Differentiating between legitimate public regulation of private property and regulatory takings has become an important and controversial issue (Pilon 1988). Although a concern for more than 100 years (Mercuro 1992), it has been recognized by the Supreme Court only since Justice Holmes’s comments in Pennsylvania Coal Co. v. Mahon (260 US 393 [1922]). In that landmark ruling, the Court recognized that regulation can go “too far” and constitute a taking of private property, for which the owner must be afforded just compensation according to the Fifth Amendment. Justice Holmes indicated that the state’s police power and the taking of private property may be thought of as a continuum—that is, exceeding the former results in the latter. The analysis applies equally to exercises of state police power and federal regulatory power under other provisions of the Constitution.

Developing Guidelines
Since 1922, no clear standards have emerged for deciding when regulations go “too far,” and rulings have been inconsistent (Rose-Ackerman 1989; Flick, Barnes, and Tufts 1995). In Keystone Bituminous Coal v. DeBenedictis (480 US 470 [1987]), the Supreme Court ruled opposite its 1922 Mahon ruling, even though the facts and Pennsylvania laws at issue were very similar. Keystone seems to be the last in a line of cases that generally sided with the government concerning regulatory takings. Since 1987, the Court has granted a right of action for inverse condemnation, even if a property is taken only temporarily (First English Evangelical Lutheran Church v. County of Los Angeles, 482 US 304 [1987]). It has required conditions on development permits that substantially advance a legitimate state interest (Nollan v. California Coastal Commission, 107 S.Ct. 3141 [1987]), and required that the burden of the conditions on private owners be roughly proportional to the burden of proposed development to the public interest (Dolan v. City of Tigard, 62 USLW 4576 [1994]). Finally, it has required compensation when regulation eliminates all economically beneficial use of private property (Lucas v. South Carolina Coastal Commission, 112 S.Ct. 2886 [1992]).

Not long after the Court’s 1987 rulings, and perhaps directly attributable to them, President Reagan issued an Executive Order in 1988 calling on executive departments and agencies to review their actions to prevent unnecessary takings. It also called on the US attorney general to promulgate guidelines to help government decisionmakers evaluate the effects of their administrative actions on private property. The order required government officials to anticipate and account for the obligations imposed by the just compensation clause of the Fifth Amendment and to avoid or minimize burdens on private landowners.

The favorable court rulings and Reagan’s Executive Order undoubtedly contributed to the recent development of property rights law. However, some state legislation has gone beyond these guidelines by recognizing partial regu-
latory taking and creating a new cause of action for inverse condemnation if the state partially reduces private property values. The legislation, therefore, redefines the concept of regulatory taking and redraws the line between government police power and regulatory takings of private property.

This article documents and discusses recent state legislation related to regulatory takings and private property rights. The study retrieved all known state laws related to regulatory takings of private property (table 1). A list believed current and complete as of January 1, 1996.

The laws were then analyzed in terms of type, purpose, contents, regional differences, and national and regional trends. The social, economic, and political characteristics of the states that have enacted a takings law were also compared to those of other states. Since individual states have their own case law, and state courts may have different interpretations of similar language, this article is descriptive rather than analytical in any legal sense. Therefore, readers seeking definitive legal advice are encouraged to seek legal counsel.

Growth and Distribution
Legislatures at both federal and state levels have considered bills that protect private property from regulatory takings, yet state legislatures have experienced more success than have federal legislatures. The US House of Representatives passed a property rights bill in March 1995 (HR 925), and the Senate is currently debating its version (S 605). On the other hand, 18 states have already enacted some form of takings provisions (table 1). Washington and Delaware were the first two—in 1991 and 1992, respectively. Indiana and Utah followed in 1993, and Arizona, Idaho, Mississippi, Missouri, Tennessee, and West Virginia in 1994. The remaining eight passed laws in 1995. States have increasingly created statutes to curb government regulatory takings, although a few have chosen other means (executive order and resolution) to achieve the same objective. Some have added other provisions to their previous takings laws (e.g., Utah in 1994) or extended them to local governments (e.g., Idaho in 1995).

Regionally, seven states in the South and six states in the West and Rocky Mountain regions have enacted takings laws or provisions, leading the rest of the country. Four of the five compensation laws were enacted in southern states. Three states in the Midwest and two in the Northeast have enacted takings provisions.

Forms and Purposes of the Law
Three forms of laws have been enacted so far. Thirteen states have selected an assessment law, which requires state or local agencies to assess takings of private property rights before their regulations can become effective. Another form, compensation law, requires state and local governments to compensate property owners once their property value is reduced by a certain percentage or when the use of their property is “inordinately burdened” by state and local regulations. Mississippi was the first state to pass such a law, requiring compensation of private forest (and, as amended in 1995, agricultural) landowners if government regulations reduced their property values by 40 percent or more. Florida followed in 1995. Texas, Louisiana, and North Dakota enacted the third form, a combination of both assessment and compensation laws, in 1995.

Compensation laws are substantive while assessment laws are procedural (Castelnuovo 1995). Substantive laws define right and duties; procedural laws deal with the methods and means by which substantive laws are made and maintained. Several states’ takings assessment laws parallel the 1988 Executive Order and the National Environmental Policy Act (NEPA) of 1969 (PL 91-190, 83 Stat. 852 [1970]).

The intent of assessment laws is to avoid imposing expensive litigation burdens on the states and to minimize unanticipated demands on public financial resources. By requiring state or local government agencies to assess the taking of private property, the laws establish an orderly and consistent process that better enables the agencies to evaluate whether an action might result in the taking or damaging of property rights. Eleven of 13 assessment laws (excluding Indiana and Virginia) specifically use language such as, "It is not the purpose of this act to expand or diminish the private property protection provided in federal and state constitutions.” Thus they are guided by US and state case law and constitutional provisions. The laws do not advance any new concept of regulatory takings, but merely require that state agencies “look before they leap.” Any landowner who wants to prove a case of regulatory taking must pass stringent constitutional requirements before receiving compensation.

On the other hand, compensation laws have significantly altered the concept of regulatory takings of private property that evolved from the federal and state supreme courts. In Mississippi, an action for inverse condemnation is available if state actions reduce the fair market value of forest and agricultural lands, or of personal property associated with conducting forestry and agricultural activities on such land, by 40 percent. Florida's law explicitly creates a new cause of action “separate and distinct from a constitutional taking,” defining a taking as an inordinate burden of government action on the use or value of private property. This has significantly expanded the regulatory takings concept developed in the court cases, where only denial of all economic use of a property by government actions guarantees government compensation.

Assessment Law Procedures
Utah, Virginia, and West Virginia require state agencies to prepare a written assessment of the takings implications of proposed rules that limit the
use of real property. Those in Virginia must explain why a proposed rule is necessary to substantially advance the agency’s goal; why no alternatives would work; and how the benefits of the rule exceed the estimated costs of compensation. Utah’s law demands an estimate of financial costs to the state for compensation and the source of payment within the agency’s budget if a constitutional taking is determined. West Virginia targets its assessment requirements only at the Division of Environmental Protection. Missouri only requires state agencies to file an analysis of the likelihood of takings. In all these laws, state agencies must only prepare an impact assessment for the taking of private property, although some states require that the assessment be submitted to the governor.

Other states (Idaho, Kansas, Montana, and Washington) require their state attorney general to establish a review process and, if needed, promulgate—a checklist and agency guidelines. Wyoming’s law adopts the same formula and provides general parameters for the checklist. In Delaware, Indiana, and Tennessee, the state attorney general has the authority to review and legalize agency actions that may result in a taking of private property rights.

The assessment components of the Louisiana and North Dakota enactments are similar to those in the first states mentioned above, requiring agencies to prepare a written taking assessment. The assessment components of the Texas enactment are similar to the second group of states, requiring the state attorney general to promulgate guidelines and government agencies to write a taking assessment. However, these three states offer a different definition of taking.

In Virginia, the Department of Planning and Budget must expand its economic impact analysis by including “the impact of the regulation on the use and value of private property” and must make it available for public review. Kansas and Missouri also require that the assessment be available for public input, as do the assessment components of the Louisiana and Texas enactments. Idaho, Indiana, Utah, and Washington create an internal review process, relying on attorney-client privilege. The rest of the assessment laws are silent about public input.

Except for Idaho, Washington, and Arizona, assessment laws only apply to state agencies. The laws in Idaho and Washington cover both state and local governments. Arizona’s laws apply only to local governments, establishing a process whereby property owners can challenge local land-use planning decisions conditioned on a dedication or exaction. If challenged, the government agency would have to prove an “essential nexus” between a dedication or exaction requirement and a legitimate government interest; and that the proposed dedication or exaction is “roughly proportional” to the impact of the proposed use. The law also includes certain taking assessments and reporting requirements for local governments. Another law enacted in Arizona in 1994 established an “ombudsman for private property rights” to represent the interests of private property owners in “proceedings involving governmental action.”

All assessment laws have exemptions when immediate risks to public health and welfare are involved. A taking analysis is not required in Missouri and Utah if government action is federally mandated or substantially codifies existing federal or state laws. Virginia exempts regulations of its Department of Air Pollution Control, and specifies that the accuracy of the assessment “should in no way affect the validity of the regulations, nor shall any failure to comply with or otherwise follow the procedures set forth create any cause of action or provide standing for any person.”

Compensation Law Procedures

As noted earlier, the purpose of compensation laws is to create a cause of action for inverse condemnation if state regulations reduce the value of private property, even if not by 100 percent. In other words, they establish a remedy if property use is partially restricted by governmental actions. This is distinct from the much criticized (e.g., Epstein 1985; Rose-Ackerman 1989) constitutional taking doctrine advanced by the US Supreme Court, which recently observed: “It is true that in at least some cases the landowner with 95 percent loss will get nothing, while the landowner with total loss will recover in full. . . . Takings law is full of these ‘all-or-nothing’ situations” (Lucas, 112 S.Ct. at 2895, n.8 [1992]). The Court concluded that compensation is due only when the state law prohibits all economically beneficial use of the land. State compensation laws have changed this situation.

Florida’s law is most explicit in establishing a new statutory cause of action, “separate and distinct” from a taking claim under Florida or US constitutions. Property owners can sue the government if government actions “inordinately burden” an “existing use” of real property, or a “vested right” to a specific use of real property. The law defines inordinate burden as a restriction or limitation on the use of property such that the owner “is permanently unable to attain the reasonable, investment-backed expectation of the existing use of real property,” or the owner “is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the public, which in fairness should be borne by the public at

Gopher tortoises, keystone inhabitants of the sandhill ecosystems of the Southeast, are dependent on fire and open stand conditions for quality habitat.
<table>
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<th>Type of law</th>
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<td>Indiana</td>
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</tr>
<tr>
<td>West Virginia</td>
<td>W.Va. Code 22-1A-1 to -6 (1994)</td>
<td>Assessment</td>
<td>Division of Environmental Protection</td>
<td>State government/real property</td>
</tr>
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1It is not clear that North Dakota's law really has compensation provisions. It requires that state agencies prepare a written assessment that includes, among other things, the likelihood of a taking or regulatory taking and an estimation of the potential cost if a taking or regulatory taking is awarded by a court. Here, "regulatory taking" means a taking of real property through the exercise of the police and regulatory powers of the state that reduces the value of the real property by more than 50 percent. However, it does not specify that compensation is due if the court determines that a regulatory taking occurred.

2Washington enacted an assessment and compensation law in early 1995. It required state and local governments to pay for any loss of property values caused by regulations for the "public benefit," including land-use restrictions, unless the regulation was designed to prevent a public nuisance. The law was repealed in a referendum on November 7, 1995.
large.” The law also provides a mechanism for property owners to sue the government or settle the matter through voluntary mediation if they feel governmental actions have “unreasonably or unfairly burdened” the use of their real property.

The Florida law makes it clear that some government actions “may inordinately burden, restrict, or limit private property rights without amounting to a taking” under the federal or state constitutions, and that there is “an important state interest” in protecting owners from such “inordinate burdens.” Therefore it intends to provide, separate and distinct from the law of takings, relief or compensation when government actions unfairly affect private real property.

Other compensation laws recognize the problems of partial takings by establishing a threshold of government action, beyond which it is a regulatory taking of private property and the property owner is entitled to full compensation. Among the four such laws enacted, Louisiana has the lowest threshold—20 percent. Texas, Mississippi, and North Dakota have 25, 40, and 50 percent, respectively. The laws in Louisiana and Mississippi only apply to the affected portion of agricultural and forest lands. Texas, Florida, and North Dakota cover all private real property. While the Texas law applies to property in whole or in part, temporarily or permanently, Florida’s law applies only to “the real property as a whole.” All cover both state and local governments.

Thus all compensation laws except North Dakota’s clearly define the “property interest” against which the loss of value is to be measured. This eliminates the ambiguity surrounding “deprivation of all economically feasible use” for a tract as a whole or the burdened portion of the tract only, as observed by the US Supreme Court (Lucas, 112 S.Ct. at 2894, n.7 [1992]).

The laws in Louisiana, Mississippi, and Texas require that regulatory agencies use their budgets to pay court awards of inverse condemnation. The laws in Florida and North Dakota do not specify the source of funds. Louisiana’s law gives property owners an option once their property value is reduced by more than 50 percent; they can either receive compensation and retain title, or sell the property to the state at its full preregulated value. Mississippi’s law specifies that payment should not result in state ownership of the property unless the taking is 100 percent.

States have several options when sued by a landowner. They can repeal or rescind the action. If this is done before a final court decision, owner recovery is limited to damages arising before the repeal plus attorney’s fees. In addition, payment awards are subject to the limitations in other laws allowing the state to be sued. Mississippi specifies that “if any county, municipality, or political subdivisions of the state whose actions constitute inverse condemnation are unable to pay the costs awarded, then the actions causing the inverse condemnation shall be rescinded within 60 days after the judgment of the court.”

Finally, all compensation laws require the losing party to bear attorney fees and court costs, and have provisions that protect the state’s right to advance public health and safety; to prohibit public and private nuisances; and to enforce orders resulting from violations of other state laws. These discourage lawsuits intended to obstruct legitimate government actions.

Social and Economic Differences

In 1995, more than 100 bills containing regulatory takings provisions were introduced in 39 states (Murray 1995, pers. commun.). Those enacting property rights laws have distinct social, cultural, and economic characteristics. Regional culture and tradition have a strong influence on individual views about natural resources and the perceived role of government in regulating their use. The Northeast has long been industrialized and its population is more urbanized than the rest of the country. The Pacific Coast traditionally has been a battlefield between environmentalists and other groups. Few states in these two regions have enacted property rights laws.

On the other hand, the economies of the southern and Rocky Mountain states are more dependent on agriculture, forestry, grazing, and mining. A large number of small landowners own the majority of their agricultural and private-sector forestlands. Many still rely on income from farms, grazing, and forests. Moreover, people in these two regions typically show less interest in environmental activism than people in other regions (Cowdrey 1983; Martus, Haney, and Siegel 1995). These two regions have shown a strong demand for protection of private property rights.

Conclusions and Implications

Eighteen states have attempted to protect private property rights from government regulatory takings by enacting takings assessment laws, compensation laws, or a combination. Takings assessment laws are procedural, requiring that state or local agencies “look before they leap”; follow certain review processes and guidelines; and avoid unnecessary takings. Compensation laws are substantive, creating a new cause of action for partial takings of private property and providing remedies to recover resultant financial loss. Since the compensation laws go beyond existing court cases on regulatory takings, they redraw the boundary of private property rights and governmental police power.

The South and the Rocky Mountain states have enacted more laws than other regions. A strong natural resource sector and rural economies have contributed to this focus. However, the increasing number and complexity of government regulations may be the main cause for the property rights movement (Lewis 1995), and more states may enact property rights laws in the future.

State and local agencies will probably be more cautious in promulgating new regulations that may affect property rights and result in regulatory takings. In fact, this is the sole purpose of most assessment laws and one of the main purposes of compensation laws.

In addition, landowners’ security
will increase because the laws either request their input on governmental actions or provide compensation. Even in the few states that require an internal agency taking assessment, it is obvious that protecting property rights is a greater governmental concern than it was a decade ago.

Compensating owners for partial takings is controversial and its effect is uncertain. Some describe these enactments as a model for federal and other state governments, believing that recognizing and compensating for partial takings has been neglected too long. Others view it as a compromise that deflects more extreme proposals. And still others allege that the laws protect rich landowners at the expense of the public and the environment; cause unnecessary litigation; and undermine the government’s ability to protect public health, welfare, and morals. No matter which view is correct, it may take a while for the courts and juries to figure out the meaning of “real and substantial threats to public health” or “inordinate burden.” For compensation laws with a threshold, the margin of error in property appraisals will be critical. On the other hand, if people can understand “prove beyond reasonable doubt” in criminal courts, relevant concepts will also be worked out in property rights laws.

Finally, most regulations affecting private property rights are federal. Therefore, the biggest battle is at the federal level. President Clinton has threatened to veto HR 925 and the pending S 605 (Schmidt 1995). But a rising number of property right laws may increase the chance of a federal property rights law.

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