that the voters might approve a more draconian amendment to the state constitution.¹²⁶ In contrast, voters in Arizona and

because their attorney predicted that it would give rise to "inordinate burden" claims. In Saratoga County, officials were unable to enact a complete ban on nudity in businesses because the owner of one night club threatened to sue, claiming an "inordinate burden."

The New Property Rights Bill: Wolf in Sheep's Clothing (S.C. Coastal Conservation League, Beaufort, S.C.), Apr. 21, 1995 at 1. Some supporters recognize that some degree of chilling has occurred but regard this chilling as "proper." See, e.g., Letter from Rep. Charles W. Sembler, II, Florida House of Representatives, to Rep. James H. Harrison, Chairman, South Carolina House of Representatives Judiciary Committee (May 14, 1997) (on file with author) ("[R]egulators are far more careful and discriminating . . . [and] more willing to listen to landowners' concerns and look for consensus . . . [The Harris Act] has created a new sense of caution among regulatory agencies during a period of fiscal restraint.").

126. See, e.g., Juergensmeyer, *supra* note 9, at 699 (stating that Florida act "was the product of a carefully crafted compromise" that "staved off the [possibly successful] attempts of property rights protection forces to amend the Florida Constitution"); Powell, *supra* note 117, at 261-64 (noting that "a citizens group mounted a well-funded petition drive" for constitutional amendments concerning private property rights); Vargas, *supra* note 117, at 327-33 (noting support for reform both from "big business" interests and from a more populist group of small

Washington voted in referenda to reject a previously enacted compensation scheme.¹²⁷

Thus, the property rights movement is a national movement, but only in terms of four elements.¹²⁸ First, a segment of society in each state would prefer less regulation of land use. This segment agrees on the goal of less regulation, but it has not developed a coherent scheme identifying specific problems and providing explicitly designed solutions to these problems.¹²⁹ Second, this segment of society has sufficient resources to place the issue of compensation for regulatory impact on land value on the political agenda in each state and in Congress, and it has the ability to coordinate these efforts by exchanging data and legislative proposals. Third, this push for reform gained some measure of public support by phrasing its position in terms of a rhetoric of rights,¹³⁰ which stresses the importance of rights without recognizing the difficult tasks of defining rights and of justifying that definition.¹³¹ This rhetoric is bolstered by constant repetition of “horror stories” about governmental waste and abuse.¹³² Fourth, this reform effort is coordinated at a national level by conservative, business-oriented groups like the American Legislative Exchange Council, the American Farm Bureau Federation, the National Association of Realtors, and Defenders of Property Rights.¹³³

It is important to keep this sense of the term “national movement” in mind when considering property rights reform proposals because the term connotes a broader, more politically persuasive meaning. More specifically, reference to a national movement in a state legislative debate suggests a coherent scheme of reform is being pushed throughout the country. The phrase also suggests that other parts of the country have not only considered the matter but also recognized a need for reform and agreed on the context of reform. These connotations give the phrase “a national movement” far more rhetorical impact than the more accurate statement that there is a national push, phrased in terms

farmers, middle class landowners, and developers).

127. See Cordes, *supra* note 79, at 191 & n.24; Drees, *supra* note 80, at 806-07.

128. For an argument that the proper rights reform movement has been a more populist, grass roots development than argued in this Article, see Nancie G. Marzulla, *The Property Rights Movement: How It Began and Where It Is Headed*, in *LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION* 1 (Bruce Yandle ed., 1995).

129. See, e.g., Wolf, *supra* note 79, at 640-50 (illustrating ways that problems identified by reformers are not addressed by property rights legislation).

130. See *supra* notes 82, 95 and accompanying text; Wolf, *supra* note 79.

131. See *supra* notes 26-67, 87-92 and accompanying text.

132. See, e.g., Torres, *supra* note 84, at 8 (stating that the struggle over regulatory takings has been told “in terms of a generalized government attack on private property”); William Michael Treanor, *The Armstrong Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1158 (1997) (“The property rights movement derives its political strength from the power of its stories.”); Wolf, *supra* note 79, at 639 (relating stories about “citizens whose property is severely devalued or appropriated”).

133. David Helvarg, *Legal Assault on the Environment*, THE NATION, Jan. 30, 1995, at 126; Marianne Lavelle, *The “Property Rights” Revolt*, NAT’L L.J., May 10, 1993, at 1. The American Legislative Exchange Council is “a D.C.-based organization of state legislators who call themselves pro-business, pro-free enterprise and claim 2,400 members.” *Id.* at 34. Defenders of Property Rights claims to be “the nation’s only legal defense foundation devoted exclusively to the protection of private property rights.” Marzulla, *supra* note 79, at 613 n.*.

of rights rhetoric and horror stories, for reduced regulation of land use by a segment of society that would prefer less regulation and has the resources to place the issue on the political agenda.

When one views the property rights movement in this manner, the diversity of action in the various states makes sense. The legislation (or lack of legislation) resulting from property rights "reform" can only be understood as each state's individualized response to the push for change. From this perspective, it becomes important to consider the individual legal and political characteristics that determine how each state will respond to a well-funded push for legislative change in the approach to compensation for the economic impact of land use regulation. The following section of this Article addresses this question within the context of the South Carolina experience with property rights reform.

IV. "TAKINGS REFORM" IN SOUTH CAROLINA

The takings reform movement arrived in the South Carolina legislature in 1995, when several takings bills were introduced in the House and Senate.¹³⁴ No bill was passed during the 1995-96 session, but takings bills were introduced in both houses during the 1997-98 session.¹³⁵ The House passed a takings bill on May 28, 1997. This bill was referred to the Senate Judiciary Committee, which referred it to a special subcommittee in 1998. However, no bill was reported out of the subcommittee before the legislature adjourned in 1998. Though no property rights legislation has yet been adopted, it seems likely that new legislative proposals will be made during the 1999-2000 session.¹³⁶ The takings reform proposals considered by the South Carolina legislature include all three types of reform: assessment requirements, procedural reform, and substantive changes. All of these proposals encountered substantial opposition, particularly from local governments and environmentalists.

A. *The Proposals*

1. *1995-96 Legislative Session*

Four bills were introduced during the 1995-96 legislative session. One of these bills was an assessment-type act that imposed substantial procedural burdens on state agencies.¹³⁷ Though parts of this bill appeared in later

134. *See infra* Part IV.A.1.

135. *See infra* Part IV.A.1.a.

136. *See infra* text accompanying notes 242-43.

137. S. 374, 111th Leg., 1st Sess. (S.C. 1995). The bill required state agencies to adopt assessment guidelines, to consider an explicit list of factors concerning actions with "constitutional taking implications," and to submit copies of assessments to the State Budget and Control Board. *Id.* §§ 28-13-30, -40(A)(2), -40(D). Though the bill focuses on assessment, the bill arguably imposed a more restrictive substantive standard on exactments than the constitutional standard. Exactments are conditions imposed on an owner as a condition for granting a permit. *See supra* notes 52-56 and accompanying text. Subsection 28-13-40(B)(1) of

proposals,¹³⁸ the bill received relatively little attention. Instead, legislative discussion and political debate focused on two bills that expanded the substantive rights of property owners and provided a simplified judicial process to enforce property owners' rights.

The first of these bills, South Carolina Senate Bill 121,¹³⁹ provided that "[whenever] any regulatory program or law operates to reduce the fair market value of real property to less than fifty percent of its fair market value . . . the property is deemed to have been taken."¹⁴⁰ In such a case, the owner was entitled "to require condemnation by and just compensation from the governmental unit, or units . . . involved . . . [and] to have the just compensation determined by a jury. . . for the full value of the interest taken or for the full amount of the decrease in fair market value."¹⁴¹ The bill provided exceptions to the right of compensation if the regulation was "to prevent uses noxious in fact, or to prevent demonstrable harm, to the health and safety of the public."¹⁴² The bill also provided:

If the governmental unit which is found to have inversely condemned the property is unwilling or unable to pay the costs awarded, it may instead relax the land use planning, zoning, or other regulatory program as it affects the plaintiff's land and all similarly situated land in the jurisdiction in which the regulatory program is in effect, to the level of regulation in place as of the time the owner acquired title or January 1, 1996, whichever is later.¹⁴³

The second legislative proposal that received attention appeared in two identical bills, South Carolina House Bill 3790¹⁴⁴ and South Carolina Senate Bill 839.¹⁴⁵ These bills imposed substantial assessment requirements,¹⁴⁶ granted a new right of compensation for regulations resulting in a "substantial diminution of the total value of the real property,"¹⁴⁷ and provided that the state's Eminent Domain Procedure Act¹⁴⁸ would be used to determine takings

the bill provides: "If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall *directly relate* to the purpose for which the permit is issued and shall *substantially advance* that purpose." (emphasis added). The constitutional standard for exactments does not require *direct* relationship and *substantial* advancement. Instead, the Supreme Court has imposed a looser standard of "rough proportionality." See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

138. See *infra* note 152 and accompanying text.

139. S. 121, 111th Leg., 1st Sess. (S.C. 1995).

140. *Id.* § 2(A).

141. *Id.* § 2(B)-(C).

142. *Id.* § 3.

143. *Id.* § 5(A); see also § 5(C) (dispensing with need for "public hearing or proceedings" in order to "relax" restrictions).

144. H.R. 3790, 111th Leg., 1st Sess. (S.C. 1995).

145. S. 839, 111th Leg., 1st Sess. (S.C. 1995).

146. See, e.g., S.C. H.R. 3790, § 28-4-50(A) (requiring five separate findings to be included within written assessment).

147. *Id.* § 28-4-80.

148. S.C. CODE ANN. §§ 28-2-10 to -510 (Law. Co-op. 1976).

claims under the state constitution or the federal constitution and under the new statutory right.¹⁴⁹

2. 1997-98 Legislative Session

The legislative debate during the 1997-98 session focused on South Carolina House Bill 3591, which was introduced in March 1997. In April 1997 the House Judiciary Committee "amended" South Carolina House Bill 3591 by substituting a completely different bill. The House adopted this amended bill in May 1997. Thus, it is necessary to distinguish the original version of South Carolina House Bill 3591 from the version of South Carolina House Bill 3591 adopted by the House in 1997.

a. South Carolina House Bill 3591 as Originally Introduced

The original version of South Carolina House Bill 3591¹⁵⁰ did not change the constitutional definition of a taking. Instead, it addressed two concerns. First, it established an assessment process pursuant to guidelines to be set by the attorney general.¹⁵¹ The factors to be considered were very similar to those contained in South Carolina Senate Bill 374, which had been introduced in the 1995-96 session.¹⁵² This assessment procedure had the potential for imposing substantial administrative burdens on governmental entities because it required government entities to "prepare a written assessment which specifically and fully addresses each of the checklist guidelines" before adopting or enforcing any proposed land use regulation.¹⁵³

Second, the bill attempted to expedite the resolution of takings disputes in several ways. The bill addressed problems of cost and delay in reaching a final appealable decision¹⁵⁴ by setting an extremely short time period for determining ripeness for judicial review. More specifically, the bill provided that:

- (1) the owner must exhaust "all administrative remedies afforded by the applicable governmental entity;"¹⁵⁵
- (2) "the parties shall mediate the dispute;"¹⁵⁶
- (3) both the exhaustion of remedies and mediation must "be completed within one hundred eighty days;"¹⁵⁷ and
- (4) "[i]f the matter is not resolved within the one hundred eighty-day

149. See S.C. H.R. 3790, § 28-4-100.

150. H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as introduced Mar. 4, 1997) (*see infra* Appendix).

151. *Id.* §§ 28-4-40, -60.

152. See *id.* § 28-4-40(D); S. 374, 111th Leg., 1st Sess., § 28-13-40(A) (S.C. 1995).

153. S.C. H.R. 3591, § 28-4-60(A) (as introduced Mar. 4, 1997) (*see infra* Appendix). This assessment was also declared to be "public information" that "must be made available . . . upon request." *Id.* § 28-4-60(B).

154. See *supra* notes 70-72 and accompanying text.

155. S.C. H.R. 3591, § 28-4-70 (as introduced Mar. 4, 1997) (*see infra* Appendix).

156. *Id.*

157. *Id.*

period, the private property owner may commence a suit for compensation.”¹⁵⁸

The bill attempted to provide flexibility in resolving disputes by listing a number of approaches that a governmental entity was “specifically authorized and empowered to recommend . . . , consistent with applicable law[,] that protect the public interest served by the governmental action at issue” in order to “avoid or resolve a dispute.”¹⁵⁹ The bill also provided that an owner who prevailed in a suit for compensation for a taking was entitled to “reasonable and necessary attorney’s fees, expert witness fees, court costs, and prejudgment interest.”¹⁶⁰

An identical bill, South Carolina Senate Bill 686, was introduced in the Senate on April 23, 1997.¹⁶¹ This bill was not a typical “companion bill” because it was introduced *after* the House Judiciary subcommittee amended South Carolina House Bill 3591 by substituting the bill with provisions from the Florida takings act.¹⁶² Because the House adopted the revised version of South Carolina House Bill 3591, the Senate Judiciary Committee’s consideration of proposed takings reform focused on the amended South Carolina House Bill 3591—not on South Carolina Senate Bill 686.

158. *Id.* As with H.R. 3790, 111th Leg., 1st Sess. (S.C. 1995), which was introduced during the 1995-96 session, the suit would be treated as one for eminent domain condemnation. See S.C. H.R. 3591, §§ 28-4-30(A), -100(A) (as introduced Mar. 4, 1997) (*see infra* Appendix).

159. S.C. H.R. 3591, § 28-4-80(A) (as introduced Mar. 4, 1997) (*see infra* Appendix). The alternatives included, but were not limited to, the following:

- (1) [A]n adjustment of land development or permit standards or other provisions controlling the development or use of land;
- (2) increases or modifications in the density, intensity, or use of areas of development;
- (3) the transfer of development rights;
- (4) land swaps or exchanges;
- (5) mitigation, including payments in lieu of onsite mitigation;
- (6) location on the least sensitive portion of the property;
- (7) conditioning the amount of development or use permitted;
- (8) a requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- (9) issuance of a variance, special exception, or other extraordinary relief, including withdrawal of the proposed action;
- (10) purchases of the real property, or an interest in it, by an appropriate governmental entity.

Id.

160. *Id.* § 28-4-110(E).

161. S. 686, 112th Leg., 1st Sess. (S.C. 1997).

162. See *infra* notes 163-64 and accompanying text.

b. South Carolina House Bill 3591 as Amended and Adopted By the House

The version of South Carolina House Bill 3591 passed by the House¹⁶³ was virtually identical to the property rights bill adopted in Florida in 1995.¹⁶⁴ This version adopted a new right to compensation that went far beyond the constitutional right for regulatory taking.¹⁶⁵ The bill conditioned this right on the owner's having first sought to resolve the matter by filing an administrative claim.¹⁶⁶ In addition, the bill authorized the governmental entity to resolve this claim through a variety of measures,¹⁶⁷ and provided that the claim was "ripe" for judicial review within no more than 180 days from the filing of the administrative claim.¹⁶⁸ If judicial action is involved, the bill entitled the winner to costs and reasonable attorney fees under certain conditions.¹⁶⁹

The amended bill granted an extraordinarily broad, substantive right to compensation. The bill provided:

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.¹⁷⁰

The definitions portion of the bill provides useful guidance on the meaning of this right. The term "inordinately burdened" is defined as:

[A]n action of one or more governmental entities [that] has directly restricted or limited the use of real property such that the property owner is unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with the respect to the real property as a whole, or that the property owner is left with existing or vested use[s] that are unreasonable such that the property owner bears a

163. H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as adopted by the House on May 28, 1997).

164. See *supra* notes 117-25 and accompanying text (discussing Florida bill).

165. See *infra* notes 156-59 and accompanying text.

166. S.C. H.R. 3591, § 28-4-40(A) (as adopted by the House on May 28, 1997).

167. *Id.* § 28-4-40(C); see also *id.* § 28-4-40(D) (mandating protection of public interest in administrative settlement context). The listing of remedial measures was virtually identical to that contained in § 28-4-80(A) of the original version of South Carolina House Bill 3591. See H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as introduced Mar. 4, 1997) (see *infra* Appendix).

168. S.C. H.R. 3591, § 28-4-50 (as adopted by House on May 28, 1997).

169. *Id.* § 28-4-60(A), (C).

170. *Id.* § 28-4-30(A); see *supra* note 117 and accompanying text for analysis of the same provisions in context of discussion of the Florida act.

disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.¹⁷¹

This definition was expanded by defining “existing use” broadly as follows:

The term “existing use” means an actual present use or activity on the real property including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity on the real property.¹⁷²

The net result of these statutory provisions is that, unless one of the specifically identified exceptions applies,¹⁷³ an owner is entitled to compensation if governmental action reduces the market value of the property.

3. *The Diversity of the Proposals*

The diversity of the proposals raises questions about the goals of reformers. More specifically, it is not clear whether this diversity might be explained by one or more of the following views:

- (1) The proponents of reform were not in agreement about the goals of

171. S.C. H.R. 3591, § 28-4-30(B)(5) (as adopted by the House on May 28, 1997). The bracketed “s” is included to reflect the plural of “use” contained in the parallel provision of the Florida act. *See* FLA. STAT. ANN. § 70.001(3)(e) (West Supp. 1998). The South Carolina bill uses the term “use” which results in the bill’s being grammatically incorrect.

172. S.C. H.R. 3591, § 28-4-30(B)(2) (as adopted by the House on May 28, 1997); *see supra* note 117 for discussion of Florida’s adoption of this expanded definition.

173. *See* S.C. H.R. 3591, § 28-4-30(B)(5) (as adopted by the House on May 28, 1997). The subsection contains the following list of exclusions:

The terms ‘inordinate burden’ or ‘inordinately burdened’ do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section; or any action of a governmental entity affecting either the location of any type of solid or liquid waste disposal facility (or the discharge therefrom) or landfill or expansion of any existing solid or liquid waste disposal facility (or the discharge therefrom) or landfill.

Id.

reform. For example, they disagreed about the current state of the law or its "bad effects."

- (2) The proponents of reform agreed on goals but were flexible about the details in any given bill in order to deal with political realities and achieve these goals incrementally.
- (3) The proponents of reform were more interested in the symbolic goal of achieving some type of property rights reform than changing any particular substantive or procedural takings rules.

As indicated below,¹⁷⁴ it is reasonable to believe that the first explanation played a considerable role in the diversity of proposals. Even when addressing a specific bill, the proponents of reform seemed unable to agree on the bill's purpose or practical effects.

B. *The Political Struggle*¹⁷⁵

The South Carolina General Assembly is composed of two chambers: (1) the House of Representatives, with 124 members elected for a term of two years; and (2) the Senate, with forty-six members elected for a term of four years.¹⁷⁶ Each member of the General Assembly is elected from a single member district.¹⁷⁷ Along with many southern states, South Carolina has recently experienced a political realignment as the Republican Party has gained majority status. In South Carolina, this process has resulted in three Republican governors¹⁷⁸ and, beginning in 1994, a majority of Republicans elected to the House.¹⁷⁹ However, the Democrats still have a majority in the Senate.¹⁸⁰ This

174. See *infra* notes 208-10, 238-41 and accompanying text.

175. An unpublished student research paper written during the spring semester of 1998 was helpful in writing this part of this Article. See William McIntosh, *The Ordeal of "Takings" Legislation in South Carolina: 1995-1998* (Spring, 1998) (unpublished directed research paper, on file with author).

176. 1997 SOUTH CAROLINA LEGISLATIVE MANUAL 17, 80 (Sandra K. McKinney ed., 1997) [hereinafter LEGISLATIVE MANUAL].

177. *Id.*

178. The first modern Republican governor, James Edwards, was elected in 1974 largely because of a fluke. See COLE BLEASE GRAHAM, JR. & WILLIAM V. MOORE, *SOUTH CAROLINA POLITICS & GOVERNMENT* 93-94 (1994). A more permanent political realignment began in 1986 with the election of Carroll Campbell, a Republican who served two four-year terms. *Id.* at 93-97. Campbell was constitutionally barred from seeking re-election, see LEGISLATIVE MANUAL, *supra* note 176, at 7; and David Beasley, who is also a Republican, was elected governor in the 1994 election. *Id.* at 15. In November 1998, James Hodges, a Democrat, was elected governor. Joseph S. Stroud & Michael Sponhour, *'Historic' Upset Built on Education, Lottery*, THE STATE (Columbia, S.C.), Nov. 4, 1998, at A1. The long term impact of Hodges's election on the political landscape of South Carolina is not clear. See *id.* (noting unique factors, like dislike of incumbent, that affected outcome); Michael Sponhour & Joseph S. Stroud, *Sleeping Democrats Awaken with a Roar*, THE STATE (Columbia, S.C.) Nov. 4, 1998, at A1 (noting that state "remains a Republican stronghold").

179. See Nina Brook & Cindi Ross Scoppe, *Partisan Power-Sharing Argument Highlight of Speaker Pro Tem Race*, THE STATE (Columbia, S.C.), Dec. 6, 1994, at B1 (shifting by two members from Democratic to Republican party resulted in the House having 62 Republicans, 58 Democrats, and four independents and created the first Republican majority since Reconstruction). For general discussion of the growth of Republican power in the State

shift in political power is important to the story of property rights reform in South Carolina because the takings movement is closely aligned with the Republican Party at the national level.¹⁸¹

Inevitably, any review of the political struggle over the takings reform proposal will be superficial. A statewide debate among numerous people and interest groups spanning several years cannot be summarized in a few paragraphs. Moreover, much of the discussion on takings reform is hard to research and authenticate because it is not a matter of public record. The following discussion, therefore, is meant to convey only an overall sense of the political treatment of the proposals.

1. 1995-96 Legislative Session

Though several bills had been introduced for the 1995-96 session, the legislative and political debate focused on South Carolina House Bill 3790, the first South Carolina Property Rights Act, which was introduced on March 14, 1995 by Rep. James R. Harrison (R-Richland).¹⁸² Initially, the chances of passage appeared strong. The bill had wide legislative support as seventy members of the House co-sponsored it.¹⁸³ In addition, two influential interest groups, the South Carolina Farm Bureau and the South Carolina Forestry Association, quickly became vocal supporters of the bill. The bill also had wide support from agricultural, forestry, development, and mining interests.¹⁸⁴ These interests joined together to form the South Carolina Property Rights Coalition.¹⁸⁵ Moreover, the political climate seemed receptive to such legislation. The takings reform “movement” that was gathering momentum in other states fit well with the agenda of the Republicans in South Carolina.¹⁸⁶ Moreover, the 1992 decision in *Lucas v. South Carolina Coastal Council*¹⁸⁷ provided an example of “regulatory excess” that was well known in the state.¹⁸⁸

legislature, see GRAHAM & MOORE, *supra* note 178, at 98-99, 119-37. The Republicans kept their majority in the House in the 1998 election. Michael Sponhour & Joseph S. Stroud, *Sleeping Democrats Awaken with a Roar*, THE STATE (Columbia, S.C.), Nov. 4, 1998, at A1.

180. LEGISLATIVE MANUAL, *supra* note 176, at 17-45 (26 Democrats, 20 Republicans). In 1980, the Senate had just five Republicans, and this number had increased to twelve by 1990. GRAHAM & MOORE, *supra* note 178, at 133-34. The Democrats kept their majority in the Senate in the 1998 election. Michael Sponhour & Joseph S. Stroud, *Sleeping Democrats Awaken with a Roar*, THE STATE (Columbia, S.C.), Nov. 4, 1998, at A1.

181. See *supra* notes 79-80, 84 and accompanying text.

182. For discussion of the contents of this bill, see *supra* notes 144-49 and accompanying text.

183. H.R. 3790, 111th Leg., 1st Sess. (S.C. 1995).

184. Monte Paulsen, *S.C. Would Compensate ‘Takings’ of Property*, THE STATE (Columbia, S.C.), Mar. 15, 1995, at B1.

185. *Id.*

186. See *supra* notes 175-81 and accompanying text.

187. 505 U.S. 1003 (1992); see also *supra* notes 31-42 and accompanying text; Part II.B.1.b (discussing *Lucas*).

188. See Max Kidalov, Comment, *H. 3591: Affirming Traditional Principles of Protection of Private Property and the Environment*, 6 S.C. ENVTL. L. J. 295, 296 (1997) (noting that Mr. Lucas has been actively supporting reform in South Carolina and other states since his victory in the Supreme Court).

However, the House did not pass the bill largely for two reasons.¹⁸⁹ First, opposition to the bill soon emerged. Two powerful interest groups—environmentalists and local governments—quickly aligned to fight the bill,¹⁹⁰ and influential newspapers also opposed it.¹⁹¹ Second, in a pattern that would continue throughout the debate in South Carolina, the reformers agreed on the need for reform, but they displayed no agreement on the desired goals and effects of any such reform.¹⁹²

a. *Opposition*

Opponents of the bill relied on two types of criticisms—that the bill would impose substantial costs on government and that it was contrary to American ideological traditions. County and municipal governments, opposing the bill through their respective associations, focused on the costs involved. On April 3, 1995, the South Carolina Association of Counties sent a position paper to House members stating that “[p]assage of H.3790 will place local communities, and ultimately taxpayers, under the continual threat of costly litigation.”¹⁹³ The Association indicated it would “advise counties to cease all planning and zoning activities” upon passage of the bill because of the indeterminably high fiscal impact of the bill.¹⁹⁴ The Association also claimed that the bill could even halt enforcement of existing building codes.¹⁹⁵ In a similar position paper, the Municipal Association of South Carolina stated that this “[o]ne bill could potentially reverse all efforts of local government planning and growth management and deter economic development.”¹⁹⁶ In a challenge to the South Carolina Tourism Council, a group of major coastal area developers supporting the bill,¹⁹⁷ the Municipal Association argued that the state’s tourism industry benefitted from historic preservation requirements and beachfront management regulations, both of which would be jeopardized by the bill.¹⁹⁸

Environmentalists also stressed the costs involved. These costs include not only the compensation paid for a taking, but also the costs of increased litigation. The executive director of the South Carolina Chapter of the National

189. Passage of the bill was also hindered because its primary sponsor, Rep. Harrison, was called to Army reserve duty in Bosnia during the session. Christina Binkley, *Coalition Plans to Push ‘Takings Law,’* WALL ST. J., Dec. 18, 1996, at 51.

190. See *infra* notes 193-203 and accompanying text.

191. See *infra* notes 204-07 and accompanying text.

192. See *infra* Part IV.B.1.b.

193. *Why “Takings” Legislation Hurts Local Communities* (S.C. Ass’n of Counties, Columbia, S.C.), Apr. 3, 1995, at 1.

194. *Id.*

195. *Id.* at 2.

196. *Private Property Rights and “Takings”* (Mun. Ass’n of S.C., Columbia, S.C.), Sept. 19, 1995, at 1.

197. The Tourism Council was emerging from behind the scenes as one of the primary supporters of the bill. Included among the listed members of the Tourism Council were: (1) The Beach Co., a Charleston developer; (2) several major Myrtle Beach area land owners; and (3) Union Camp Corp., a national forest products company with plans to develop its vast holdings in Beaufort County. Sammy Fretwell, *Land, Laws Collide in ‘Takings’ Debate*, THE STATE (Columbia, S.C.), Jan. 15, 1998, at B1.

198. MUNICIPAL ASS’N OF SOUTH CAROLINA, *supra* note 196, at 1.

Wildlife Federation argued that this approach to takings was “only going to benefit attorneys, appraisers and bureaucrats.”¹⁹⁹ The South Carolina Coastal Conservation League, a non-profit organization viewed as influential with coastal legislators, attacked the underlying ideology behind the takings reform movement as “fundamentally unhealthy.”²⁰⁰ In particular, the League challenged the validity of the proponents’ picture of “landowner[s] . . . [as] helpless victim[s] of a malevolent government.”²⁰¹ The League maintained that “our system was painstakingly designed to allow citizens to participate in lawmaking, by voicing their positions on specific legislation, by electing competent and responsive representatives, and by running for office at every level of government from town council to Congress.”²⁰² Environmentalists alleged “that the entire ‘property rights’ movement is a big-business wolf dressed in the sheep’s clothing of farmers and other small landowners.”²⁰³

The bill also faced media attacks on its underlying distributional premises. On January 17, 1996, *The State* newspaper, published in South Carolina’s capitol city of Columbia, published two editorials attacking the bill. The first editorial noted that when regulatory takings issues are litigated

[T]he courts balance “public benefit against private loss.” Over the last century, courts have decided that permissible public goals include landmark preservation, protection of wetlands, floodplains, open space and endangered species.

....

But the S.C. Property Rights bill before the Legislature would compensate landowners whenever it “appears likely” that a law would cause “substantial” diminishment of their property’s value.²⁰⁴

The editorial concluded that the bill “could force us to pay a landowner not to harm us. The Constitution did not guarantee landowners they could make the most profitable use of their land or that they could make use of their land at the expense of others’ health and safety.”²⁰⁵ *The State*’s second editorial attacking South Carolina House Bill 3791 noted that 83% of readers responding to its annual legislative survey supported “[r]equiring the government to pay property owners if it takes their land or passes laws—such as zoning or

199. Paulsen, *supra* note 184, at B1 (quoting Trish Jerman, Executive Director, South Carolina Chapter, National Wildlife Federation).

200. South Carolina Coastal Conservation League, “*Takings*” Laws: *Are We Being Taken?*, THE COASTAL GUARDIAN, Jan.-Feb. 1995, at 8.

201. *Id.*

202. *Id.*

203. Paulsen, *supra* note 184, at B1.

204. *Takings Legislation Takes Far More Than It Could Give*, THE STATE (Columbia, S.C.), Jan. 17, 1996, at A8. This paper published this editorial on a weekday while lawmakers were in session in Columbia.

205. *Id.*

environmental protection laws—that reduce the value of the land.”²⁰⁶ However, the editors argued that:

It’s all in the wording. What would readers have said if asked about ending regulations that keep porn shops from locating next to churches or liquor stores next to schools? About regulations that protect historic Charleston or that keep us from paying a polluter not to pollute? “Takings” legislation could do that.²⁰⁷

b. Goals and Effects of Reform

Supporters of reform argued that the current system had serious flaws. For example, the South Carolina Farm Bureau Federation argued:

Even with favorable court decisions for property owners, government regulation of property use has resulted in a number of problems, including:

•*Poor Planning and Waste of Resources.* Presently, regulatory agencies frequently ignore the financial implications of their regulations. As a result, resources available for important projects are often wasted when unanticipated takings result.

•*Excessive Litigation.* Landowners who may be financially ruined by regulatory takings receive no compensation except after bringing legal proceedings. Litigation for all parties with a government entity is expensive and time consuming.

•*Uncertainty.* Because each regulatory taking is litigated on a case-by-case basis, neither citizens nor the state can be sure what regulations of property rights give rise to a right to compensation.²⁰⁸

Although proponents of reform frequently repeated such general, conclusory criticisms, they did not provide any details or specifics as to which “regulatory agencies frequently ignore the financial implications of their regulations,” what resources had been “wasted when unanticipated takings result,” or which landowners “may be financially ruined.”²⁰⁹ A similar lack of details characterized discussions of the bill. Proponents appeared to be unconcerned or uncertain about the bill’s purpose or legal effects. For example, Rep. Harrison, the bill’s sponsor, appeared uncertain whether the bill would create a new standard for defining a taking or simply codify existing Fifth

206. *Beware What You Support*, THE STATE (Columbia, S.C.), Jan. 17, 1996, at A8.

207. *Id.*

208. SOUTH CAROLINA FARM BUREAU FEDERATION, LEGISLATIVE FACT SHEET: PROPOSED SOUTH CAROLINA PROPERTY RIGHTS ACT 1 (1994).

209. *Id.*

Amendment case law.²¹⁰

2. 1997-98 Legislative Session

Following the failure of South Carolina House Bill 3790 in the 1995-1996 legislative session, proponents of takings reform prepared to reintroduce legislation in the next session. Among those involved were the South Carolina Tourism Council (comprised of developers and large property owners),²¹¹ members of the South Carolina Chamber of Commerce, the South Carolina Farm Bureau, the Realtors Association, the South Carolina Forestry Association, and the Homebuilders Association.²¹² However, the state Chamber of Commerce did not include a new takings bill when it released its 1997 legislative agenda.²¹³ Pam Bennett, the executive director for the Tourism Council, explained that the proponents' strategy was "to keep this within our house" in order to keep potential opponents in the dark.²¹⁴ This strategy was undermined when *The Wall Street Journal* published an article profiling the coalition's push several weeks before the new session. Jimmy Chandler, attorney for the South Carolina Environmental Law Project, told the *Journal* that, until the *Journal* had informed him, he "didn't know . . . the [proponents of the reform] were coming back again this year."²¹⁵

On March 4, 1997, Rep. Jim Harrison (R-Richland), House Speaker David Wilkins (R-Greenville), Rep. Hunter Limbaugh (R-Florence), and eighty other House members introduced a new South Carolina Property Rights Act as South Carolina House Bill 3591.²¹⁶ After its first reading, the bill was assigned to the House Judiciary Committee, chaired by Rep. Harrison.

On April 16, 1997, a subcommittee of the House Judiciary Committee, with virtually no debate or review, "amended" South Carolina House Bill 3591 by substituting a completely different bill.²¹⁷ The new bill was essentially identical to Florida's recently enacted takings law.²¹⁸ On April 23, 1997, the full House Judiciary Committee began consideration of the amended bill and, on May 1, adopted it after very little deliberation, debate, or input from interested parties. On May 27, 1997, the House of Representatives concluded three days of debate on South Carolina House Bill 3591²¹⁹ and voted by a margin of 78-35 to send the bill on to the Senate.²²⁰

Because the 1997 session was nearly over at this point, the Senate did not

210. See Letter from Nina Morais, South Carolina Coastal Conservation League, to The Honorable James H. Harrison, Chairman, South Carolina House of Representatives Judiciary Committee 1 (Oct. 19, 1995) (on file with author).

211. See Fretwell, *supra* note 197, at B1.

212. Binkley, *supra* note 189, at 51; Fretwell, *supra* note 197, at B1.

213. Binkley, *supra* note 189, at 51.

214. *Id.* (quoting Pam Bennett, Executive Director, South Carolina Tourism Council).

215. *Id.* (quoting Jimmy Chandler, Attorney, South Carolina Environmental Law Project).

216. See *supra* notes 150-60 and accompanying text for discussion of this bill.

217. See *supra* Part IV.A.2.b for discussion of this amended bill.

218. See *supra* notes 117-25 and accompanying text for discussion of the Florida act.

219. 4 H.J. 3457 (1997).

220. *Id.* at 3505-06.

consider South Carolina House Bill 3591 until the 1998 session.²²¹ It was referred to the Senate Judiciary Committee where Sen. Don Holland, chair of the Committee, appointed a subcommittee, and on April 8, 1998, this subcommittee held a public hearing to consider the bill.²²² At the conclusion of this hearing, the subcommittee chair, Sen. Glenn McConnell, requested that proponents and opponents of the bill meet to determine if a compromise was possible.²²³ These efforts to find a compromise were not successful, and the 1997-98 session ended before the subcommittee could reconsider the bill.

This inability to compromise was largely due to a substantial effort by opponents of the bill. Initially, takings legislation had received relatively little public attention. However, after the House passed the substituted version of South Carolina House Bill 3591, both sides in the struggle became actively involved in presenting their respective positions. Not surprisingly, this renewed public debate paralleled the earlier controversy that had occurred during the 1995-96 session.

a. Opposition

Once again, opponents stressed that the bill would make important, necessary governmental regulation very expensive. In order to push this argument, the opponents used the six month break between the 1997 and the 1998 legislative sessions to form the Beat the Burden Coalition.²²⁴ Members of this diverse group included the League of Women Voters of South Carolina, the Municipal Association of South Carolina, the South Carolina Association of Counties, the South Carolina Christian Action Council, the South Carolina Downtown Development Association, the National Trust for Historic Preservation, and the South Carolina Wildlife Federation.²²⁵ The Coalition distributed a pamphlet that stressed how passage of South Carolina House Bill 3591 would result in "skyrocketing costs to taxpayers," "costly court battles," and "threatened quality of life."²²⁶ These vague, conclusory statements were buttressed by two additional attacks.

First, opponents argued that special interests were "buying" legislation. The Coalition described proponents as "big developers, some from out of state,

221. A similar bill was also introduced in the Senate on April 23, 1997. *See* S. 686, 112th Leg., 1st Sess. (S.C. 1997). Senators John Land and Don Holland sponsored this bill. Because the House version was acted upon and passed prior to any action on the Senate version, South Carolina House Bill 3591 became the vehicle for any sort of "takings" legislation which might be passed during the legislative session. This is the normal process when companion bills are introduced in the House and Senate; the bill making the route faster is usually the one ultimately considered. This Senate bill was not a typical companion bill because it was introduced *after* the House subcommittee had substituted the Florida takings act for the original version of South Carolina House Bill 3591. *See supra* notes 161-62 and accompanying text.

222. Audio tape of Subcommittee Hearing on South Carolina House Bill 3591 (April 8, 1998) (on file with author).

223. *Id.*

224. Fretwell, *supra* note 197, at B1.

225. BEAT THE BURDEN, STRAIGHT ANSWERS ON THE "INORDINATE BURDEN" BILL 1 (n.d.).

226. *Id.* at 2.

along with their attorneys. Also on board are real estate, billboard, petroleum, and factory hog farming interests.”²²⁷ Another opponent argued that, though few House members understood the effect of the bill, “[w]hen you spend \$300,000 lobbying for a bill, you’re going to get a lot of signatures.”²²⁸

Second, opponents persuaded legislators that the bill would negatively impact zoning.²²⁹ Several factors helped opponents make this argument. First, the language of the bill clearly included zoning.²³⁰ Second, it was easy to argue that the bill could severely hamper popular land use regulation schemes.²³¹ Third, many parts of the state do not have any zoning.²³² In these areas, if comprehensive zoning were initially enacted after passage of South Carolina House Bill 3591, it would arguably be necessary to compensate all property owners suffering a reduction in property value as a result of the new zoning scheme.²³³ Fourth, these arguments were readily expressed because local officials have easy access to and credibility with legislators.²³⁴ Finally, the

227. *Id.* at 1.

228. Arlie Porter, ‘Takings Bill’ Faces Local Ire, *THE POST & COURIER* (Charleston, S.C.), Feb. 27, 1998, at 1-B (quoting Nancy Bloodgood, Charleston County Deputy Attorney). *The State* newspaper reported that supporters of property rights reform spent \$280,000 lobbying the legislature in 1997, while opponents only spent \$90,000. Fretwell, *supra* note 197, at B1.

229. Some legislators indicated they would oppose the bill if it restricted zoning but were unsure whether it would do so. See, e.g., *Legislation Isn’t Needed to Guard Property Rights*, *THE STATE* (Columbia, S.C.), Jan. 19, 1998, at A8 (comments of Sen. John Land). Thus, it was important that opponents succeed in making it clear that zoning would be affected.

230. The bill defined governmental entity to include county governments and municipalities. H.R. 3591, 112th Leg., 1st Sess. § 28-4-30(B)(3) (S.C. 1997) (as adopted by the House on May 28, 1997). The bill also provided that it was not deemed to prevent the exercise of zoning powers so long as they were exercised in a manner “consistent with the provisions in this chapter.” *Id.* § 28-4-30(C). Though the Florida act does not contain such a provision, the Florida act and the South Carolina bill do not differ in terms of effect. For a discussion that the Florida act does apply to zoning and could require compensation for downzoning, see, for example, Powell, *supra* note 117, at 289. Similarly, the South Carolina takings bill would apply to zoning because the bill required that zoning be “consistent” with the provisions of the bill.

231. For example, the use of zoning restrictions to regulate “sexually oriented businesses” is a very popular zoning technique being adopted by many local governments in South Carolina. For further discussions on this particular use of zoning from both pro and con standpoints, see, for example, James C. Bradley, Note, *Don’t Come Around Here No More: The Regulation of Adult Businesses—Zoning or Entitlements?*, 49 S.C. L. REV. 1007 (1998); Jeffrey P. Dunlaevy, Note, *Dirty Dancing: The South Carolina Supreme Court Rejects Local Authority to Ban Nude Dancing by Fast-Stepping Around the Plain Meaning of the South Carolina Constitution*, 49 S.C. L. REV. 1025 (1998). Opponents of the bill argued that local governments might have to compensate property owners who suffered a loss in property value as a result of a zoning restriction on sexually oriented businesses. Proponents of reform argued that the bill would not affect this type of zoning because prohibiting this one use would not, by itself, reduce the value of the land. See Subcommittee Hearing Tape, *supra* note 222 (statement of Rep. Harrison). For further discussion of this issue, see *infra* note 240.

232. Twenty-six counties do not have any zoning. Subcommittee Hearing Tape, *supra* note 222 (statement of Howard Duvall, appearing for the Municipal Association).

233. At the subcommittee hearing on H.R. 3591, a member of the subcommittee, Sen. Bryan from Laurens County, expressed concern about the impact of the bill on the ability of Laurens County, which currently does not have zoning, to adopt zoning in the future. Subcommittee Hearing Tape, *supra* note 222 (statement of Sen. Bryan).

234. In many South Carolina cities and counties, local neighborhood organizations have considerable impact on local zoning decisions. Therefore, it might have been expected that they would play a similar role in expressing concerns to legislators. Yet their role appears to

proponents' argument that it was unfair to make a property owner bear the costs of achieving a broad public goal was inapplicable in most zoning situations. Typically, the underlying conflict in a zoning dispute is between private land owners. For example, an owner wants to have a store, but the owners of the adjacent residences fear that the store will reduce the value of their homes. Such individualized situations differ from disputes over an environmental regulation between a land owner and the public, where the aim is to preserve some common, public good like air quality. Opponents argued that, given this context, the bill was unfair, and perhaps unconstitutional, because it limited the ability of local government to protect adjoining land owners from the negative effects of certain types of land use.²³⁵ Because of these factors, opponents enjoyed considerable success in convincing influential senators that the bill would make substantive changes in zoning law and that these changes could require compensation in many cases.²³⁶

b. Goals and Effects of Reform

As with South Carolina House Bill 3790, the supporters of South Carolina

have been very limited in both the 1995-96 session and the 1997-98 session. For example, the Columbia, South Carolina, Council of Neighborhoods was a member of the Beat the Burden Coalition. However, Rep. Harrison, the sponsor of both property rights bills represents an area in Columbia, South Carolina, which has one of the oldest and most influential neighborhood organizations in the city. Yet his support for the bills does not seem to have had any effect on his political base in the neighborhood. Representative Harris was reelected in 1996 and was not opposed in in the 1998 general election.

235. See, e.g., Subcommittee Hearing Tape, *supra* note 222 (statement of Prof. Elizabeth Patterson pointing out "constitutionally troubling aspects" of the bill).

236. For example, Sen. Larry Martin (R-Pickens) expressed concerns that the bill could impact local governments' ability to regulate sexually oriented businesses without becoming a huge burden on taxpayers. Martin remarked that the Senate should "be careful about how we proceed. There's not any question about that. It doesn't take but one little sentence to ultimately wreak havoc on the taxpayers." Jennifer Langston, *Property Rights Law Could Upset Legal Balance*, THE GREENVILLE NEWS (Greenville, S.C.), Dec. 24, 1997, at 1A; see also Subcommittee Hearing Tape, *supra* note 222 (Sen. Martin remarking that "I would sure hate to think that we put ourselves in a box [by adopting H.3591] on that type of business enterprise."). The *State* newspaper also noted in an editorial that the bill could affect "Columbia's efforts to limit where X-rated businesses can locate." *Legislation Isn't Needed to Guard Property Rights*, *supra* note 229; see also Sammy Fretwell, *Bill Would Hobble Land-Use Laws, Critics Charge*, THE STATE (Columbia, S.C.), May 9, 1997, at B1 (stating that the Mayor of Columbia, South Carolina, held a press conference in front of an adult bookstore and said that this "legislation would prevent the city from keeping more sex shops and strip clubs out of Columbia"). The Coastal Conservation League also expressed similar concerns arguing against the property rights bill. See THE NEW PROPERTY RIGHTS BILL, *supra* note 125. Opponents of new statutory rights to compensation in other states have expressed similar concerns. See, e.g., Marzulla, *supra* note 79, at 635 (noting that concern with power to "zone the location of pornography shops" was a factor in defeating a broad-based compensation scheme in Mississippi); Timothy Egan, *Unlikely Alliances Attack Property Rights Measures*, N.Y. TIMES, May 15, 1995, at A1 ("What if a government entity decided that a topless bar could not open next to a church . . . Would acts of government even as routine as these require taxpayers to pay the owners of property that declined in value as a result?"). For a counterargument by proponents that the bill would not affect the ability to restrict sexually-oriented businesses in South Carolina, see *supra* note 231.

House Bill 3591 were unclear about its purpose or effect.²³⁷ Evidence of this uncertainty was made public in several ways. First, “sound bite” public relations statements of little substance found their way into the public. These statements asserted that reform was necessary and beneficial, but they were vague about the precise problems to be addressed by reform and the effects of the bill.²³⁸ Some proponents also claimed that the bill would not have any substantive effect on existing law,²³⁹ while others said that the bill would create new substantive rights.²⁴⁰ Proponents also argued, in a somewhat conclusory fashion, that these new rights were fair or necessary, that implementing them would not create serious problems, and that any resulting payout costs or

237. See *supra* Part IV.B.1 (discussing South Carolina House Bill 3790).

238. For example, on January 1, 1998, the South Carolina Tourism Council prepared a review of the final version of H.R. 3591. *The South Carolina Private Property Rights Protection Act* (South Carolina Tourism Council, Inc., Columbia, S.C.), Jan. 1, 1998 (on file with author) [hereinafter “Summary”]. The Summary noted that the act “is patterned after Florida’s Act which became law in October 1995.” *Id.* at 1. According to the Summary, the intent of the legislation is to “establish a solution-oriented process which strikes a balance between public and private interests and promotes settlements outside of the costly court system.” *Id.* The Summary argues that the act would establish such a process by encouraging government “regulators to develop flexible and creative ways of achieving the same result while eliminating the impairment of private property rights. These measures could include the use of variances, marketable emission credits, transfer development rights, mitigation and private sector incentives.” *Id.*

239. For example, Rep. Harrison, the sponsor of South Carolina House Bill 3591, stated:

[T]he intent of H.R. 3591 [is] to establish a solution-oriented process which strikes a balance between public and private interests and promotes settlements outside of the costly court system.

....

Nothing in this bill would prevent governments from adopting strict land-use plans. It would not impede regulations protecting the environment. It would have no effect on much-needed nuisance laws. The bill simply guarantees property owners a procedure by which they can seek compensation from government if their property is inordinately burdened by governmental actions.

Letter from James H. Harrison, Chairman, South Carolina House of Representatives Judiciary Committee, to Henry E. Brown, Jr., Chairman, South Carolina House of Representatives Ways and Means Committee 2 (May 8, 1997) (on file with author) (emphasis added). Additionally, the Summary prepared by the South Carolina Tourism Council asserts that the Florida law has not produced a flood of litigation and claims that “nothing in H.3591 would prevent governments from adopting strict land-use plans,” nor would it “wreak havoc on environmental regulations.” Summary, *supra* note 238, at 2; see also Subcommittee Hearing Tape, *supra* note 222 (statement of David Lucas adopting this view of the bill).

240. See, e.g., Subcommittee Hearing Tape, *supra* note 222 (statement of Neil Robinson, attorney appearing on behalf of supporters of the bill). In 1996, Mr. Robinson said: “If you want to prevent strip shopping centers on every corner, that’s laudable—but I’m just saying they ought to be prepared to pay for it.” Binkley, *supra* note 189, at 51. In 1998, Mr. Robinson stated, “We think some chilling effect on government is appropriate and we don’t make any apologies about that at all.” Fretwell, *supra* note 197, at B1.

reduction in regulation would be proper.²⁴¹

The variation in the proponents' descriptions of the bill's goals and effects could be due to many factors. For example, it could be due to clear, substantial disagreement among proponents, to uncertainty or misunderstanding on the part of some proponents, or to tactical decisions about how best to sell property rights reform. Whatever the cause, the failure of proponents to articulate a clear view of their goals and of the details of the bill may have had a substantial negative impact on the chances of passage of reform legislation because this failure facilitated the efforts of the bill's opponents to present their characterizations of the bill's goals and effects.

C. *The Future of "Takings Reform" in South Carolina*

Several factors indicate that some sort of takings proposals will be introduced in the 1999-2000 legislative session. First, the stakes are high; regulations do in fact impose substantial restrictions and costs on owners. Second, the passage of House Bill 3591 in the South Carolina House provides reform supporters with hope of success in the next session either with a bill based on House Bill 3591 or with a different type of bill. Third, passage of even a limited procedural or assessment bill would constitute a symbolic victory for proponents of reform.²⁴² Finally, the mere consideration of a property rights bill has several important advantages: (1) It provides a forum for criticizing current doctrine²⁴³ and for arguing in favor of increased property rights protection; (2) it may chill regulatory zeal because regulators will not want to provide concrete examples of unfair impacts on property value; (3) it would keep regulators busy fighting a property rights bill, leaving them less time to push for new regulatory legislation; and (4) it may affect the treatment of any new regulatory legislation.

Though it is likely that takings reform proposals will be introduced in the 1999-2000 legislative session, their form is uncertain. One reason for this uncertainty is that the proponents' goals remain unclear. This lack of clarity as to goals is reflected not only in the disagreement among reform supporters as to the goals and effects of legislation,²⁴⁴ but also by the diversity of the proposed bills.²⁴⁵ Another reason for uncertainty is that opponents of extreme reform may offer "defensive" bills which would make only minor changes. Because legislative response to property rights reform will largely depend on

241. See, e.g., *supra* note 240; Subcommittee Hearing on "State Approaches to Protecting Private Property Rights," 112th Leg., 1st. Sess. (S.C. 1997) (testimony of Chip Campsen, member of South Carolina House of Representatives) (supporting reform). Dwight Stewart, a consulting forester and agricultural property manager, stated: "If regulations are required to take private property rights for the common good, then I think the citizens should also be willing to share its costs." Subcommittee Hearing Tape, *supra* note 222.

242. See *infra* notes 251-52 and accompanying text for discussion of reasons to adopt such a bill.

243. See *supra* note 83 and accompanying text for discussion of reform rhetoric in terms of three facts of life concerning regulatory takings.

244. See *supra* notes 129, 208-10, 238-41 and accompanying text.

245. See *supra* Part IV.A.

the nature of the proposals involved, it is impossible to predict what the legislature may do in the 1999-2000 session. For example, a relatively mild assessment-type bill is more likely to pass than a bill substantially enlarging the definition of a taking.²⁴⁶

V. SOME NORMATIVE COMMENTS

The specific content of any takings legislation adopted in South Carolina, or any other state, will be determined largely by the relative political strength and skill of proponents and opponents and by the normative merits of the proposals involved. To the extent that normative concerns like fairness are involved, it is impossible to be neutral about takings reform. No clear, noncontroversial guide for deciding whether a property owner should be compensated if regulation reduces his property value has been presented. Nevertheless, *irrespective of what one believes about the fairness of the current system*, it is possible to make some relatively neutral remarks regarding the strengths and weaknesses of various proposals for states in general and for South Carolina in particular.

A. General Comments

The first general comment is that there is no one-size-fits-all property rights bill suitable for every state. The states vary enormously in terms of both physical attributes and legal context. Thus, it is not surprising that the national movement for property rights reform has been national only in the sense of expression of dissatisfaction with existing takings doctrine. Each state has addressed that dissatisfaction in a very unique and localized manner.²⁴⁷

Second, common sense indicates that legislators should be clear about the goals of reform and the effects of proposed legislation. The role, if any, that this common-sense concern for clarity has played in other states is hard to determine. In some states, public indifference may have resulted in little demand for clear statements about goals and effects.²⁴⁸ In other states, cultural or symbolic concerns may have been more important than careful legislative analysis of the bill at issue.²⁴⁹ For example, as a result of concern by blacks in Mississippi that a compensation bill was “racially motivated against blacks, . . . every black representative and senator voted against the bill.”²⁵⁰

Third, assessment statutes have considerable advantages from a political

246. See *infra* Part V.B.3.

247. See *supra* Part III.B.1.a to Part III.B.1.c.

248. See, e.g., George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 607 (1996) (“[T]he public in Texas has been largely indifferent to the [act] . . .”).

249. See, e.g., Brick & Cawley, *supra* note 81, at 303 (noting the view of environmentalists as “outsiders” and “elitists”); Jacobs & Ohm, *supra* note 84, at 217-18 (property rights as cultural symbol in struggle between urban/suburban interests and rural interests in Wisconsin and Minnesota); Lavelle, *supra* note 133, at 34 (noting “city vs. county” split).

250. Marzulla, *supra* note 79, at 635.

perspective. Ironically, the fact that assessment schemes are generally limited in effect²⁵¹ is, perhaps, a major advantage in the political context. One reason for the relatively widespread adoption of such schemes is that they provide a basis for compromise: Regulators can live with such limited changes, and proponents of reform can achieve a symbolic victory.²⁵²

Fourth, procedural reforms can be helpful, but only to a limited extent. As a general rule, procedural reforms tend to have less impact than substantive reform. Consequently, procedural reforms are more likely than substantive reforms to achieve a measure of success without resulting in substantial costs. One procedural reform that merits consideration is the adoption of a scheme that makes a decision ripe for judicial review within a relatively short period of time. The effect of this reform is very narrow because: (1) it makes no substantive changes in existing takings doctrine, including the lack of a standard and the presumption in favor of the validity of regulation;²⁵³ (2) it only addresses takings challenges to regulation; and (3) if a change in ripeness rules is too broad, it may run afoul of the constitutional "case or controversy" requirement.²⁵⁴ Nevertheless, this approach could provide property owners with quick, certain access to the courts to assert some takings claims. Arguably, it will also force regulators to assess more carefully cases that are likely to be litigated. As with assessment provisions, the limited role of procedural reform means that it could provide a basis for compromise.

Fifth, if adopted, substantive reforms should be narrowly tailored. Though there is considerable debate about the costs of legislatively adopting a different standard for a compensable taking than that used in the constitutional context, it is logical to think that substantial costs will be involved.²⁵⁵ Consequently, it seems prudent to proceed cautiously and incrementally in adopting a new substantive standard. Specifically, if a new standard is adopted, it should be limited in terms of: (1) the types of losses in property value that are compensable, (2) the types of regulatory schemes affected, and (3) the impact on the budget of the regulating agency. Each limitation is discussed below in further detail within the context of potential South Carolina legislation.²⁵⁶

B. South Carolina

1. Each State Is Unique

South Carolina's experience with the amended version of South Carolina House Bill 3591,²⁵⁷ which was based on the Florida act,²⁵⁸ indicates the

251. See Cordes, *supra* note 79, at 221-25; *supra* text accompanying notes 102-06; *infra* Part V.B.3.

252. See *supra* text following note 106.

253. See *supra* Part II.B.1 for a discussion on the lack of any standard and presumption in favor of validity.

254. See TRIBE, *supra* note 70, § 3-10.

255. See *supra* text following note 125.

256. See *infra* Part V.B.5.a and Part V.B.5.b.

257. See *supra* Part IV.A.2.b.

258. See *supra* note 117.

importance of considering the individual characteristics of each state. The differences between the two states in terms of such physical attributes as size, population, economy, and history are obvious. Moreover, the regulatory context is different in each state. Florida has been in the forefront of adopting statutory schemes for environmental and regional planning;²⁵⁹ whereas South Carolina has large areas with no zoning schemes.²⁶⁰ These differences do not mean that Florida's act should be ignored. South Carolina can and should learn from the experience of other states. However, any use of another state's approach must be done with an appreciation of the differences between that state and South Carolina.

2. *Proponents of Reform Should Have the Burden of Articulating the Goals of Reform and the Effects of Proposed Legislation*

It is not clear whether South Carolina needs reform. This uncertainty is partly due to the controversial nature of deciding whether the current system is unfair. It is also due to the fact that in four years of political debate, only limited discussion of the specifics concerning why reform is needed or how it should be achieved has taken place. Though proposed changes in basic rules about regulation of land use should be considered carefully, state legislators cannot personally examine all proposed legislation in detail. Therefore, careful committee review is essential. The reviewing process should require proponents of change to articulate specific goals and effects. To date, supporters of property rights reform have not satisfied this burden.

Virtually the only concrete example of unfairness identified by reform proponents is the experience of David Lucas.²⁶¹ However, his case does not support an assertion of systemic unfairness because: (1) Mr. Lucas is not an ordinary, common person—his “taken” property consisted of two exclusive oceanfront lots purchased for nearly one million dollars;²⁶² (2) Mr. Lucas did get compensated under existing compensation rules, even though it cost him a considerable amount of time and money to do so;²⁶³ and (3) the statutory scheme under which his lots were taken has now been amended to provide a mechanism to avoid such takings.²⁶⁴ These circumstances do not show that the system is inherently unfair. One such unique, isolated instance cannot provide such a showing.

Rather than address the task of articulating the goals and effects of specific legislative proposals, proponents of change have argued in vague, conclusory terms that the system is unfair and inefficient and have offered numerous solutions that are allegedly designed to address these problems. However, they have not identified the problems in any concrete fashion, nor have they

259. See, e.g., DANIEL R. MANDELKER ET. AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 870-71, 878-81 (4th ed. 1995).

260. See *supra* note 232 and accompanying text.

261. See *supra* Part II.B.1.b and notes 31-55 and accompanying text for discussion of Mr. Lucas' takings lawsuit.

262. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006-08 (1992).

263. *Id.* at 1009.

264. *Id.* at 1010-14.

discussed how the proposed legislation will address specific problems. The net result is that they appear to be offering solutions that are in search of problems.

3. *Though Assessment Provisions Have Limited Effects, They May Provide Some Improvement and Can Provide a Useful Approach to Compromise*

As indicated above,²⁶⁵ assessment provisions are generally limited in effect because no standard for identifying a taking exists and because the provisions are either so formalistic that regulators easily satisfy them or so detailed and substantial that regulators follow them only in a pro forma manner. Regulators are unlikely to follow a detailed assessment provision because they have limited personnel and budgets to handle a large workload. For example, Columbia, South Carolina, has four entities constantly making zoning decisions: (1) the City Council, (2) the Planning Commission, (3) the Zoning Board of Adjustment, and (4) the Landmarks Commission. In a given month, these bodies make dozens of decisions affecting property values. If the legislature were to adopt an easily satisfied, formalistic assessment statute, this decisionmaking could continue without problem. However, if a statute required the city planning staff to make detailed, written takings assessments based on listed factors for each decision, zoning would virtually stop. The planning staff is not large enough to do such assessments along with its current tasks. It is unlikely that Columbia is going to increase its budget substantially for planning staff. Nor is it likely that Columbia will stop zoning activities. As a result, takings assessments are likely to be done in a quick, formal manner that would be contrary to a strict assessment statute.

Several assessment schemes have been proposed for South Carolina, either as independent bills or as part of a more comprehensive proposal.²⁶⁶ The difficulty with these schemes as a basis for compromise is that they would impose substantial administrative burdens on regulators. Consequently, administrators would be faced with the dilemma of choosing between superficial compliance and substantive compliance, which would reduce their ability to regulate. In addition, if opponents were to agree to an assessment scheme, this agreement could be viewed as a recognition that current practice is somehow wrong or unfair. In this way, the agreement or compromise could become an argument by proponents for broader, more substantive changes. Thus, opponents of reform have fought the proposed assessment schemes.

Because of these concerns, assessment proposals have not provided a basis for compromise in South Carolina. However, if a clearly limited assessment proposal could be combined with assurances that the proposal was not simply the first step toward broader reform, it might be possible to persuade opponents

265. See *supra* notes 102-06 and accompanying text.

266. See S. 374, 111th Leg., 1st Sess. (S.C. 1995) (assessment scheme only); H.R. 3790, 111th Leg., 1st Sess. (S.C. 1995) (assessment scheme as part of scheme with statutory standard for compensation); H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as introduced Mar. 4, 1997) (assessment scheme only); H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as adopted by the House on May 28, 1997) (assessment scheme with statutory standard for compensation).

to agree. However, whether such a symbolic victory would satisfy proponents of reform is unclear, given the uncertainty as to their goals.²⁶⁷

4. *Procedural Reform Can Be Helpful to a Limited Extent and Can Provide a Basis for Compromise*

Procedural reforms are generally more likely than substantive reforms to do some good without resulting in substantial harm.²⁶⁸ This is particularly true regarding well drafted schemes for achieving a decision that is ripe for judicial review within a relatively short period of time. These benefits and the low cost of procedural reform could provide a basis for compromise in South Carolina as long as the new procedures are not unduly burdensome. In 1995, the Municipal Association proposed that both sides in the dispute consider a process of administrative review of a takings claim.²⁶⁹

A compromise on limited procedural reform has not been possible because no bill has involved procedural reform alone. One example is the version of South Carolina House Bill 3591 as adopted by the House.²⁷⁰ The procedural provisions in that bill could be viewed as burdensome, and the proposals were part of a scheme that included a new substantive standard for takings.²⁷¹ Consequently, the total scheme was strongly opposed, particularly by environmentalists and local governments.²⁷² Even if a bill contained only limited procedural reforms, opponents might still oppose it if they are not given assurances that the procedural bill is not simply the first step in further reform efforts.

Insofar as procedural reforms other than changes in ripeness rules are concerned, the legislative proposals thus far contain many provisions that appear unnecessary in terms of zoning because similar provisions already exist. The enabling act that will govern all zoning in South Carolina after May 3, 1999, achieves flexibility through the following methods:

- (1) In addition to classical Euclidian zoning, the property owner may also request the following zoning classifications: "cluster development," "floating zone[s]," "performance zoning," "planned development district," "overlay zone," and "conditional uses."²⁷³
- (2) Existing uses are generally allowed as a "nonconformity" or

267. See *supra* text accompanying note 208; *supra* notes 238-41 and accompanying text.

268. See *supra* Part III.B.1.b; *supra* text accompanying notes 253-56.

269. Memorandum from Howard Duvall, Municipal Association of South Carolina on Administrative Review of Takings to Interested Parties 1 (Sep. 25, 1995) (on file with author).

270. S.C. H.R. 3591 (as adopted by the House on May 28, 1997); Part IV.A.2.b.

271. See *supra* notes 170-73 and accompanying text.

272. See *supra* Part IV.B.2.a.

273. S.C. CODE ANN. § 6-29-720(C) (Law. Co-op. Supp. 1997). Most large cities in South Carolina utilize these techniques under existing law. See, e.g., COLUMBIA, S.C., CODE §§ 17-241, -248 (1998) (overlay districts); *id.* §§ 17-247, -305 (planned unit development districts); *id.* § 17-301 (cluster development).

nonconforming use.²⁷⁴

- (3) Owners may request variances and special exceptions in unique circumstances.²⁷⁵
- (4) Owners may obtain feedback from regulators concerning subdivision schemes.²⁷⁶

As a general rule, the exercise of this flexible zoning power is explicitly subject to prompt judicial review.²⁷⁷ This right of review is sometimes granted to adjoining owners as well.²⁷⁸

Perhaps similar flexibility should be adopted for environmental regulation.²⁷⁹ If so, such flexibility should be part of the environmental scheme involved or addressed to a class of similar environmental schemes. Such a focused approach could fit into the existing administrative structure. In contrast, a broad-based statute affecting all regulation, including zoning, could create problems like the unnecessary and potentially costly duplication of existing administrative flexibility.

5. *If Adopted, Substantive Reforms Should Be Narrowly Tailored*

As indicated above, there is considerable debate about the desirability of legislative adoption of a different standard for a compensable taking than that used in the constitutional context.²⁸⁰ One reason for this debate is uncertainty regarding costs. The State Budget and Control Board concluded that the fiscal impact of South Carolina House Bill 3591 was indeterminable.²⁸¹ Opponents

274. S.C. CODE ANN. § 6-29-730 (Law. Co-op. Supp. 1997). The enabling statute authorizes this technique and "amortization" approaches. Such techniques are generally used in city ordinances under the current South Carolina enabling statute. *See, e.g.*, COLUMBIA, S.C., CODE §§ 17-201 to -205 (1998) (nonconforming uses and lots); *id.* § 17-381(g) (amortization period for nonconforming sexually oriented businesses).

275. S.C. CODE ANN. § 6-29-800 (Law. Co-op. Supp. 1997). The new enabling statute authorizes these techniques, and they have been universally adopted under the current enabling legislation. For example of inclusion of variance and special exceptions as "new" rights in property rights reform, see *supra* note 159.

276. S.C. CODE ANN. § 6-29-1150 (Law. Co-op. Supp. 1997) (providing for submission of "sketch plans, preliminary plans, and final plans for review"). Similar statutory authorization exists under current legislation and local governments follow this approach. *See, e.g.*, COLUMBIA, S.C., CODE § 17-491 (1998) (governing plat approval).

277. For examples of statutes requiring prompt judicial review, see, S.C. CODE ANN. §§ 6-29-760(D), -820, -900, -1150(C) (Law. Co-op. Supp. 1997).

278. For examples of statutes providing standing to adjoining land owners, see, S.C. CODE ANN. §§ 6-29-760(C), -820, -900 (Law. Co-op. Supp. 1997).

279. *See, e.g.*, Jonathan S. Klavens, *At the Edge of Environmental Adjudication: An Administrative Takings Variance*, 18 HARV. ENVTL. L. REV. 277, 343 (1994) (arguing that a "hardship variance" may be a useful environmental tool).

280. *See supra* Part III.A; notes 122-25 and accompanying text.

281. Memorandum from the Office of State Budget, Budget and Control Board to The Honorable James H. Harrison, Chairman, South Carolina House Judiciary Committee 1 (Apr. 22, 1997) (on file with author). The fiscal impact statement seems to be based on a misunderstanding of how land use decisions affect property value. For example, it focuses on the granting of permits instead of discussing conduct that could reduce property value and thus involve a potential taking, such as changes in zoning classifications or adoption of new zoning restrictions

offered an estimated cost of “\$100,000,000 to \$125,000,000 a year in litigation costs, administrative costs, and payments to property owners,” but conceded that this was a “best of our ability” estimate by a “panel of experts.”²⁸² The benefits of any costs are also unclear due to the limited articulation of the concrete problems to be addressed by reform.²⁸³ The net result is that it is unclear whether South Carolina should substantively change the standard for granting compensation for a regulatory taking. Nevertheless, *if it is decided that such a change is desirable*, several concerns should be addressed in determining the content of any substantive change.

a. Limitations on Types of Loss in Property Value That Give Rise to Right to Compensation Should Be Considered

The approach used in the Florida act appears to grant a right to compensation for any property value reduction.²⁸⁴ Given the uncertainties concerning the costs of any substantive change in takings law, a more limited approach merits consideration if one decides that a substantive change is in order. This approach can be accomplished in three ways: (1) limitations based on a percentage of lost value, (2) flexible limits based on concerns of “fairness” in the context of a particular regulatory scheme, and (3) an overall balancing approach.

(1) Limitations Based on Percentage Loss in Market Value

The major objections to existing takings law are its uncertainty, the costs involved in determining whether a taking has occurred, and the fact that substantial losses in value may not involve a constitutional taking.²⁸⁵ One way to ameliorate these problems is to define a “taking” in terms of loss in property value, which is arguably more fair and provides a relatively clear test. This is the approach used in the amended version of South Carolina House Bill 3591. Problems still exist with this approach. One problem is that, in many cases, determining a regulation’s impact on market value will be complex and difficult. A market value test is only clear and simple by comparison to the existing constitutional approach, which relies upon case by case determinations. Moreover, as opponents of South Carolina House Bill 3591

(which do not usually involve a taking under the constitutional standard).

282. See, e.g., Subcommittee Hearing Tape, *supra* note 222 (statement of Howard Duval, appearing for South Carolina Municipal Association). Dana Beach, speaking later on behalf of the South Carolina Coastal Conservation League at the Senate Subcommittee Hearing, noted that copies of the study providing these figures had been made available to the Subcommittee. Beach described the panel membership, stressing that it included people from both the public and private sector, including a past president of the State Chamber of Commerce. He also indicated that the lowest estimate was \$60,000,000, and that “for every dollar that goes to a property owner, more than \$5 goes to lawyers, litigation costs, appraisers, and bureaucratic processes.” *Id.* (statement of Dana Beach).

283. See *supra* text accompanying note 209; *supra* notes 238-42 and accompanying text.

284. See *supra* note 117 and accompanying text.

285. See *supra* Part II.B.; *supra* note 83 and accompanying text.

noted, this relative clarification is achieved by granting a new substantive right to owners. This new right may involve substantial costs, and critics dispute its fairness.²⁸⁶ These cost and fairness problems suggest that if reduction in property value is used to define taking, this approach should be limited. One approach used in some states is to limit the right by providing that an owner has no right to compensation unless a certain percentage of the property's value is lost.²⁸⁷

There are several reasons to limit the right to compensation to situations where the property owner suffers a loss above some cut-off point—for example, a property value loss of fifty percent or more.²⁸⁸ First, determining compensation by loss of property value provides a relatively easily applied standard. Second, a fifty percent cut-off point is arguably a fairer way of balancing the social benefits against the costs to the owner.²⁸⁹ Where the impact is less than fifty percent, the cost to the owner is lower and can more easily be viewed as “part of the burden of common citizenship,”²⁹⁰ particularly given the reciprocal benefits that an owner may receive from regulation.²⁹¹ When the impact is above fifty percent, it can be argued that the burden “should be borne by the public as a whole.”²⁹² Third, this approach will limit the number of claims and thus reduce both administrative and claim costs for regulatory entities.

In some cases, a test based on a minimum-percentage-value loss will present difficulties that do not exist with a test based on *any* reduction in value. For example, if the property involved is part of a large tract, is the percentage in loss determined by reference to the part affected by the regulation or by the entire tract?²⁹³ A simple answer is to use the entire tract as the basis. This approach provides a certain, easily applied test. Moreover, this test is fair for two reasons. First, because only large tracts of land will likely be affected by this rule, the impact on the owners' total wealth (at least as measured by the value of the total tract) will probably be less. Second, the owner always has the right to compensation under the constitutional takings test.

Another problem is the possibility that the government or the owner will try to manipulate the rule. For example, a regulatory entity could adopt a series

286. See *supra* notes 87-92, 282 and accompanying text; *supra* Part IV.B.2.a.

287. See *supra* notes 112-16 and accompanying text.

288. South Carolina Senate Bill 121, introduced in 1995, utilized a 50% approach. S. 121, 111th Leg., 1st Sess., § 2(A) (S.C. 1995). See also *supra* text accompanying notes 139-40. Defenders of Property Rights, a group pushing for property rights reform nationally, has drafted a model takings bill making 50% the point triggering compensation. See Marzulla, *supra* note 79, at 635.

289. Cf. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) (adopting a 50% approach for comparative negligence).

290. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (quoting *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949)).

291. See *supra* notes 91-92 and accompanying text; *infra* text accompanying note 304.

292. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

293. See *supra* text accompanying note 22, notes 57-58 and accompanying text for further discussion of this problem in context of constitutional takings doctrine.

of restrictions that, when considered collectively, cause more than a fifty percent reduction in value, even though no single one of the restrictions would cause such a reduction. Similarly, a land owner might subdivide his land in anticipation of a regulatory restriction. Though these problems cannot be eliminated, they could be addressed by the legislation involved. For example, the incremental-regulatory-action problem could be addressed by treating regulatory actions within some time frame, as if only a single regulatory limit were involved. A similar time-based approach might be used in determining the treatment of the land owner's actions in subdividing the tract.

(2) *Limitations Based on Distinctions Among Regulatory Schemes*

Thus far, the substantive proposals considered in South Carolina treat all regulatory takings equally. There has been no distinction between zoning vis-à-vis environmental regulation or between different types of zoning decisions.²⁹⁴ One possible explanation for this approach is that, from a political perspective, the broad-based application of the scheme to all regulation assists in building coalitions. The approach also facilitates the drafting of a simple, clear, and effective definition of a taking. If the statute distinguishes among regulatory schemes in applying a takings scheme, it might be more complex and harder to apply. Moreover, regulators might use the statutory distinctions to alter the result in a particular case simply by changing the type of regulation involved.

However, the advantages of adopting a simple one-size-fits-all scheme may be outweighed by the unfairness of ignoring important aspects of the real world. Arguably, if there is a problem of clarity or fairness in terms of a particular regulatory program, that problem should be addressed within the context of that program.²⁹⁵ For example, if the South Carolina Coastal Tidelands and Wetlands statutory provisions²⁹⁶ have problems in terms of their impact on owners, these problems should be addressed by revising this

294. Rep. Harrison explained the rejection of an approach that would distinguish among schemes when the House adopted South Carolina House Bill 3591 in 1997 as follows:

[T]here [were] amendments put up for hog farms, and there [were] amendments put up for topless establishments, [and] there [were] amendments put up for this. We thought the concept was pure [that] either it's a taking or it's not, and we couldn't pick and choose . . . [and based upon that,] the decision was made. You either believe in the concept of individual property rights or you don't, and we would rather lose the whole bill than just . . . start carving out exceptions for this and that just to get support for the bill.

Subcommittee Hearing Tape, *supra* note 222 (statement of Rep. Harrison).

295. See Sax, *supra* note 79, at 519 ("[W]here there are legitimate problems, let's target the specifics with a focused solution.").

296. See S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. Supp. 1997). This is the statutory scheme at issue in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

statutory scheme, not by a total, broad-based revision of takings law.²⁹⁷

In drawing distinctions between regulatory schemes, it is perhaps most important to keep in mind the ways that zoning differs from virtually all environmental schemes. First, zoning is administered at the local level, and the contents of the zoning ordinance are subject to the control of democratically elected city and county councils.²⁹⁸ Consequently, the system is more responsive to the concerns of the residents affected by the decision involved. Second, zoning is extremely flexible.²⁹⁹ Because of this flexibility, many proposed procedural reforms are simply unnecessary in the zoning context.³⁰⁰ Third, many zoning disputes are, in effect, private disagreements among neighbors. As indicated above, determining the right to a particular land use for one parcel of property affects more than just that parcel's value; these determinations also affect neighboring property values.³⁰¹ A scheme granting new property rights to the parcel's owner, but not the neighbors, appears unfair (and perhaps unconstitutional) in light of the fact that the value of the owner's property might be increased at the expense of his immediate neighbors, not the general public.³⁰² Fourth, it is usually clear that an owner receives both benefits and burdens from a zoning scheme.³⁰³ Because government exercise of the police power often confers benefits on property owners and thus can increase land values, it can be said that regulatory "givings" as well as takings occur. These givings take many forms, including the value added to land from infrastructure improvements like roads and sewer lines.

Regulatory givings are particularly common and direct in zoning. For example, zoning, by itself, generally has the following positive effects on the value of property in a residentially zoned district:

- (1) If the property is zoned residential, the value of the property is enhanced by the fact that the adjoining land is zoned residential.
- (2) If the property is zoned commercial, the value is enhanced by the fact that the zoning scheme limits the amount of land in the community that can be used for commercial purpose. Because of this limiting

297. As an example of focused reform, the problem involved under the Act in *Lucas*, 505 U.S. 1003, has been ameliorated by a statutory variance procedure. *Id.* at 1010-11.

298. See, e.g., S.C. CODE ANN. § 6-29-720(A) (Law. Co-op. Supp. 1997) ("[G]overning body of a municipality or county may adopt a zoning ordinance . . ."). The ordinance is administered by citizen bodies appointed by the council. See S.C. CODE ANN. §§ 6-29-340 to -380 (Law. Co-op. Supp. 1997) ("local planning commission"); S.C. CODE ANN. § 6-29-780 (Law. Co-op. Supp. 1997) (Board of Zoning Appeals); S.C. CODE ANN. § 6-29-870 (Law. Co-op. Supp. 1997) (Board of Architectural Review). The question of whether such localized democratic control is good or bad is beyond the scope of this Article. The textual point is that *zoning is different* because these councils (and the appointed persons on the boards and planning commission) are responsive to citizens and to problems in ways that bureaucratic experts, particularly those at a state office, are not.

299. See *supra* text accompanying notes 273-78.

300. H.R. 3591, 112th Leg., § 28-4-80(A) (S.C. 1997) (as introduced Mar. 4, 1997) (see *infra* Appendix) (listing procedural approaches, including variances and special exceptions).

301. See *supra* note 235 and accompanying text.

302. See *supra* notes 91-92, 235 and accompanying text.

303. See *supra* notes 91-92 and accompanying text.

effect, the supply of commercial properties is reduced. If the demand for commercial property is constant, this reduction in supply will translate into higher purchase or rental value for commercially zoned property. This effect may be stronger if the area nearby is zoned residential because there will be less commercially zoned property in that area.

- (3) The zoning scheme as a whole will arguably enhance property values as a whole by providing a more orderly and harmonious arrangement of explicit land uses.

Zoning also has negative effects on property value. For example, a rezoning of a parcel of land from commercial to residential reduces the value of the parcel if commercial uses were a more valuable use of the parcel than residential. However, part of the total value of the land before rezoning results from the positive effects of the zoning scheme. These positive effects complicate discussions of reduction in property values from “downzoning”—i.e., from a change in zoning that reduces the permitted uses or density.³⁰⁴ For example, if downzoning from commercial to residential results in a loss in value of \$10,000, should the owner be compensated for this loss if most of the difference in value between commercial and residential zoning for the parcel resulted from the second effect listed above—i.e., from the scarcity in the amount of land in the community that can be used for commercial purposes?

(3) *Limitations Based on Balancing*

A takings standard based on a loss of any or some minimum percentage of property value has the advantage of clarity and relative ease of application. However, these market value tests of takings are not necessarily fair. For example, requiring compensation because a property’s market value decreased as a result of downzoning from commercial to residential use might be unfair where: (1) the land owner never used the property for a commercial purpose, (2) the property is an area that is virtually all residential in use, and (3) a commercial use would substantially reduce other property values in the immediate vicinity. In such a case, the owners of nearby land might argue that any increased value from allowing a potential commercial use comes at their expense. One might respond that these other owners purchased (or did not sell) their land with knowledge that the parcel at issue was zoned for commercial use. However, this argument is subject to the counterargument that they, and the owner of the property at issue, also knew that the property could be downzoned.

Because of such problems, the advantages of flexible definitions should be considered when drafting takings proposals that grant new substantive rights

304. See *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 248-49 n.1 (Utah Ct. App. 1998) (quoting 1 JULIUS L. SACKMAN, *NICHOLS ON EMINENT DOMAIN* § 1.42 [18] [a] [vi] (3d. ed. 1997) (“‘Downsizing’ is defined as ‘[t]he process by which zoning changes reduce an area’s density level or limit the intensity of [development on] designated land’”).

to land owners. This flexible approach would provide a way to balance the goal of clarity with the goal of fairness. For example, the version of South Carolina House Bill 3591 adopted by the House was arguably more flexible than a clear-cut, loss-in-value scheme because it referred to a right to compensation if property was "inordinately burdened."³⁰⁵ The bill also contained other language that appeared to grant flexibility because the right granted by the bill was limited by phrases like "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses,"³⁰⁶ and like "[limits] that are unreasonable such that the property owner bears a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."³⁰⁷ However, the potential effect of this flexible language was negated by explicit language that appeared to grant a right to compensation based on reduction in property value.³⁰⁸ Moreover, because of the way South Carolina House Bill 3591 is drafted, it is very difficult to understand or apply these phrases. For example, is compatibility with adjacent land uses to be judged by a common law nuisance standard or by a more flexible, zoning-like standard? Nevertheless, the quoted phrases indicate the type of language that, if placed in a clear, well-drafted statute, could grant courts discretion to be flexible while guiding them in the exercise of that discretion.

b. Limitation of Amount of Liability Should Be Considered

Thus far, reform proposals have taken a completely property-oriented approach and viewed the scheme as if it were a form of eminent domain. This approach is consistent with the underlying property rights basis of the takings reform movement.³⁰⁹ However, this approach provides no limit on the liability of the regulating entity. An alternative approach is to view the scheme as a type of statutory tort. From this perspective, the "injury" to the owner—loss in property value as a result of regulation—is treated in the same way as any other tortious property injury.³¹⁰

This tort approach has several advantages. It should be preferred by local governments because liability would be limited by the South Carolina Tort Claims Act³¹¹ or by some maximum dollar amount set by the takings bill

305. H.R. 3591, 112th Leg., 1st Sess. § 28-4-30(A) (S.C. 1997) (as adopted by House on May 28, 1997).

306. *Id.* § 28-4-30(B)(2).

307. *Id.* § 28-4-30(B)(5).

308. *See supra* text accompanying notes 170-73.

309. *See supra* Part III.A.

310. *Cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972) (noting that ownership rights can be protected by either "property rules" or by "liability rules").

311. *See* S.C. CODE ANN. § 15-78-120(a)(1)-(2) (Law. Co-op. Supp. 1997) (placing limits of \$250,000 per claim and \$500,000 per occurrence, except for malpractice, where limits are \$1,000,000 per claim and per occurrence).

itself.³¹² In addition, an insurance type fund could be established to cover liability for this new tort. This would not only provide a way to fund payments for “tortious takings,” but also serve as a means for gathering data about the impact of the new tort in terms of numbers and costs of claims. Another advantage of this approach is that it focuses recovery on “little people,” who are more likely to receive full compensation within the liability limits, rather than large developers or large industrial or agricultural uses.³¹³

c. Local Governments Without Zoning Must Be Addressed

One problem with adopting a new substantive takings right to compensation in South Carolina is that many counties currently have no zoning.³¹⁴ Many smaller municipalities also lack zoning.³¹⁵ The initial adoption of zoning in these areas will present problems if a statutory takings bill requires compensation for reduction in property value, even if the right is limited in some way. Local governments that now lack zoning will be faced with a choice: (1) adopt zoning and pay property owners who suffer a devaluation caused by zoning restrictions, or (2) continue without zoning. Given taxpayer resistance to tax increases, the second choice is likely to prevail.

One solution to this problem would be to adopt legislation requiring that all counties and incorporated cities adopt zoning by some date, for example, by June 1, 2001. Such a requirement is necessary because the current zoning act merely *authorizes* cities and counties to adopt zoning in a particular manner by

312. The potentially unlimited liability was a concern expressed by opponents of H.R. 3591. Robert Nash, Chairman of the Pickens County Council, argued:

Under this legislation, there is no limit to the liability. When the state decided to waive sovereign immunity a few years ago, it did so advisably. And it set caps on the amount of money due to litigants even in the most extreme cases of negligence or in injury and even in death. This bill is a no holes barred attack on the county's financial resources regardless of the county planners' good or ill intent.

. . . .

. . . Regardless of the [dollar] numbers attached to these bills, the costs born by the counties will be unlimited, it will be uninsured, and it will be uninsurable. A judgment against Pickens County will impair its credit rating and judgments will be passed off in the following year's budgets.

Subcommittee Hearing Tape, *supra* note 222 (statement of Bob Nash).

313. See Treanor, *supra* note 132, at 1164-65 (noting that narratives concerning loss of homes and substantial portions of “small person's” wealth have power in cultural norms of fairness).

314. See *supra* note 232.

315. Telephone Interview with Howard Duvall, South Carolina Municipal Association (Nov. 11, 1998).

May 3, 1999.³¹⁶ This enabling act, like prior enabling acts in South Carolina,³¹⁷ does not *require* local governments to adopt zoning.³¹⁸ However, requiring local governments to adopt zoning would raise new problems. For some counties, zoning seems unnecessary. For example, eight counties have less than twenty thousand residents.³¹⁹ Do these small, rural counties need the things required for zoning such as a comprehensive land use plan, a planning commission, and a zoning board of adjustment?³²⁰ Another problem is funding the cost of drafting a comprehensive zoning plan and administering a zoning scheme. Obviously, such an unfunded mandate would present political and practical problems because many of the poorer, rural counties have trouble enough funding adequate schools. How would they fund this new zoning requirement? Nevertheless, without a legislatively imposed requirement, many areas of the state could remain without zoning for years. Consequently, the dilemma of choosing between zoning and compensation will remain.

An alternative approach would be to defer the application of a takings reform act in any city or county without zoning until after a comprehensive zoning scheme has been adopted.³²¹ One problem with this approach is the resulting inequality in applying the right to compensation. However, some inequality is unavoidable. If South Carolina adopted a state-wide compensation

316. South Carolina Local Government Comprehensive Planning Enabling Act of 1994, No. 355, § 2, 1994 S.C. Acts 4010, 4036 (1994) (repealing prior acts, effective five years from approval of Act No. 355 on May 3, 1994, and requiring all "local planning programs . . . [to] be in conformity" with the Act's provisions after that date).

317. See S.C. CODE ANN. § 6-7-330 (Law. Co-op. 1976) (providing that municipalities and counties "may exercise" powers granted under the chapter).

318. Cf. S.C. CODE ANN. § 6-29-720(A) (Law. Co-op. Supp. 1997) ("[G]overning body of a municipality or county may adopt a zoning ordinance . . .").

319. See OFFICE OF RESEARCH AND STATISTICAL SERVS., S.C. STATE BUDGET AND CONTROL BD., S.C. STATISTICAL ABSTRACT 331 (1994) (noting that in 1990, Allendale and Calhoun Counties had populations of less than fifteen thousand, and McCormick County had less than ten thousand).

320. See S.C. CODE ANN. §§ 6-29-510, -720(A), -780 (Law. Co-op. Supp. 1997) (requiring a planning process, zoning districts, and a board of zoning appeals as a part of zoning scheme).

321. The approach of postponing effect in areas without zoning was rejected when the House adopted H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997) (as adopted by House on May 28, 1997). Rep. Harrison indicated that the reason for this rejection was:

If you wait until everybody has every land use plan . . . those plans . . . can in fact have a takings impact. So, if you wait until after every land use plan and every zone is in effect, you're basically saying go ahead and take a free shot at us because we won't have a claim until after you finish.

Subcommittee Hearing Tape, *supra* note 222 (statement of Rep. Harrison).

An additional problem is that local governments have broad police powers granted by statute. See S.C. CODE ANN. § 5-7-30 (Law. Co-op. Supp. 1997); cf. S.C. CONST. art. VIII, § 7 ("No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government."). Arguably, these powers include the ability to enact zoning-like laws that affect land use without having a complete zoning system. For example, a county might argue that it has the power to impose restrictions on hog farming to protect the public health and welfare, even if the county has not adopted a comprehensive zoning scheme as required by the state zoning enabling act.

requirement, local governments that currently have zoning could maintain existing zoning restrictions without paying compensation, while local governments without zoning could not adopt equivalent zoning restrictions without paying compensation. Proponents of reform are also concerned that postponement of effectiveness in areas without zoning will allow these governmental units to adopt restrictive schemes knowing that the initial adoption will avoid compensation payouts and that future changes will be subject to a right to compensation. Arguably, the zoning classifications and restrictions at the time of initial adoption might deliberately be very restrictive in order to provide the local governments with increased flexibility in the future. This incentive to initially adopt restrictive zoning results because changes to less restrictive zoning are unlikely to result in a statutory takings claim in the way that a change to more restrictive zoning would. However, these counties desire investment and economic growth and deliberately restrictive zoning might hinder this development. Moreover, similar incentives already exist without a statutory takings bill. Under the present scheme, if an entity initially adopts a deliberately overrestrictive zoning scheme, planning regulators can “bargain” with developers by exchanging a reduction in zoning restrictions for public amenities that could not have been required by law.³²²

VI. CONCLUSION—LEGISLATIVE REFORM IN CONTEXT OF A NATIONAL REFORM MOVEMENT

Takings reform can be viewed as another chapter in a long-term struggle between two competing groups—regulators versus the regulated and environmentalists versus developers and industrialists. Each side has a particular world view, and the sides disagree about what is fair, just, efficient, or otherwise desirable. Consistent with its view, one side favors regulation for the public good while the other side opposes it. One side adopts a “rhetoric of responsibility,” while the other side uses a “rhetoric of rights.” The merits of the respective sides’ positions are beyond the scope of this Article. The point is not that one side or the other is right. Instead, the point is that one can better understand property rights reform by seeing it as a part of this broader struggle.

From this perspective, property rights reform is simply another tactic adopted by one side in its broader struggle to lessen the impact of regulation. In this context, the basic goal of reform is always to lessen regulatory restrictions. This goal may be articulated in terms of other goals and values—such as rights, fairness, or efficiency. However, these other goals and values often serve simply as rhetoric to further the fundamental goal of lessening regulation.

Because this ongoing struggle is national in scope, the property rights movement is also national in scope. However, it can be very misleading to think that the movement is only about rights. It is also about regulation in itself. The most irksome regulations are federal, not state. Yet state property rights

322. See, e.g., Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game?*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (discussing the impact of recent decisions on “incentive zoning”).

reform has no effect on these federal programs. Nevertheless, the states provide a forum for adopting limitations on state regulation as well as for symbolic attacks on *all* regulation. It is also misleading to think that the national movement shares any goals more specific than the desire to reduce regulation. More specific goals might be identified as a matter of tactics, but these specific goals become less clear and less important as the legislative reform "movement" expands across the country and develops into a local struggle in each state. As a result, the "property rights reform movement" has resulted in very different scenarios in different states.³²³

Consistent with this pattern, South Carolina has had its own reform story. South Carolina has its own unique circumstances, including a deeply rooted conservative resistance to government in general and to planning bureaucrats in particular. This conservatism conflicts with the need to balance rapid population growth and development with the desire to maintain a small town, small state "feel." This conservative resistance to government also conflicts with concerns like protecting sensitive, relatively unspoiled coastal areas and maintaining an irreplaceable historical heritage. Resolving this conflict must be addressed in the midst of a political struggle between a recently vibrant Republican party and a Democratic party which has lost its traditional dominance. In short, South Carolina is different from Florida, and it is not surprising that the bill that was adopted with overwhelming support in Florida has had trouble in South Carolina. Indeed, all of the reform proposals considered thus far have had trouble in South Carolina. This difficulty does not mean that the push for reform will end. As indicated above, the movement is likely to continue. The point is that even though the push for change in South Carolina is part of a "national movement," the result, whatever it may be, should be and will be unique to South Carolina.

323. *See supra* Part III.B.1.

APPENDIX
PROPERTY RIGHTS BILLS CONSIDERED
BY THE SOUTH CAROLINA LEGISLATURE

1. *Senate Bill 121 (introduced Jan. 10, 1995)*

A BILL

TO ENACT THE “SOUTH CAROLINA PRIVATE PROPERTY PROTECTION ACT.”

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act is known and may be cited as the “South Carolina Private Property Protection Act.”

SECTION 2. (A) Whenever implementation by the State or any of its political subdivisions of any regulatory program or law operates to reduce the fair market value of real property to less than fifty percent of its fair market value for the uses permitted at the time the owner acquired the title, or January 1, 1996, whichever is later, the property is deemed to have been taken for the use of the public. These regulatory programs include, but are not limited to, land use planning or zoning programs.

(B) The owner or user has the right to require condemnation by and just compensation from the governmental unit, or units, when more than one governmental unit is involved, imposing the regulation or law resulting in decreased value, or to receive compensation for the reduction in value caused by government action, and in either case to have the just compensation determined by a jury. When more than one governmental unit is involved, the court shall determine the proportion each unit is required to contribute to the compensation.

(C) The compensation must be for the full value of the interest taken or for the full amount of the decrease in fair market value and may not be limited to the amount by which the decrease in fair market value exceeds fifty percent.

(D) Governmental units subject to the provisions of this act may not make waiver of the provisions of this act a condition for approval of the use of real property or the issuance of any permit or other entitlement. Plaintiffs may accept an approval of use, permit, or other entitlement granted by the governmental unit without compromising their rights under this act if:

(1) a written reservation of rights is made at the time of acceptance of the authorization, permit, or other entitlement; or

(2) an oral statement is made before the governmental unit granting the authorization, permit, or other entitlement at a public meeting at which the

governmental unit renders its decision.

(E) The owner may make his reservation in either or both forms.

SECTION 3. No compensation is required by virtue of this act if the regulatory program or law is an exercise of the police power to prevent uses noxious in fact, or to prevent demonstrable harm, to the health and safety of the public. A use is deemed a noxious use if, and only if, it amounts to a public nuisance in fact. Determination by the governmental unit or units involved that a use is a noxious use or poses a demonstrable harm to public health and safety is not binding upon the court. Review of the governmental unit's, or units', determination is de novo.

SECTION 4. (A) The statute of limitations for actions brought pursuant to this act is the statute of limitations for ordinary actions brought for injuries to real property. The statute of limitations begins to run upon the final administrative decision implementing the regulatory program affecting a plaintiff's property. This statute of limitations applies to any claim which may be brought pursuant to any other provision of law.

(B) A law or program is implemented with respect to an owner's property when actually applied to that property unless the enactment of the law or program by itself operates to reduce the fair market value of the real property, or any legally recognized interest in the real property, to less than fifty percent of its fair market value for the uses permitted at the time the owner acquired title, or January 1, 1996, whichever is later, without further governmental action and the program contains no provision allowing for relief from the program's operation.

(C) This act applies not only to new regulatory programs but also to the application of regulatory programs in effect on the effective date of this act, including, but not limited to, land use laws or zoning laws and regulations regarding the owner's property.

SECTION 5. (A) If the governmental unit which is found to have inversely condemned the property is unwilling or unable to pay the costs awarded, it may instead relax the land use planning, zoning, or other regulatory program as it affects the plaintiff's land and all similarly situated land in the jurisdiction in which the regulatory program is in effect, to the level of regulation in place as of the time the owner acquired title or January 1, 1996, whichever is later. In that event, the governmental unit is liable to the plaintiff landowner for the reasonable and necessary costs of the inverse condemnation action, plus any actual and demonstrable economic losses caused the plaintiff by the regulation during the period in which it was in effect.

(B) This section does not affect any remedy which is constitutionally required.

(C) Notwithstanding any other provision of law, the governmental unit or units

subject to an award of compensation under this act may elect to relax the land use planning, zoning, or other regulatory program without further public hearing or proceedings or environmental review. If the governmental unit or units elect to so relax the affected regulatory program, the previously effective program is automatically in effect.

(D) Any permit, authorization, or other entitlement granted under a program rolled back pursuant to this section continues to be valid, notwithstanding any provision of law in the program reinstated by the rollback.

SECTION 6. Nothing in this act may be construed to preclude property owners from bringing legal challenges to regulatory programs affected by this act in instances where the diminution in value of the property or the use of the property caused by the regulatory programs does not exceed fifty percent of fair market value for the uses permitted at the time the owner acquired title, or January 1, 1996, whichever is later. This act also may not be construed to preclude property owners from bringing legal challenges to regulatory programs affected by this act based on other provisions of law.

SECTION 7. This act takes effect January 1, 1996.

2. *Senate Bill 374 (introduced Jan. 17, 1995)*

A BILL

TO AMEND TITLE 28, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO EMINENT DOMAIN BY ADDING CHAPTER 13 SO AS TO ENACT THE "SOUTH CAROLINA PRIVATE PROPERTY PROTECTION ACT OF 1995" INCLUDING PROVISIONS PROVIDING THAT COMPENSATION MUST BE PAID UNDER CERTAIN CONDITIONS AS A RESULT OF REGULATIONS OR ACTIONS BY STATE AGENCIES SUBSTANTIALLY INTERFERING WITH OR TAKING PRIVATE PROPERTY, REQUIRING AGENCIES TO CREATE GUIDELINES TO DETERMINE WHETHER THERE IS A TAKING, PROVIDING FOR AN ASSESSMENT TO BE MADE BEFORE THE ACTION IS TAKEN, AND PROVIDING FOR EMERGENCIES WHEN HEALTH AND SAFETY IS AN ISSUE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 28 of the 1976 Code is amended by adding:

"CHAPTER 13

Private Property Protection Act

Section 28-13-10. This chapter is known and may be cited as the 'South Carolina Private Property Protection Act of 1995.'

Section 28-13-20. As used in this chapter:

(A) 'Constitutional taking' or 'taking' means due to a governmental action private property is taken such that compensation to the owner of the property is required by either;

(1) the fifth or fourteenth amendment of the Constitution of the United States; or

(2) Article 1, Section 13 of the Constitution of this State.

(B) (1) 'Governmental action' or 'action' means:

(a) proposed regulations and emergency regulations by a state agency that if adopted and enforced may limit the use of private property unless its provisions are in accordance with applicable state or federal provisions of law;

(b) proposed or implemented licensing or permitting conditions, requirements, or limitations to the use of private property unless its provisions are in accordance with applicable state or federal provisions of law or the regulations applicable thereto;

(c) required dedications or exactions from owners of private property; or

(d) provisions or law on the regulations applicable thereto.

(2) 'Governmental action' or 'action' does not mean:

(a) activity in which the power of eminent domain is exercised formally;

(b) repealing regulations discontinuing governmental programs or amending regulations in a manner that lessens interference with the use of private property;

(c) law enforcement activity involving seizure or forfeiture of private property for violations of law or as evidence in criminal proceedings;

(d) orders and enforcement actions that are issued by a state agency or a court of law in accordance with applicable federal or state provisions of law.

(C) 'Private property' means any real or personal property in this State that is protected by either the fifth or fourteenth amendment of the Constitution of the United States or Article I, Section 13 of the Constitution of this State.

(D) 'State agency' means an officer, entity, or department of state government that is authorized by law to promulgate regulations. State agency does not include the legislative or judicial branches of state government.

Section 28-13-30. (A) Each state agency shall adopt guidelines to assist them in the identification of actions that have constitutional taking implications.

(B) In creating the guidelines, the state agency shall take into consideration recent court rulings on the taking of private property.

(C) The state agency shall complete the guidelines on or before July 1, 1995, and review and update the guidelines annually to maintain consistency with court rulings.

Section 28-13-40. (A) Using the guidelines prepared under Section 28-13-30, each state agency shall:

(1) determine whether an action has constitutional taking implications; and

(2) prepare an assessment of constitutional taking implications that includes an analysis of the following:

(a) the likelihood that the action may result in a constitutional taking, including a description of how the taking affects the use or value of private property;

(b) alternatives to the proposed action that may:

(i) fulfill the government's legal obligations of the state agency;

(ii) reduce the impact on the private property owner; and

(iii) reduce the risk of a constitutional taking;

(c) an estimate of financial cost to the State for compensation and the source of payment within the agency's budget if a constitutional taking is determined.

(B) In addition to the guidelines prepared under Section 28-13-30, each state agency shall adhere, to the extent permitted by law, to the following criteria if implementing or enforcing actions that have constitutional taking implications:

(1) If an agency requires a person to obtain a permit for a specific use of private property, any conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued and shall substantially advance that purpose.

(2) Any restriction imposed on the use of private property must be

proportionate to the extent the use contributes to the overall problem that the restriction is to redress.

(3) If an action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process must be kept to the minimum necessary.

(4) Before taking an action restricting private property use for the protection of public health or safety, the state agency, in internal deliberative documents, shall:

(a) clearly identify, with as much specificity as possible, the public health or safety risk created by the private property use;

(b) establish that the action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

(c) establish, to the extent possible, that the restrictions imposed on the private property are proportionate to the extent the use contributes to the overall risk; and

(d) estimate, to the extent possible, the potential cost to the State or local government if a court determines that the action constitutes a constitutional taking.

(C) If there is an immediate threat to health and safety that constitutes an emergency and requires an immediate response, the analysis required by item (B)(2) of this section may be made when the response is completed.

(D) Before the state agency implements an action that has constitutional taking implications, the state agency shall submit a copy of the assessment of constitutional taking implications to the State Budget and Control Board."

SECTION 2. This act takes effect upon approval by the Governor.

3. *House Bill 3790 (introduced Mar. 4, 1995; companion bill: S.839 (introduced May 16, 1995))*

A BILL

TO AMEND TITLE 28, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO EMINENT DOMAIN, BY ADDING CHAPTER 4 SO AS TO ENACT "THE SOUTH CAROLINA PROPERTY RIGHTS ACT."

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 28 of the 1976 Code is amended by adding:

“Chapter 4

The South Carolina Property Rights Act

Section 28-4-10. This chapter may be cited as ‘The South Carolina Property Rights Act’ and any references to the term ‘act’, unless the context clearly indicates otherwise, mean the South Carolina Property Rights Act.

Section 28-4-20. As used in this chapter and as used in the South Carolina Eminent Domain Procedure Act, Title 28, Chapter 2, when made applicable by this act:

(A) Except as otherwise specified, the words defined in the Eminent Domain Procedure Act shall have the meanings defined therein.

(B) ‘Government entity’ means:

(1) the General Assembly or a board, authority, commission, council, committee, department, office, officer, individual, or agency in the executive branch of state government;

(2) a political subdivision of the State; and

(3) a special purpose district.

(C) ‘Interest in real property’ includes any rights to the use of property which may be limited through regulation by a governmental entity.

COMMENTS

Takings jurisprudence traditionally has recognized that compensation is due for what the property owner has lost, rather than what the condemning authority gains. With respect to the acquisition of a fee interest in real property, it is thus well established that valuation of the property must be based upon the status of the property in the owners’ hands before the taking or acquisition occurs. Much recent litigation has centered on the question of whether a regulation on the use of property represents a taking of property in the constitutional sense that would require compensation. This definition explicitly provides that under state law any right to use property which may be limited through regulation constitutes an interest in real property. The phrase ‘interest in real property’ is drawn directly from the eminent domain statute. Thus, the proposed legislation operates principally by bringing regulatory actions within the scope of that statute.

(D) ‘Acquire’ as used in various forms referring to acquisition of an interest in real property or of property rights includes any enactment or enforcement of a

regulation that has the effect of limiting or extinguishing any existing right to use real property by an owner, whether or not such regulation involves the physical appropriation or invasion of real property, and whether or not such regulation transfers such right to use to a governmental entity.

COMMENTS

The broad definition of 'acquire' in this act reflects the notion referred to above that the emphasis in takings jurisprudence is on what is lost by the property owner, rather than what is gained by the condemning authority. By defining 'acquire' broadly, the act brings all regulatory acts within the scope of the eminent domain statute, which otherwise might be narrowly read to include only those acquisitions which result in the passing of title to the State.

(E) 'Condemn' includes the acquisition of an interest in real property by governmental entities through regulation.

COMMENTS

This definition serves to clarify the broadened scope of the eminent domain statute. In the past, condemnation was generally regarded as a process applicable only when the State acquired a fee interest in property or the equivalent. Because the effect of regulation may also require compensation, the same process, condemnation, should be used in the case of land use regulation. (F) 'Investment' as used in the expression 'investment backed expectations' includes the:

- (1) giving of value for the acquisition of property;
- (2) giving of value to maintain, improve, or retain ownership of property;
- (3) decision not to sell an interest in real property in the expectation of future use or sale; and
- (4) giving of value to develop or improve adjacent property.

COMMENTS

A line of constitutional cases has recognized that one of the factors to be considered in determining whether compensation is required for a taking is the reasonable investment backed expectations of the owner. See 'Penn Central'. In subsection (1) 'the giving of value for the acquisition of property' represents the most obvious instance in which the owner has paid a specific sum in expectation of future use of the property. In actuality, there are other situations as well in which a property owner has a legitimate investment made in reliance on future use of property which should be taken into account in determining the right to compensation. Subsection (2) refers to investments made by an owner after the original time of acquisition. In subsection (3) 'the decision not to sell

an interest in real property . . .’ addresses the situation in which a landowner may not expend funds on property, but elects to forego short term gains through liquidation of the property in reliance on long-term appreciation in value. It is a matter of economic reality that the decision to hold property over a period of time and to pass up an opportunity to liquidate it may often represent a conscious investment decision. In subsection (4) ‘the giving of value to develop or improve adjacent property’ recognizes that individual parcels of land may not be viewed in isolation, and that funds spent to improve one tract of land may actually represent an investment benefiting other adjacent property.

(G) ‘Nuisance’ refers to unreasonable, unwarranted, or unlawful use of property, as traditionally recognized in the common law, and is limited to those uses whose prohibition inheres in the title to the property and which use could be enjoined by adjacent landowners or other uniquely affected persons, or by the State under its power to abate nuisances that affect the public generally.

COMMENTS

This definition tracks the treatment of nuisance law in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). In that case, Justice Scalia reconciled the power of the State to control and abate nuisances without compensation with the constitutional requirement for payment of just compensation by explaining that preexisting nuisance law should be recognized as, basically, an element of value. To the extent that use of a property is already limited by nuisance law, the property’s value would be similarly limited, and no compensation would be required for regulation affecting those same uses. On the other hand, newly created limitations on use cannot be exempted from the compensation requirement merely by characterizing them as nuisances.

(H) ‘Regulation’ includes:

(1) All land use regulation, rules or emergency rules, statutes, ordinances, dedications, or denials of permits, licenses, authorizations, or other governmental permission if such denial is without cause or if such denial is with cause but is based upon selective enforcement of any statute, regulation, or standard; any of which has the effect of limiting or imposing conditions upon the owner’s rights to use or occupy property.

(2) The following actions are not included in the definition of ‘regulation’:

(a) exercise of the power of eminent domain to physically appropriate real property or to effect the physical invasion of real property;

(b) the repeal or amendment of a statute, rule, ordinance, requirement, or other action if the repeal or amendment qualifies, lessens, or reverses a limitation or restriction on the use of private property;

(c) a state governmental action specifically mandated by a federal governmental authority, to the extent that the state action does not result from the exercise of legislative, executive, or administrative discretion;

(d) law enforcement activity involving the seizure or forfeiture of private property for a violation of law or as evidence in a criminal proceeding;

(e) any regulation which would otherwise be included in this definition, to the extent that it does not affect existing property rights, or clarifies, restates, or otherwise imposes restrictions on property use which were already in effect before the enactment of such regulation; provided, however, that when such a regulation imposes new or broader restrictions, to that extent such regulation is subject to the provisions of this chapter; and further provided that exemptions created by this section shall not serve to limit or extinguish any rights or causes of action resulting from prior regulation.

COMMENTS

Subsection (1) defines regulation as broadly as possible. The only exceptions to this broad definition are those exemptions specifically identified in subsection (2). Clause (a), the physical appropriation of real property, refers to actions which would require compensation under the existing eminent domain statute. This exemption is included here so as to avoid affecting existing law pertaining to physical appropriation of property by the enactment of this act, which addresses other forms of government action. Clause (b) explicitly allows the State to relax regulations without triggering the need for compensation under this action. Presumably, existing zoning legislation and jurisprudence is better suited to address problems created by down-zoning and similar regulatory actions. Clause (c) is a narrow exemption which applies only to those regulatory actions which the State may be required to take by the federal government in which the State plays no significant decision-making role. In such instances, the federal government probably should be regarded as the true taking authority, and the state's purely ministerial actions would not fall within the scope of this act. This exemption does not remove from the scope of the act those state actions which are taken in compliance with a federally-mandated program when the General Assembly, executive, or administrative branch of the state government take part in the decision-making process in shaping the regulation or enforcing it. Clause (d) involves seizure and forfeiture of property which is governed by other law. Obviously, exemption from this act does not imply that improperly seized property may not be recovered or require compensation under other applicable law. Clause (e) is a savings clause protecting both the State and property owners. It allows legislation to be redrafted and clarified without giving rise to any new compensation requirement, except to the extent that further restrictions on property are created. On the other hand, in like manner the reenactment of regulation cannot

serve to cut off any preexisting rights for compensation on the part of the property owner.

Section 28-4-30. (A) The General Assembly declares the basic state policies further by this chapter to be the recognition that land use regulation may constitute a constitutional taking requiring compensation, and the requirement that governmental entities follow similar procedures with respect to acquisition of property rights through regulation as they are required to follow for the physical appropriation of real property under the Eminent Domain Procedure Act.

(B) Specific policies to be promoted through the implementation of this chapter are to:

- (1) provide uniform procedures for the acquisition of all property rights by governmental entities, both through regulation and physical appropriation;
- (2) reduce costly litigation which may be caused by inverse condemnation claims arising from the implementation of regulations;
- (3) provide for the development and use of administrative procedures to compensate landowners for loss of property rights resulting from land use regulation;
- (4) assist governmental entities in planning and budgeting for state programs which involve the regulation of land use;
- (5) provide for the efficient use of state resources in the achievement of state objectives involving land use regulation;
- (6) maximize the results of desirable regulation through cost control, informed planning, and the avoidance of after the fact litigation;
- (7) provide explicit guidelines for governmental entities involved in land use regulation;
- (8) protect the property rights of landowners and to provide for compensation for the taking of those property rights through regulation.

COMMENTS

The overall purpose of this act is to provide a specific statutory right to compensation for state regulation of land use so as to eliminate the need for litigation based on constitutional takings. While this act is based on the constitutional requirement for payment of just compensation when property is taken for public use, the word 'taking' is not used anywhere in the act except in this policy statement and the policy statement in Section VI. By 'defining interest in real property' to include rights to use which may be limited by

regulation, the act may create a property right under state law which would clarify property owners' rights with respect to the constitutional requirement for the payment of just compensation. However, the primary purpose of the act is to create a process for the payment of compensation when land use regulation causes an economic impact upon property owners, without requiring the litigation of constitutional issues. Under the act, it is not necessary for a property owner to prove that a constitutional taking has occurred; rather, as noted in Section VIII, the right to compensation will arise whenever an appraisal in accordance with this act indicates that a regulation has caused a substantial diminution in the total value of the real property. The simplest way to achieve this end, and the method chosen by this act, is to bring regulatory actions of the State within the scope of the eminent domain statute. Subsection (B) identifies some of the specific policies promoted by the act. Clause (1) refers to the fact that the legislature and state agencies should use the same procedures with respect to regulation of land use as they were previously required to use for the physical appropriation of land of property under the eminent domain statute. Clause (2) recognizes the fact that, in the absence of this action, property owners are forced to seek compensation for regulatory takings through inverse condemnation claims. This results in costly litigation, as well as, in many instances, damage awards which could be avoided by following the normal condemnation procedures. Clause (3) reiterates the concept that landowners should be compensated for what they lose without respect to the benefit, if any, accruing to the State by any regulation. Clause (4) extends to the regulatory arena the same principles which have been applicable under preexisting condemnation law. Under existing law, when the enactment of regulation only gives rise to state expense after affected property owners bring inverse condemnation actions, agencies are unable to budget intelligently for the cost of the regulations they enact. The result is that often regulations are enacted with the belief that the cost will be minimal, and years later it may be discovered that the total cost of litigation and damages has been substantial, at which time the regulations may even be rescinded. Clause (5) recognizes that state resources are limited, and that only with the informed planning and budgeting referred to in Clause (4) may these limited resources be effectively allocated. By engaging in a condemnation process for the regulation of property similar to that applicable for physical appropriation, agencies are required to estimate the cost of any program before going forward with it. Any regulations which would be unusually costly may be identified in advance. In that way, the optimum results may be achieved for the lowest cost possible. Clause (6) similarly recognizes that the costs of desirable regulation may be best controlled by advance planning. Clause (7) recognizes that regulatory agencies have traditionally been given broad discretion to implement state programs without any guidance or requirement to consider the economic impact of the regulations upon property owners. Clause (8) recognizes that the underlying purpose of the act is to provide for compensation when property rights are taken through regulation.

Section 28-4-40. Not later than January 1, 1996, all executive governmental entities which administer or issue land use regulations shall adopt regulations

and internal procedures for the implementation of the policies contained in this chapter.

COMMENTS

This section is necessary to ensure that state agencies affirmatively incorporate the procedures required by the act into their internal procedures.

Section 28-4-50. (A) Before the adoption or enforcement of regulations affecting land use, governmental entities shall, consistent with the guidelines established by this act, assess the proposed regulation or proposed manner of enforcing such regulation, and prepare a written assessment which states the following findings:

- (1) the specific purpose of the proposed regulation;
- (2) the probable effect of the proposed action on the use and value of private property, including an evaluation of the probable cost of acquisition of an interest in that property through enactment or enforcement of the regulation;
- (3) alternatives to the proposed action that may lessen the effect on private property or which may involve lower probable costs to the State;
- (4) an estimate of the cost to the governmental entity including the cost of acquisition of property rights through regulation; and
- (5) the source of payment within the governmental entity's budget for such compensation.

(B) If there is an immediate threat to health and safety that constitutes an emergency and requires immediate action, the assessment required under this section may be postponed until the action is completed.

(C) The governmental entity shall deliver copies of this assessment to the Governor, appropriate financial management authority, and the Attorney General.

COMMENTS

This section similarly requires affirmative action on the part of agencies adopting land use regulations. In the absence of such requirements, it would be easier for agencies to continue existing practices, forcing property owners to bring inverse condemnation claims. The whole purpose of this act is to encourage all regulatory agencies to engage in advance planning.

Section 28-4-60. To the extent reasonably possible, governmental entities shall avoid adopting or enforcing regulations in a manner that constitutes a taking of

property requiring the payment of just compensation in accordance with the Constitution of this State or of the United States or which would require compensation under the provisions of this chapter.

COMMENTS

This policy statement derives from Executive Order 12630, issued by Ronald Reagan March 15, 1988, (53 F.R. 8859). Similar policy statements have been repeated in a variety of regulatory acts on the federal and state levels. See 49 C.F.R. Section 24.8 (1992); 3 C.F.R. 555 (1989); S.C. Code Ann. Section 48-39-30(C) (1987).

Section 28-4-70. In all cases in which it appears likely that the adoption or enforcement of a regulation may give rise to a right to compensation under the Constitution of this State or of the United States, under the common law of this State, under the statutes of this State, or under the provisions of this chapter, the proposed regulation must be treated as an acquisition of an interest in real property under the Eminent Domain Procedure Act, and the governmental entity shall proceed to condemn that interest in real property in accordance with the provisions of the Eminent Domain Procedure Act.

COMMENTS

This section explicitly brings regulatory takings into the condemnation process under the Eminent Domain Procedure Act. The existing procedures under the Eminent Domain Procedure Act are well tailored to fairly resolve the issues arising from condemnation, whether it involves physical appropriation or land use regulation, and there is no need to create a separate set of procedures to deal with regulatory actions.

Section 28-4-80. Any regulation of real property gives rise to a right to compensation when an appraisal or other valuation pursuant to this chapter or the Eminent Domain Procedure Act indicates a substantial diminution of the total value of the real property resulting from the regulation.

COMMENTS

This section creates an explicit right to compensation when regulation of real property results in a substantial diminution of the total value of the property. The amount of such a diminution would be determined through appraisal. No specific formula for determining what constitutes a 'substantial diminution' is provided, because no formula could adequately address all of the various situations in which compensation would be appropriate. The right to compensation must therefore be determined on a case-to-case basis.

Section 28-4-90. (A) For the purposes of this chapter, in appraising property rights which may be acquired through land use regulation, in accordance with the procedures set forth in the Eminent Domain Procedure Act, the following

additional factors must be taken into account:

- (1) the economic impact of the regulation on the property owner;
- (2) the extent to which the regulation interferes with distinct investment-backed expectations;
- (3) the character of the regulation;
- (4) the present use of the property and of adjacent property;
- (5) the probable future use of the property;
- (6) the extent to which the use of the property is already limited by other regulations, nuisance law, and the use of adjacent property;
- (7) the extent to which remaining uses of the property are economically viable;
- (8) any economic benefit to the property as a result of the proposed regulation;
- (9) the existence of any liens or encumbrances on the property, and the extent to which claims secured by such liens or encumbrances on the property before the regulation exceed the extent to which such claims are secured by liens or encumbrances on the property subject to the regulation.

(B) The fact that a property owner paid taxes based upon a particular valuation or use is not relevant to the valuation of property or an interest in property for the purposes of this chapter; however, in the event that compensation is awarded based upon an anticipated change in valuation or use, payment of the compensation must be equivalent to a sale or change in use for tax purposes and the property may be subject to such tax rollbacks as would otherwise be effective in the event of such a sale or change in use.

COMMENTS

This section identifies additional factors which should be taken into account in appraising property taken through regulation in accordance with the general procedures created under the eminent domain statute. Subsection (A) requires that the following additional factors be considered: Clause (1), the economic impact of the regulation on the property owner, ties the property owner's right to compensation to the actual economic realities pertaining to the property in question. Clause (2) incorporates the constitutional test of investment backed expectations into the appraisal process. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Agins v. Tiburen*, 447 U.S. 255 (1980). Clause (3) incorporates additional language from *Penn Central* which is applicable to

the determination of compensation for a constitutional taking. By their nature, some regulations will be more invasive and give rise more directly to a right to compensation, while other less invasive regulations would only give rise to a right to compensation when other facts such as economic impact of the regulation are also taken into account. Clauses (4) and (6) recognize that the use and value of property are subject to prior limitations resulting from nuisance law, the use of adjacent property, and so forth. Clause (5) indicates that, when a particular future use of the property is probable, a right to compensation may arise even if it is unsupported by substantial investment. Clause (7) recognizes that the economic impact of a regulation depends in part upon the remaining viable uses. The expression 'economically' is drawn from Supreme Court takings jurisprudence. (See *Lucas, Agins*) Clause (8) is drawn from existing eminent domain legislation and recognizes that the need for compensation is offset by benefit which are conferred upon property. Clause (9) has two purposes. First, it recognizes that the existence of liens and encumbrances upon property often is a good indication of the property's value or of investment backed expectation. Additionally, because any regulation which impairs the collateral value of property is likely to cause a default or acceleration of obligations secured by the property, this clause requires any appraisal to take into account the compensation which would be required to satisfy or secure existing obligations. The language is loosely patterned after language in Section 506 of the Bankruptcy Code. Section (B) eliminates the use of tax status of land as evidence of its value. The fact that a property owner takes advantage of tax reductions which may be available should not affect the owner's right to compensation when the land is acquired or regulated by the State. Rollbacks provided for under other state law adequately provide compensation to the State for recovery of lost revenues following a change in tax status. Section 28-4-100. In the event that any governmental entity fails to institute condemnation proceedings in accordance with this act and the Eminent Domain Procedure Act when the enactment or enforcement of the regulation has the effect of diminishing the value of real property, then the property owner is entitled to bring an action for damages in inverse condemnation and is entitled to attorney's fees in accordance with Section 28-11-30. Nothing in this chapter shall be construed as limiting the rights of a property owner to seek damages for inverse condemnation or constitutional takings, or to challenge the constitutionality of any regulation.

COMMENTS

This section indicates that this act is not intended to limit property owners' rights to compensation for constitutional takings or their right to bring inverse condemnation claims. If the procedures created by the act are followed, the number of such claims should be reduced because in most instances compensation should be provided through the statutory process. Whenever the State fails to follow the procedures of the act, the property owner would retain the right to bring an action for damages under other law. This section also indicates that property owners should have the same right to recover attorney's fees when they are forced to bring actions for inverse condemnation for

regulatory takings as presently exist in the case of physical appropriation of property, pursuant to Section 28-11-33 of the South Carolina Code.”

SECTION 2. Except as otherwise specifically provided in this act, this act takes effect upon approval by the Governor.

4. *House Bill 3591 (as originally introduced on March 4, 1997; “companion bill”: S.686 (introduced April 23, 1997))*

A BILL

TO AMEND TITLE 28, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO EMINENT DOMAIN, BY ADDING CHAPTER 4 SO AS TO ENACT THE “SOUTH CAROLINA PROPERTY RIGHTS ACT.”

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 28 of the 1976 Code is amended by adding:

“CHAPTER 4

The South Carolina Property Rights Act

Section 28-4-10. This chapter may be cited as the ‘South Carolina Property Rights Act’ and any references to the term ‘act,’ unless the context clearly indicates otherwise, mean the ‘South Carolina Property Rights Act.’

Section 28-4-20. As used in this chapter:

(1) (a) ‘Governmental action’ or ‘action’ means:

(i) proposed or enacted laws, regulations, emergency regulations, and ordinances by a governmental entity which by adoption or enforcement limit the use of private property;

(ii) licensing or permitting conditions, requirements, or limitations on the use of private property;

(iii) required dedications or exactions from owners of private property;

(iv) amendments to any of the above.

(b) The following actions are not included in the definition of ‘governmental action’ or ‘action’:

(i) activity in which the power of eminent domain is exercised formally;

(ii) repealing regulations, discontinuing governmental programs, or amending regulations in a manner that lessens interference with the use of private property;

(iii) law enforcement activity involving the seizure or forfeiture of private property for a violation of law or as evidence in a criminal proceeding;

(iv) orders and enforcement actions that are issued by a governmental entity or a court in accordance with applicable federal or state provisions of law;

(v) governmental action specifically mandated by a federal governmental authority, to the extent that the action does not result from the exercise of legislative, executive, or administrative discretion.

(2) 'Governmental entity' means:

(a) an officer, entity, or department of state government that is authorized to promulgate regulations;

(b) the General Assembly;

(c) a political subdivision of the State that is created by the State Constitution or by general or special act, or a county or municipality that independently exercises governmental authority;

(d) a special purpose district.

(3) 'Private real property' means any real property in this State that is protected by either the Fifth Amendment or the Fourteenth Amendment to the Constitution of the United States or Article 1, Section 13 of the State Constitution.

(4) 'Taking' or 'constitutional taking' means a governmental action that affects private real property in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth Amendment or the Fourteenth Amendment to the United States Constitution, or both, or Article 1, Section 13 of the South Carolina Constitution.

Section 28-4-30. (A) The General Assembly declares the basic state policies furthered by this chapter to be the recognition that land use regulation may constitute a taking requiring compensation, and the requirement that governmental entities follow the same procedures with respect to compensating landowners to the event of a taking through regulation as they are required to follow for the physical appropriation of real property under Chapter 2 of Title

28.

(B) Specific policies which must be promoted through the implementation of this chapter are to:

- (1) provide uniform procedures for compensation when property has been taken through regulation;
- (2) reduce costly litigation which may be caused by taking claims arising from the implementation of regulations;
- (3) provide for the development and use of administrative procedures to afford landowners alternative remedies to compensation if possible, or to compensate landowners for a taking resulting from land use regulation;
- (4) assist governmental entities in planning and budgeting for state programs which involve the regulation of land use;
- (5) provide for the efficient use of state resources in the achievement of state objectives involving land use regulation;
- (6) maximize the results of desirable regulation through cost control, informed planning, and the avoidance of after-the-fact litigation;
- (7) provide explicit guidelines for governmental entities involved in land use regulation;
- (8) protect the property rights of landowners and provide for compensation or alternative remedies for a taking through regulation.

Section 28-4-40. (A) The Attorney General shall prepare a checklist of guidelines to assist governmental entities in evaluating proposed governmental action to assure that such actions do not result in a taking of private property.

(B) In establishing the guidelines, the Attorney General shall take into consideration recent court rulings on the taking of private property. A person may make comments or suggestions or provide information to the Attorney General concerning the guidelines. The Attorney General shall consider the comments, suggestions, and information in the annual review process required by subsection (C) of this section.

(C) The Attorney General shall complete the guidelines by October 1, 1997 and distribute them to all governmental entities. The guidelines must be filed with Legislative Council and published in the State Register. The Attorney General shall review the guidelines at least annually and revise them as necessary to ensure consistency with the decisions of the Supreme Court of the United States and the Supreme Court of South Carolina and the expressed intentions of this chapter.

(D) The checklist of guidelines shall include, among other factors considered appropriate by the Attorney General, the following considerations:

- (1) the specific purpose of the proposed regulation;
- (2) a statement as to how the proposed regulation advances that purpose;
- (3) the probable effect of the proposed action on the use and value of private property, including an evaluation of the probable cost of acquisition of an interest in that property through enactment or enforcement of the regulation;
- (4) alternatives to the proposed action that may lessen the effect on private property or which may involve lower probable costs to the State;
- (5) the source of payment within the governmental entity's budget for such compensation.

Section 28-4-50. To the extent reasonably possible, governmental entities shall avoid adopting or enforcing regulations in a manner that constitutes a taking of property under the Constitution of this State or the Constitution of the United States.

Section 28-4-60. (A) Before the adoption or enforcement of regulations affecting land use, governmental entities, consistent with the guidelines established by Section 28-4-40, shall assess the proposed regulation and prepare a written assessment which specifically and fully addresses each of the checklist guidelines.

(B) The written assessment is public information and must be made available by the governmental entity upon request.

Section 28-4-70. A party may not institute suit under this chapter until all administrative remedies afforded by the applicable governmental entity are exhausted. If the parties cannot agree to an administrative remedy, the parties shall mediate the dispute with a mediator selected by the parties from a list of certified mediators maintained by the South Carolina Bar, as a condition precedent to suit. All administrative remedies and the mediation process must be completed within one hundred eighty days from the date the aggrieved private property owner institutes the administrative proceeding. If the matter is not resolved within the one hundred eighty-day period, the private property owner may commence a suit for compensation.

Section 28-4-80. (A) To avoid or resolve a dispute under this chapter, a governmental entity is specifically authorized and empowered to recommend one or more alternatives, consistent with applicable law that protect the public interest served by the governmental action at issue but allow for reduced restraints on the use of the owner's real property including, but not limited to:

- (1) an adjustment of land development or permit standards or other provisions controlling the development or use of land;
- (2) increases or modifications in the density, intensity, or use of areas of development;
- (3) the transfer of development rights;
- (4) land swaps or exchanges;
- (5) mitigation, including payments in lieu of onsite mitigation;
- (6) location on the least sensitive portion of the property;
- (7) conditioning the amount of development or use permitted;
- (8) a requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- (9) issuance of a variance, special exception, or other extraordinary relief, including withdrawal of the proposed action;
- (10) purchases of the real property, or an interest in it, by an appropriate governmental entity.

(B) This section does not prohibit the owner and governmental entity from entering into an agreement as to the permissible use of the property prior to the administrative agency or mediator entering a recommendation.

Section 28-4-90. (A) Sovereign immunity shall not be a defense to an action brought pursuant to this chapter.

(B) A person who has a claim under this chapter may sue the State or a governmental entity, as provided by this chapter, to:

- (1) recover damages;
- (2) invalidate a governmental action; or
- (3) recover damages and invalidate a governmental action.

(C) This chapter does not preclude a person from electing to pursue a claim under the United States Constitution in the federal court having proper jurisdiction.

Section 28-4-100. (A) After the parties have exhausted the applicable

governmental entity's administrative remedies and the mediation process prescribed by this chapter, an aggrieved private real property owner may bring suit de novo to recover compensation for a taking. A suit under this chapter must be filed in a court which has jurisdiction of statutory eminent domain actions in the county in which the private real property owner's affected property is located. If the affected private real property is located in more than one county, the private real property owner may file suit in any county in which the affected property is located and demand a jury trial to determine all factual issues.

(B) A suit under this chapter must be filed not later than three years after the date the private real property owner knew or would have known that the alleged taking had occurred.

Section 28-4-110. (A) Whether a governmental action results in a taking is a question of fact.

(B) The compensation owed to the private real property owner in a suit under this chapter must be determined from the date of the taking and is the difference between the market value of the private real property, determined as though the governmental action is not in effect, and the market value of the private real property determined as though the governmental action is in effect.

(C) The trier of fact, in determining the diminution in market value, may not consider an injury or benefit that is sustained or enjoyed in similar degree by private real property owners in the general community unless the governmental action imposes a direct physical or legal restriction on the use of the property.

(D) If the trier of fact determines that a governmental action resulted in a taking, and the governmental action has ceased or has been rescinded, amended, invalidated, or repealed, the private real property owner may recover compensation in an amount equal to the temporary or permanent economic loss sustained while the governmental action was in effect.

(E) The court shall award a private real property owner who prevails in a suit under this chapter reasonable and necessary attorney's fees, expert witness fees, court costs, and prejudgment interest. Prejudgment interest under this subsection must be calculated from the date of the taking.

Section 28-4-120. (A) The court's judgment in favor of a private real property owner in a suit under this chapter shall:

- (1) order the governmental entity or the Attorney General, as appropriate, to certify to the court whether all compensation, fees, costs, and interest owed under this chapter have been paid;
- (2) enjoin the governmental entity from enforcing or continuing the governmental action as applied to the private real property owner until the

date the governmental entity or the Attorney General, as appropriate, certifies to the court that all compensation, fees, costs, and interest owed under this chapter have been paid.

(B) A judgment awarding compensation to a private real property owner who prevails in a suit against a governmental entity under this chapter is subject to an appropriation by the appropriate funding agency.”

SECTION 2. Except as otherwise provided in this act, this act takes effect upon approval by the Governor and applies to governmental action, as defined in Section 28-4-20(1) of the 1976 Code as contained in Section 1 of this act, which is first proposed or enacted on September 1, 1997 and thereafter.

5. *House Bill 3591 (as amended and adopted by House on May 28, 1997)*

A BILL

TO AMEND TITLE 28, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO EMINENT DOMAIN, BY ADDING CHAPTER 4 SO AS TO ENACT THE “SOUTH CAROLINA PROPERTY RIGHTS ACT.”

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 28 of the 1976 Code is amended by adding:

“CHAPTER 4

The South Carolina Private Property Rights Protection Act

Section 28-4-10. This chapter may be cited as the ‘South Carolina Private Property Rights Protection Act’ and any references to the term ‘act’, unless the context clearly indicates otherwise, mean the ‘South Carolina Private Property Rights Protection Act.’

Section 28-4-20. The General Assembly recognizes that some laws, regulations, and ordinances of the State and political subdivisions of the State, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The General Assembly determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the General Assembly that as a separate and distinct cause of action from the law of takings, the General Assembly in this chapter provides for relief or payment of compensation when a new law, regulation, or ordinance of the State or of a political subdivision of the State, as applied, unfairly affects real property.

Section 28-4-30. (A) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(B) For purposes of this section:

(1) The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this State.

(2) The term 'existing use' means an actual present use or activity on the real property including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual present use or activity on the real property.

(3) The term 'governmental entity' includes an agency of the State, a regional or a local government created by the State Constitution or by act of the General Assembly, any county, or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the State, a regional or a local government created by the State Constitution or by act of the General Assembly, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

(4) The term 'action of a governmental entity' means a specific action of a governmental entity which affects real property including action on an application or permit.

(5) The terms 'inordinate burden' or 'inordinately burdened' mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with the respect to the real property as a whole, or that the property owner is left with existing or vested use that are unreasonable such that the property owner bears a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms 'inordinate burden' or 'inordinately burdened' do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or

remediation of a public nuisance at common law or a noxious use of private property; impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section; or any action of a governmental entity affecting either the location of any type of solid or liquid waste disposal facility (or the discharge therefrom) or landfill or expansion of any existing solid or liquid waste disposal facility (or the discharge therefrom) or landfill.

(6) The term ‘property owner’ means the person who holds legal title to the real property at issue. The term does not include a governmental entity.

(7) The term ‘real property’ means land and includes any appurtenances and improvements to the land including any other relevant real property in which the property owner had a relevant interest.

(C) Nothing in this section shall be deemed to prevent the exercise of the police powers of any governmental entity to adopt or modify lawful zoning ordinances or comprehensive land use plans consistent with the provisions of this chapter.

Section 28-4-40. (A) Not less than one hundred eighty days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity. The property owner must submit along with the claim a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

(B) The governmental entity shall provide written notice of the claim to all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner’s property at the addresses listed on the most recent county tax rolls.

(C) During the one hundred eighty-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

- (1) an adjustment of land development or permit standards or other provisions controlling the development or use of land;
- (2) increases or modifications in the density, intensity, or use of areas of development;

- (3) the transfer of developmental rights;
- (4) land swaps or exchanges;
- (5) mitigation, including payments in lieu of onsite mitigation;
- (6) location on the least sensitive portion of the property;
- (7) conditioning the amount of development or use permitted;
- (8) a requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- (9) issuance of the development permit, a variance, special exception, or other extraordinary relief;
- (10) purchase of the real property, or an interest in the real property, including development rights, by an appropriate governmental entity;
- (11) no changes to the action of the governmental entity.

If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief, or by other appropriate method, subject to subsection (D).

(D) (1) Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a regulation or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(2) Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

Section 28-4-50. (A) During the one hundred eighty-day-notice period provided for in Section 28-4-40, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to Section 28-4-40(A) shall issue a written ripeness decision identifying the

allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the one hundred eighty-day-notice period must be deemed to ripen the prior action of the governmental entity and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter must be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(B) If the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court, a copy of which must be served contemporaneously on the head of each of the governmental entities that made a settlement offer and a ripeness decision that was rejected by the property owner. Actions under this section must be brought only in the county where the real property is located.

Section 28-4-60. (A) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and ripeness decisions, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall determine the percentage of responsibility each governmental entity bears with respect to the inordinate burden. A governmental entity may take an interlocutory appeal of the court's determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the interlocutory appeal. If the governmental entity does not prevail in the interlocutory appeal, the court shall award to the prevailing property owner the costs and a reasonable attorney fee incurred by the property owner in the interlocutory appeal.

(B) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation must be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities. In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental

entity or entities, considering the settlement offer together with the ripeness decision has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity or entities.

(C) (1) In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the ripeness decision, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the one hundred eighty-day-notice period.

(2) In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the ripeness decision, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the one hundred eighty-day-notice period.

(3) The determination of total reasonable costs and attorney fees pursuant to this subsection must be made by the court and not by the jury. Any proposed settlement offer or any proposed ripeness decision, except for the final written settlement offer or the final written ripeness decision, and any negotiations or rejections in regard to the formulation either of the settlement offer or the ripeness decision, are inadmissible in the subsequent proceeding established by this section except for the purposes of the determination pursuant to this subsection.

(D) The circuit court may enter any orders necessary to effectuate the purposes of this section and to make final determinations to effectuate relief available under this section.

(E) An award or payment of compensation pursuant to this section shall operate to grant to and vest in any governmental entity by whom compensation is paid the right, title, and interest in rights of use for which the compensation has been paid, which rights may become transferable development rights to be held, sold, or otherwise disposed of by the governmental entity. When there is an award of compensation, the court shall determine the form and the recipient of the right, title, and interest, as well as the terms of their acquisition.

(F) This section does not supplant methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize these methods to augment or facilitate the processes and actions contemplated by this section.

(G) This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this section are cumulative and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity is not liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once for the same inordinate burden.

(H) This section does not apply to any actions taken by a governmental entity which relate to the operation, maintenance, or expansion of transportation facilities, and this section does not affect existing law regarding eminent domain relating to transportation.

(I) A cause of action may not be commenced under this section if the claim is presented more than one year after a law or regulation is first applied by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under this section is tolled until the conclusion of those proceedings.

(J) No cause of action exists under this section as to the application of any law enacted on or before July 1, 1997, or as to the application of any regulation or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, regulation, or ordinance being amended.

(K) This section does not affect the sovereign immunity of government to the extent that sovereign immunity of government exists in this State.”

SECTION 2. This act takes effect July 1, 1997.