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Remedies for Regulatory Takings (Constructive Expropriations), Deprivations, Expropriations or Custodianship in South Africa and the U.S.

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ARTICLE

REMEDIES FOR REGULATORY TAKINGS (CONSTRUCTIVE EXPROPRIATIONS), DEPRIVATIONS, EXPROPRIATIONS OR CUSTODIANSHIP IN SOUTH AFRICA AND THE U.S.A.

*Christopher J. Roederer**

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“The United States Constitution is about power and liberty. The South African Constitution is about equality and reconciliation.”

-- Justice Sachs, South African Constitutional Court
(1994-2009)

[M]en suppose it requires no special wisdom to know what is just and unjust, because it is not difficult to understand the things about which the law pronounces . . . How an action must be performed, how a distribution must be made to be a just action or just distribution – to know this is a harder task than to know what medical treatment will produce health.

-- Aristotle, *Nicomachean Ethics*, Book V.ix.15.¹

“[N]or shall private property be taken for public use without just compensation.”

-- U.S. CONST. amend. V.

(1) [N]o law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application— (a) for a public purpose or in the public interest; and (b) subject to compensation . . .

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances”

-- S. AFR. CONST. Act 108 of 1996 Section 25

I. INTRODUCTION: GOING TOO FAR?

Oliver Wendell Holmes, writing for the Court in *Pennsylvania Coal Co. v. Mahon* (1922), started the regulatory takings tradition in the U.S. with his famous line that “if regulation *goes too far* it will be recognized as a taking” deserving of just compensation. As this paper

¹ ARISTOTLE, *NICOMACHEAN ETHICS* 311 (H. Rackham trans., 2nd ed. 1934).

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will show, how far is too far depends on where you are. Under the Fifth Amendment to the U.S. Constitution, regulations do not need to go as far as they once did, and under the law in states like Oregon and Florida, regulations do not need to go very far at all before one is entitled to compensation. Across the ocean in South Africa, the same regulation that went too far in *Mahon* would not constitute a taking at all under the South African Constitution's main property provision, Section 25, or at least not an expropriation that required compensation. Under South Africa's Constitution, it is very difficult for regulations to go too far, and South Africa's dominant political party, the African National Congress (ANC), has mooted the idea that Section 25 has stood in the way of it going far enough to effect transformation.²

Contrasts between the U.S. and South Africa's property rights regimes are readily apparent on the face of the respective property provisions. First, unlike in the U.S., South Africa did not need to wait so long after the passing of its final Constitution for the Courts to settle the questions of whether the state could expropriate property for public purposes or in the public interest.³ Section 25 of South Africa's Constitution explicitly authorizes expropriations for "public purposes" or in the "public interest."⁴ From the outset of its new constitutional dispensation, this arguably provided South Africa more leeway to effect land reform and socio-economic change than was allowed under existing U.S. constitutional law. Secondly, South Africa distinguishes between deprivations, which do not require compensation as a remedy and expropriations, which do require compensation. This has the potential to undermine any claim for the development of the doctrine of regulatory taking or constructive expropriation, again freeing up South Africa to regulate property without fear of incurring liability to affected property holders. Finally, while the U.S. Fifth Amendment requires just compensation, which has generally been interpreted to require market value compensation,⁵ South Africa's Constitution requires just and

² AJ VAN DER WALT, PROPERTY AND CONSTITUTION 8 (2012), http://www.pulp.up.ac.za/pdf/2012_10/2012_10.pdf (citing the ANC policy document, *The second transition: Building a national democratic society and the balance of forces in 2012*).

³ *Kelo v. New London*, 545 U.S. 469, 472, 477, 480 (2005) (holding that the Fifth Amendment does not require literal public use, but the "broader and more natural interpretation of public use as 'public purpose.'" A state may transfer property from one private party to another if future "use by the public" is the purpose of the taking). As Erwin Chemerinsky points out in *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (5th ed. 2015), this rule was well-established by *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁴ S. AFR. CONST., 1996; Section 28 of the Interim Constitution provided more limited scope than the Final Constitution, but it still provided that "such expropriation shall be permissible for public purposes only." S. AFR. (INTERIM) CONST., 1993.

⁵ *See Home v. Dep't of Agric.*, 135 S. Ct. 2419, 2431-32 (2015) ("The clear and administrable rule is that 'just compensation normally is to be measured by 'the market value of the property at the time of the

equitable compensation based on a whole host of factors in addition to market value. This also gives South Africa more leeway to affect land reform and to address the legacy of apartheid property law and policy.

For most of the twenty-plus years since the drafting of the Final Constitution, the South African government, be it the legislature or the Courts, has not taken full advantage of this leeway to affect the transformation of the South African property regime.⁶ However, there have been a number of important transformative shifts, both in terms of South African legislation⁷ and case law,⁸ that are not only making use of the leeway that is apparent on the face of Section 25, but are pushing towards the limits of those provisions. This has led some people, in particular Dr. Anthea Jeffrey, Head of Policy Research at the Institute for Race Relations, to argue that this is opening up South Africa for Zimbabwe-style land grabs, regulatory takings without any compensation, and expropriations with below market compensation.⁹ Business interests have echoed these concerns.¹⁰

Meanwhile in the U.S., a number of states have pushed back against the Supreme Court's decision to allow for the taking of private property for public purposes by enacting legislation that limits state-based takings to those done for public use, or for a more limited range of public purposes.¹¹ States have also reacted to what they consider to

taking.”) (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984)).

⁶ See, e.g., VAN DER WALT, *supra* note 2, at 8-9, 12-13. (van der Walt focuses on the need for policy and legislative reform and not merely common law reform); Pierre de Vos, *Willing Buyer, Willing Seller Works If you Have a Lifetime to Wait* (June 13, 2013), <http://constitutionallyspeaking.co.za/WILLING-BUYER-WILLING-SELLER-WORKS-IF-YOU-HAVE-A-LIFETIME-TO-WAIT/>.

⁷ For instance, the Mineral and Petroleum Resources Development Act, 28 of 2002, the recent Department of Agriculture, Forestry and Fisheries Draft Preservation and Development of Agricultural Land Framework Bill, 2015, Notice 210, No 38545, 60 (GG).

⁸ *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) [hereinafter *Agri SA*].

⁹ Dr. Anthea Jeffrey, *South Africa has taken a big step towards abolishing property rights*, RAND DAILY MAIL (May 27, 2016), <http://www.rdm.co.za/politics/2016/03/11/sa-has-taken-a-big-step-towards-abolishing-property-rights>; see also Dr. Anthea Jeffrey, *LETTER: Expropriation Bill analysis flawed* BUSINESS DAY (Mar. 01, 2016); and see Dr. Anthea Jeffrey, *Zuma's land grab urgings to traditional chiefs; desperate move by a declining force*, THOUGHT LEADERS (Mar. 17, 2015), <http://www.biznews.com/thought-leaders/2015/03/17/zumas-land-grab-urgings-to-traditional-chiefs-a-desperate-move-by-a-declining-force/>.

¹⁰ See *South Africa: In Need of an Opposition*, THE ECONOMIST 32 (June 18-24, 2016).

¹¹ Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82 (2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-keho> (“In response to Kelo, a total of forty-four states changed their laws: Eleven changed their constitutions, while forty enacted a broad range of statutory changes.”). Note that while on one level the response was to protect private property from government regulation, on a deeper level much of the response was to protect poorer property owners from richer property owners who were using the state to expropriate property for their own private interest. For instance, legislative changes in Florida included: (1) creation of restrictions forbidding the transfer of condemned property to a private party within 10 years of the property's condemnation; (2) prohibitions on the use of eminent domain to either abate or eliminate a public nuisance, or to prevent or eliminate slum or blight conditions; and (3) an amendment to state's constitution that prohibits the transfer of condemned property to private parties absent a three-fifths majority vote of both legislative houses. In direct response

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be a too stingy approach to regulatory takings and have passed legislation to provide compensation for regulatory takings that fall short of the requirements set by the Supreme Court.¹² Finally, decisions by the Roberts Court over the last half-decade have expanded the protection of private property and further limited the ability of the government to regulate for the common good.¹³

The upshot is that, while the trend in the U.S. has been to further limit the power of government to interfere with individual liberty and property rights, the trend in South Africa is to expand governmental power to affect a more egalitarian property regime. This gives substance to the claim by Justice Sachs above.¹⁴ The starkness of this contrast might in fact be overblown. There has always been a counter-current of a strong regulatory state in the U.S., and a very strong conservative property rights current in South Africa. The former has reigned in the unbridled use of private property in the U.S., while the latter has significantly dampened the wave and effects of property rights reform in the Constitution and subsequent legislation.

Part II of this paper begins with a brief description of the political and economic context in which South Africa's Section 25 Property rights provision was drafted. It then moves on to provide a brief overview of Section 25, including the distinction between deprivations and expropriations as well as provisions calling for land reform. The paper then turns to case law evaluating the relationship between deprivations and expropriations and the negative impact of these decisions on the possibility of developing a doctrine of constructive expropriations, regulatory takings, and the possibility of providing compensations for deprivations that fall short of expropriations. Next, the paper addresses recent Constitutional Court decisions that interpret the term "expropriation" narrowly to require that the state acquire the

to the facts of *Kelo*, FLA. STAT. §73.014 forbids takings for the purpose of eliminating nuisances, slums, or blight.

¹² See text accompanying notes 179-247 below.

¹³ For instance, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702 (2010); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); and *Home v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

¹⁴ James E. Krier and Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WILLIAM & MARY L. REV. 35, 40 (2016). As James E. Krier and Stewart E. Sterk argue in their article, this depiction of the American model is perhaps overblown. Based on an empirical study of over 2,000 implicit takings cases in the U.S. from 1979 to 2012, they argue that the cases reflect a balance between the competing interests of "strong property rights on the one hand, and to the imperatives of an activist government on the other." *Id.* at 40. They argue that, "American history is marked throughout by an ongoing tension between the rights of private property owners and the rights of the public to govern property for the sake of a sound social order." *Id.* at 83 (citing the work of Gregory S. Alexander, *COMMODITY AND PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970* (1997) and William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 758 (2008)). See also WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

property or property right in question, while at the same time embracing the concept of state custodianship over property. The paper then evaluates recent legislation that capitalizes on the notion of custodianship, which significantly broadens the power of the state to affect land reform without incurring liability to pay compensation. Part II of the paper will address how compensation should be determined in cases where an expropriation has occurred.

Part III of this paper addresses the U.S. approach to takings, particularly regulatory takings. After noting the Supreme Court's approach to takings in the infamous case of *Kelo v. City of New London* and the state law response, the paper turns to regulatory takings pre-Roberts Court. This is contrasted with recent Roberts Court cases expanding protection for property rights by expanding the doctrine of regulatory takings, and in the most recent case of *Horne v. Department of Agriculture*, expanding the doctrine of physical takings into what is arguably the regulatory takings realm. The paper will then critically evaluate the failure of the Court in *Horne* to remand on the question of just compensation and the decision to award unanalyzed market value compensation. The paper then turns to a critical evaluation of state based legislative expansions of the doctrine of regulatory takings with an emphasis on the approaches taking in Oregon and Florida. This section concludes by briefly addressing a recent Florida case that is pending before the Supreme Court of Florida which could expand government liability for the impact of regulations on the value of property well beyond its present scope in Florida.

The paper concludes by summarizing the contrast between the expansive protection of private property in the U.S. and the remedies provided therein to the expansive room for the government in South Africa to regulate private property and effect land reform with the limited scope for compensation therein. As noted above, this stark contrast on the face of the law has not translated into the same sharp contrast in the application of the law.

II. SOUTH AFRICA: REMEDIES FOR DEPRIVATIONS, EXPROPRIATIONS AND CUSTODIANSHIP?

The Constitutional protection of property rights in South Africa reflects a negotiated compromise between forces seeking to redress the racist and grossly unequal distribution of property that resulted from apartheid, and those forces that wanted to enshrine the protection of

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property in a justiciable Bill of Rights.¹⁵ Parliamentary supremacy ruled during the apartheid era and ensured that the majority of South Africans, be they black, colored (mixed race), or of Asian descent, often could not buy, own, or sell what, in the civil tradition, is called immovable property, or what, in the U.S., we would call real estate.¹⁶ The forces seeking redress and redistribution included the African National Congress (ANC) among others, and those seeking protection for existing property rights included the apartheid National Party, or New National Party as they came to be known after the formal ending of apartheid, and the Democratic Party, or Democratic Alliance as it came to be known.¹⁷ Those arguing for the constitutional protection of property rights argued that this was necessary for investment, social and economic growth and for personal security, while those arguing for change and reform focused on the importance of land law to the apartheid system and therefore the need to directly address this area of the law in order to “address the legacy of poverty and marginalization caused by apartheid.”¹⁸ As AJ van der Walt notes, the issue was so contentious that the property clause was one of the last provisions of the 1993 interim Constitution to be drafted.¹⁹ This negotiated compromise was reflected in Section 28 of the interim Constitution (Act 200 of 1993) and then finally in Section 25 of the Final Constitution (Act 108 of 1996).

Although the term “property” is not clearly defined in the Constitution, Section 25 provides that “property is not limited to land.”²⁰ In the Roman Dutch tradition, which forms the basis for South African property law, otherwise known as “the law of things,” property rights are rights in things, both corporeal and incorporeal (e.g., rights to shares in a company).²¹

Section 25 addresses both arbitrary deprivations and expropriations of property. The remedy for the former, at least at

¹⁵ See, e.g., Mathew Chaskalson and Carole Lewis, *Property*, in MATHEW CHASKALSON EDS CONSTITUTIONAL LAW OF SOUTH AFRICA, 31.1 (1998).

¹⁶ See the Native Land Act 27 of 1913, Development Trust and Land Act 18 of 1936, the Group Areas Acts 41 of 1950, 77 of 1957, and 36 of 1966. Note that these laws and others during the apartheid era created these classifications. These Acts were all repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

¹⁷ Chaskalson and Lewis, *supra* note 15, at 31.1.

¹⁸ VAN DER WALT, *supra* note 2, at 3. The academic debate on this issue is lengthy and can be found in footnote 2 of his work. AJ van der Walt, who is a progressive, shifted from being anti-property clause to pro-property clause once he was convinced that it could be used to serve constitutional reform rather than obstruct them. *Id.*

¹⁹ *Id.* at 3 n.3.

²⁰ S. AFR. CONST., 1996 § 25(4)(b).

²¹ E.J. Marias, *When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement* (Part I) PER/PELJ 2015 (18); see also VAN DER WALT, *supra* note 2.

present, is simply a declaration of invalidity of the law in question,²² while the remedy provided for the latter, expropriations, is considerably more complicated. Unlike in the U.S., where the remedy is generally the market value of the property at the time of the expropriation, South Africa's Constitution requires an amount, time and manner of compensation that is just and equitable. Of course one might argue that this should be the same thing as the market value, but Section 25(3) of the Constitution envisions something quite different. Under subsection 3, this must reflect an "equitable balance between the public interest and those affected, having regard to all relevant circumstances," including:

- a. the current use of the property;
- b. the history of the acquisition and use of the property;
- c. the market value of the property;
- d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e. the purpose of the expropriation.²³

Subsection 4 further provides that the public interest within this balance includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."²⁴

The remaining subsections of Section 25 explicitly contemplate legislation that may constitute deprivations and expropriations of rights for the purposes of providing equitable access to lands,²⁵ and to achieve land and water reform as a means to redress past racial discrimination.²⁶ Subsection 7 provides the authority for parliament to pass an Act providing the remedy of restitution or equitable redress for persons and

²² Although Roux has argued that the court could provide an "appropriate" remedy under its section 38 powers, thus far the only remedy provided for violations of Section 25(1) deprivations has been to declare the law invalid. Theunis Roux, *The 'Arbitrary Deprivation' Vortex: Constitutional Property Law After FNB*, CONSTITUTIONAL CONVERSATIONS 265, 277-78 (2009). As noted by Krier and Sterk, the federal rule in the U.S. prior to 1987 was to provide declaratory or injunctive relief for regulatory or implicit takings. Krier & Sterk, *supra* note 14, at n.49. Some state courts had provided compensation for regulatory takings since 1981, following the view of Justice Brennan in his dissent in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 637-60 (1981). Krier and Sterk, *supra* note 14, at n.66.

²³ S. AFR. CONST., 1996 § 25(3)(a)-(e).

²⁴ S. AFR. CONST., 1996 § 25(4).

²⁵ S. AFR. CONST., 1996 (Subsection 5 requires that the state "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.").

²⁶ S. AFR. CONST., 1996 (Subsection 8 further stipulates that "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)" (the general limitations of rights provision)).

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communities who were dispossessed of their property after June 19, 1913 “as a result of past racially discriminatory laws or practices.”²⁷ Finally, Subsection 9 requires Parliament to pass an Act providing “security of tenure or comparable redress” for “person[s] or communit[ies] whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices [are] entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”²⁸

As noted, Section 25 distinguishes between deprivations in 25(1) and expropriations in 25(2).²⁹ The text of Section 25(1) only requires that deprivations be non-arbitrary and that they result from a law of general application. As the text of 25(1) states, “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”³⁰ Most regulations impacting one’s property or property rights would fall under Section 25(1) and thus, there would be no effective remedy for the deprivation.³¹ Under this provision there is no stated requirement for compensation and thus, the only remedy available is for arbitrary deprivations and that remedy is to invalidate the law in question.³² There would in fact be no remedy for deprivations that were not arbitrary unless they rose to the level of an expropriation under Section 25(2). However, as we will see, some expropriations may never make it past

²⁷ S. AFR. CONST., 1996 § 25(7).

²⁸ S. AFR. CONST., 1996 § 25(6), (9).

²⁹ The Constitutional Court in *Harksen v. Lane NO and Others*, [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para. 33 noted that “The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law.”

³⁰ This language is reminiscent of the words of Justice McKenna in the pre-Moran Supreme Court case of *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), concerning an ordinance by the expanding city of Los Angeles forbidding the use of the petitioner’s land for making bricks from the clay on his property (land that he purchased for that purpose before the ordinance was passed and the city extended to his property). When speaking of the police power to regulate Justice McKenna stated:

It is to be remembered that we are dealing with one of the most essential powers of government -- one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development, and fix a city forever in its primitive conditions. There must be progress, and if, in its march, private interests are in the way, they must yield to the good of the community.

Id. at 410.

³¹ E.J. Marias notes that deprivations are “sourced in the state’s regulatory police power” and usually effects large groups of people in society more or less equally. For these reasons deprivations are normally not compensated. Marias, *supra* note 21, at 2983.

³² van Der Walt notes that while invalidity would be the usual remedy for regulatory excess leading to an arbitrary deprivation, that excess could also be scaled down through regulatory or administrative compensation. VAN DER WALT, *supra* note 2, at 146 n.101. In other words, compensation may alleviate an otherwise arbitrary deprivation. Roux, *supra* note 22, at 277 (2009).

Section 25(1) to Section 25(2).

A. Arbitrary Deprivations: Room for Regulatory Takings Doctrine?

The test for what constitutes an arbitrary deprivation was set out at length in the 2002 Constitutional Court decision of *First National Bank of SA Ltd t/a Wesbank v. Commissioner, South African Revenue Service & Another (FNB)*.³³ The plaintiff in *FNB* challenged Section 114 of the Customs and Excise Act because it authorized the Commissioner of the Revenue Service to detain and sell property in possession or control of a customs debtor even in cases where the property was owned by a third party, e.g., in this case, *FNB*.³⁴ While *FNB* argued that this was an uncompensated expropriation of property, the Court held that expropriations are a subset of deprivations and thus the Court first analyzed the case in terms of Section 25(1) to determine if the deprivation was arbitrary.³⁵

Coming from the U.S. perspective, one would expect that a standard of non-arbitrariness, much like the U.S. constitutional standard of rational basis review, would be a very low hurdle for the state to get over.³⁶ If South Africa followed this rather plain meaning approach to the term, most laws that resulted in the deprivation of property would be upheld. This would severely limit the possibility of any remedies for regulatory takings. There still may be some room for the doctrine in those cases where the deprivation was so severe as to amount to an expropriation.

The Constitutional Court in *FNB* did not, however, adopt mere rationality review. The Court held that a deprivation of property was arbitrary if there was not sufficient reason for the deprivation or if it was procedurally unfair.³⁷ Under U.S. rational basis review, laws do not need to be procedurally fair and do not require a sufficient reason for the deprivation beyond a conceivable rational relationship to the government's legitimate end.³⁸ The Court in *FNB* then went further and set out several different factors that would go into determining the

³³ *FNB* 2002 4 SA 768 (CC), 2002 7 BCLR 702 (CC) para. 100.

³⁴ *Id.* at para. 1.

³⁵ *Id.* at para. 57.

³⁶ Under rational basis review of governmental conduct if a law is any way rationally related to a legitimate governmental purpose it will be upheld. The law does not need to be a good law or a wise law. It does not need to have a good means – ends fit and therefore it may be both overly broad and under inclusive.

³⁷ *FNB* 2002 4 SA 768 (CC) at para. 100.

³⁸ Under rational basis review, the government is not required to justify the law in question. Rather, the burden is on the challenger of a law to disprove “every conceivable basis” for the legislation, regardless of what the actual basis for the law was. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993).

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degree of scrutiny or exactness required to establish a “sufficient reason.”³⁹ These factors would determine whether the means-ends test of mere rationality review would suffice or if substantive proportionality review was required.⁴⁰ Substantive proportionality as reflected in the Section 36(1) limitations clause, requires that a limitation be reasonable and justifiable given a whole host of factors.⁴¹ The factors that go into determining the level of justification or scrutiny between mere rationality and substantive proportionality include:

- the relationship between the purpose of the regulation and the person effected;
- the relationship between the purpose of the deprivation and the nature of the property (with deprivations involving land and corporeal movables requiring more justification than deprivations of other property rights);
- the extent of the deprivation; and
- the number of incidents of ownership affected (i.e., the number and types of sticks in the bundle of rights) (with a more compelling purpose being required for all the incidents of ownership as opposed to fewer incidents and incidents only being partially impacted).⁴²

As Theunis Roux notes, this approach leaves the courts a great deal of discretion to either show deference to “important social reform programmes, such as land reform or black economic empowerment” or “to ratchet up the level of review” in cases where “the state overzealously regulates property in pursuit of questionable goals.”⁴³ Of course, like all multi-factor balancing tests and sliding scales, flexibility

³⁹ FNB, 2002 4 SA 768 (CC) at para. 100.

⁴⁰ *Id.* It should be noted that South Africa does not have what in the U.S. is called strict scrutiny or intermediate scrutiny. It rather has a fluid test that is set out in sections 36. *See supra* note 35.

⁴¹ *Id.* Proportionality review is the review required by the limitations provision in Section 36(1) of the Constitution, which requires:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

⁴² *Id.* para 100.

⁴³ Roux, *supra* note 22, at 274.

comes at the expense of predictability.

This approach to Section 25(1) arbitrary deprivations leaves room for the possibility of regulatory takings or constructive expropriations. Theunis Roux suggests, and Frank Michelman accepts, that what might make a deprivation arbitrary is the lack of just and equitable compensation.⁴⁴ While this may be implied from the *FNB* case, I do not think that it clearly follows, and it is not entailed or required. If compensation was required to avoid a finding of arbitrariness, this would effectively collapse the distinction between section 25(1) deprivations and 25(2) expropriations. There is still ample room for laws that deprive individuals of their property in non-arbitrary ways that do not provide just and equitable compensation. As we will see below, the *Agri-South Africa* case provides one such example.⁴⁵

As noted above, the Court in *FNB* characterized expropriations as a subset of the larger category of deprivations.⁴⁶ This means that cases involving section 25(2) expropriations must also satisfy the requirements of section 25(1) deprivations. As Roux notes, this has the effect of getting rid of the problem of regulatory takings or constructive expropriations, because laws that “go too far” by destroying all economically viable use of the property, or which interfere with investment backed expectations, will be struck down as arbitrary.⁴⁷ Further, in cases like *FNB* where the state has expropriated property without compensation, one must first pass the section 25(1) analysis before ever reaching 25(2).

In *FNB*, the Court struck down the law in question as arbitrary, based upon the factors listed above. In particular, it held that while the legislative end of collecting customs debts was legitimate and important, the means used to satisfy the debt cast the net too wide.⁴⁸ Here there was no nexus between the property and the debt, nor the owner and the debt, and thus there was “no sufficient reason . . . for section 114 to deprive persons other than the customs debtor of their goods.”⁴⁹ As Roux points out, however, the law never would have been challenged if the legislative scheme had provided compensation to bank.⁵⁰ Thus, he concludes that the failure to compensate made the

⁴⁴ *Id.* at 277; Frank Michelman, Chapter 17, *Against Regulatory Takings: In Defense of a Two-Stage Inquiry: A Reply to Theunis Roux*, in CONSTITUTIONAL CONVERSATIONS 292 (2009).

⁴⁵ *Agri South Africa v. Minister for Minerals and Energy (Agri)* 2013 4 SA 1 (CC). See text accompanying notes 66-96 below.

⁴⁶ *FNB*, 2002 4 SA 768 (CC) at para. 57.

⁴⁷ Roux, *supra* note 22, at 277.

⁴⁸ *FNB*, 2002 4 SA 768 (CC) at para. 108.

⁴⁹ *Id.* at para. 108.

⁵⁰ Roux, *supra* note 22, at 277.

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scheme arbitrary.⁵¹

In his chapter, Roux speculates that while the usual remedy for an arbitrary deprivation would be invalidity, the courts could develop constitutional damages for violations of Section 25(1) under the courts' Section 38 power to grant appropriate relief.⁵² While I agree that this would be perfectly appropriate, at this stage the Courts in South Africa have not developed such a remedy. It is important to remember that the limited remedy that is available (invalidity) is only for arbitrary deprivations.⁵³ Non-arbitrary deprivations of property rights receive no remedy at all.

It is important to note that damages for one class of U.S. "regulatory" takings is not precluded by this analysis.⁵⁴ Cases where local government has harmed one's property through physical invasion, like flooding, damage caused by roadworks or what some have called government enterprise harms, can result in compensation, although not through the law of property per se, but through normal delictual (or tort liability) actions.⁵⁵ Because South Africa does not provide provincial or local immunity from delict actions,⁵⁶ there was no need to develop property law exceptions to these otherwise straightforward torts or delicts for wrongful, negligent or intentional causation of harm to

⁵¹ *Id.*

⁵² *Id.* at 278. He further notes that this would *approximate* the German approach of paying equalization payments for disproportionate regulations.

⁵³ There remains the possibility that an arbitrary deprivation could be justified under the Section 36(1) limitations clause analysis. As Roux points out it would be rare for a law that was found to be arbitrary was somehow reasonable and justifiable under Section 36(1). Roux p. 280. Nonetheless, it is theoretically possible. Frank Michelman discusses the possibility in his chapter 17 Reply to Roux. Michelman, *supra* note 41, at 298-302.

⁵⁴ Krier and Sterk rightly point out that these are not cases of regulatory takings at all, but are rather implicit takings that are treated much like tort cases under state law. Krier and Sterk note that "Courts often evaluate taking claims in the enterprise and flooding contexts in the same way they evaluate tort claims when the tortfeasor is someone other than the government." Krier and Sterk, *supra* note 14, at 72 (noting that the property claim is a way around sovereign immunity).

⁵⁵ See, e.g., *Abrahamse v. Municipality of East London and Another, Municipality of East London and Another v. Abrahamse* (483/95, 513/95) [1997] ZASCA 38; [1997] 2 All SA 651 (A) (12 May 1997) for a case involving suit against a municipality for a water pipe burst that damaged plaintiff's property. This is why these non-regulatory forms of "regulatory" takings, or implicit takings results in a much higher percentage of successful claims in the U.S. than actual regulation based regulatory takings claims. See Krier and Sterk, *supra* note 14, at table 2. The percentages are around triple those of Penn Central type balancing cases.

⁵⁶ South Africa followed English law on this point during the colonial period and continued the tradition after. It in fact went further and passed legislation abrogating Crown immunity for the executive branch of central government with the Crown Liabilities Act 37 of 1888 (Cape); Crown Suits Act 14 of 1894 (Natal); Crown Liabilities Ordinance 51 of 1903 (Transvaal); Crown Liabilities Ordinance 44 of 1903 (Orange River Colony); and after union the Crown Liabilities Act 1 of 1910. Immunity remains waived under the State Liability Act 20 of 1957 for vicarious liability, and as noted, the provinces and municipalities have never had immunity from delictual suit. See, e.g. Alistair Price, *State Liability and Accountability* (2015) Acta Juridica 313-335; *The Impact of the Bill of Rights on State Delictual Liability for Negligence in South Africa*, Obligations V Conference: Rights and Private Law, St Anne's College, Oxford University (2010), <http://uct.academia.edu/AlistairPrice/Papers>.

property.

In cases where compensation is offered for an expropriation or where the parties have focused on the Section 25(2) expropriation requirements, the Court has skipped over Section 25(1) and gone directly to Section 25(2). This occurred in the cases of *Du Toit v. Minister of Transport*;⁵⁷ *Haffejee v. eThekweni Municipality*;⁵⁸ and in *Agri South Africa v. Minister for Minerals and Energy (Agri)*.⁵⁹

B. Distinguishing Expropriations from Deprivations and Closing the Door on Compensation?

In the Constitutional Court case of *Reflect All 1025 CC v. MEC for Public Transport, Gauteng*,⁶⁰ the Court addressed the purpose behind the distinction between deprivation and expropriations, noting that:

The purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.⁶¹

These obiter dicta from the Constitutional Court signal that the failure of the government to provide compensation for deprivations would not, as a general rule, lead the courts to find the deprivation arbitrary. It also suggests that the Court would be hesitant to award constitutional damages.⁶² The Court went on to note that “courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state.”⁶³ It noted that the Supreme Court of Appeal, in a case with very similar facts, had considered whether there might be

⁵⁷ 2006 1 SA 297 (CC), 2005 11 BCLR 1053 (CC).

⁵⁸ 2011 6 SA 134 (CC). The plaintiffs in this case argued that sections of the Expropriations Act that allowed for expropriation and dispossession of property before the amount of compensation was determined violated the requirements of Section 25(2)(b). The Court held that requiring this in all circumstances would violate the Section 25(3) requirement that “The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.” While the equitable balance would often require that this be determined in advance, this would not always be the case, e.g., in cases of emergency.

⁵⁹ 2013 4 SA 1 (CC). This case will be discussed below.

⁶⁰ 2009 (6) SA 391 (CC).

⁶¹ *Id.* at para. 63.

⁶² As noted above the federal rule in the U.S. prior to 1987 was merely to provide declaratory or injunctive relief for regulatory takings. *See supra* note 22.

⁶³ *Reflect All 1025 CC v. MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC) at para. 64.

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room to develop the doctrine of constructive expropriation for cases where “a public body utilises its power to regulate private property so excessively that it may be characterised as expropriation; in other words, when the regulation in a particular case goes too far.”⁶⁴ After noting that it was doubtful that this would be appropriate in the South African constitutional order, it held that the present case was not a proper case for developing such a doctrine.⁶⁵ It concluded that “If regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its obligations in regulating the use of private property for public good.”⁶⁶ The Court held that no compensation was due because the state did not acquire the applicant’s land, but rather, only impeded its use and development due to proposed road development plans.⁶⁷

Because deprivations do not give rise to compensation unless one can show an expropriation, there is a strong incentive for property rights holders to fit their claim into Section 25(2) where they at least have the chance of “just and equitable” compensation.

C. Agri South Africa: Expropriation or Custodianship

In the 2013 case of *Agri South Africa*, the parties agreed that the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) did not arbitrarily deprive the petitioners of their property.⁶⁸ Rather, it claimed that under the Act, the state had expropriated its mineral rights. Prior to the MPRDA, landowners in South Africa owned the exclusive rights to the minerals below their land which entitled them to fully use those rights, or to prevent the use of those rights.⁶⁹ The law

⁶⁴ *Id.* at para. 65 (citing to *Steinberg v. South Peninsula Municipality* 2001 (4) SA 1243 (SCA) at paras 6-8).

⁶⁵ *Id.* at para. 65.

⁶⁶ *Id.*

⁶⁷ The case involved applicants affected by preliminary designs for roads or highways under the regulatory scheme in the Infrastructure Act. *Id.* at para. 6. Note that this case is what in the U.S. would be termed a condemnation blight case. As Krier and Sterk note, landowners generally lose condemnation blight cases. See Krier and Sterk, *supra* note 14, at table 2. (Landowners are only successful about 20% of the time). This is so, they speculate because to allow compensation for such cases could result in officials shying away from “engaging in useful public discourse about construction of roads or public facilities.” *Id.* at 75.

In the present case of *Reflect All*, the effects on each of the eight applicants are detailed in footnote 6, but include: the denial of access to the properties on which the first applicant plans to construct a shopping centre; the prevention of the development of 600 luxury cluster houses by the second applicant; the encroachment onto significant amounts of land on proposed townships by the third, fourth and sixth applicants; the inability of the fifth and seventh applicant to sell their property for the previous market value given that due to the road plans the properties cannot be rezoned; and the eighth applicant’s property is affected by a proposed road that will allegedly limit the number of stands available for development. *Reflect All* 1025 CC v. MEC for Public Transport, Gauteng, 2009 (6) SA 391 (CC).

⁶⁸ See Items 6-8 of Schedule II to the MPRDA.

⁶⁹ *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) at para. 7.

developed to allow landowners to sever their mineral rights through notarial deeds,⁷⁰ register these deeds,⁷¹ and then to further alienate the rights through cession, leases, and mortgage bonds.⁷² The rights formed part of the estate and could be bequeathed as well.⁷³

The MPRDA froze the ability to sell, lease or cede these “old order” mineral rights until they were converted into new order mineral rights under the Act,⁷⁴ and the Act abolished the mineral rights owner’s right to “sterilize” the rights.⁷⁵ In other words, the right to not sell or exploit the minerals under the land were taken away by the Act. Under the MPRDA, mineral rights owners had a limited time period to use and convert their old order rights into new order rights or they would lose them.⁷⁶ The new order rights are still regarded as “limited real rights” under the Act,⁷⁷ but they cannot be transferred or encumbered without permission from the Minister,⁷⁸ and they are not perpetual but are limited in duration.⁷⁹

Given that these rights were taken away by the state, one may be led to believe that it logically followed that the property in question had been expropriated.⁸⁰ Professor Johan D van der Vyver argued that the Act resulted in the Nationalization of mineral rights and constituted an expropriation.⁸¹ The court of first instance, the High Court, in fact held that the petitioner had been deprived of a right and that the deprivation amounted to an expropriation.⁸² The Constitutional Court held, however, that since the state did not acquire the rights that it took, but merely held them as custodians for the South African people, there was no expropriation.⁸³ The Court held that to prove expropriation a claimant must establish “sufficient congruence” or “substantial similarity” between what was lost and what was acquired by the state.⁸⁴

⁷⁰ *Id.* at para. 8.

⁷¹ *Id.* at para. 9.

⁷² *Id.* at para. 10.

⁷³ *Id.*

⁷⁴ *Id.* at para. 2.

⁷⁵ *Id.* As the court further elaborates in para. 66, “What the MPRDA in effect did was to put an end to the: (i) ability to sterilise or not to exploit minerals; (ii) previously unfettered entitlement to sell, lease or cede the mineral right at any time; and (iii) mineral right or unused old order right for which a prospecting or mining right could not be acquired in terms of the transitional provisions.”

⁷⁶ Marias, *supra* note 21, at 3042.

⁷⁷ See MPRDA § 51.

⁷⁸ See MPRDA § 11(1).

⁷⁹ See MPRDA §§ 17-19.

⁸⁰ Under the previous Minerals Act, forced exploitation of mineral rights was considered an expropriation. *Agri South Africa v. Minister for Minerals and Energy* (Agri) 2013 4 SA 1 (CC) at para. 70.

⁸¹ Johan D. van der Vyver, *Nationalization of Mineral Rights in South Africa* 2012 DE JURE 125-42, 141.

⁸² *Agri South Africa v. Minister for Minerals and Energy* (Agri) 2013 4 SA 1 (CC) at para. 18.

⁸³ *Id.* at paras. 58-59.

⁸⁴ The Court stated, “To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not

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As the Court concluded, “[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.”⁸⁵

The Court contrasted the present case with classic cases of expropriation where the government takes land for roads or development or when it acquires mineral right to exploit them.⁸⁶ Here the State did not acquire these rights to exploit the minerals, but rather is a “a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.”⁸⁷ Although the Court declined to analyze or explore the limits of the concept of custodianship, it held that custodianship under the Act did not amount to an expropriation.⁸⁸

The majority opinion took pains to emphasize that section 25 required a balance between private property rights and the public interest.⁸⁹ As the court stated, section 25 of the Constitution imposes the obligation “not to over-emphasise private property rights at the expense of the state’s social responsibilities.”⁹⁰ The Court also emphasized the role of the present legislation in addressing the legacy of apartheid. In the first paragraph the Court stated:

Regrettably, the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.⁹¹

Later in the judgment, the Court stated:

have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired.” *Id.* at para. 58.

⁸⁵ *Id.* at para. 59.

⁸⁶ *Id.* at para. 68.

⁸⁷ *Id.* at para. 68.

⁸⁸ *Id.* at para. 71.

⁸⁹ *Id.* at paras. 61-62.

⁹⁰ *Id.* at para. 62.

⁹¹ *Id.* at para. 1. Namely the MPRDA.

We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country. By design, the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans.⁹²

Towards the end of its judgment the Court stated:

The MPRDA constitutes a breakthrough the barriers of exclusivity to equal opportunity and to the commanding heights of wealth-generation, economic development and power. It seeks to address the injustices of the past in the economic sector of our country in a more balanced way, by treating individual property rights with the care, fairness and sensitivity they deserve.⁹³

A few remaining points are worth noting. First, although the Court did not find an expropriation in this case, it did leave the door open to expropriation claims under the MPRDA. As the Court stated, “It would, however, be inappropriate to decide definitively, that expropriation is in terms of the MPRDA incapable of ever being established . . . I accept that a case could be properly pleaded and argued, to demonstrate that expropriation did take place.”⁹⁴ Secondly, three justices on the Court, Cameron, Froneman, and van der Westhuizen, concurred in the result but disagreed with the proposition that the state needed to acquire property in order for an expropriation to take place.⁹⁵ Froneman J concurred in the result of the case on the basis that the rights conferred on the applicant under the MPRDA constituted just and equitable compensation for the rights taken away and lost.⁹⁶

⁹² *Id.* at para. 61.

⁹³ *Id.* at para. 73.

⁹⁴ *Id.* at para. 75. This due in part to the fact that item 12 of Schedule II has an express provision for expropriations under the Act. Earlier in the judgment the Court held that item 12 was like the result of an overly cautious legislature rather than an indication that the Act worked an expropriation. *Id.*

⁹⁵ *Id.* at paras. 77-79.

⁹⁶ *Id.* at para. 79.

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Froneman J, in his rather strong concurrence, after pointing out that foreign jurisprudence “recognises that expropriation may take place even if the disposed rights or property have not been acquired by the state,”⁹⁷ warned of the consequences of the majority opinion’s rationale. In Froneman J’s opinion, under the majority’s reasoning, the state could abolish all private ownership of property without it amounting to an expropriation, and thereby without requiring just and equitable compensation, as long as the state was only transferring those rights to others as a custodian. As he stated:

If private ownership of minerals can be abolished without just and equitable compensation - by the construction that when the state allocates the substance of old rights to others it does not do so as the holder of those rights - what prevents the abolition of private ownership of any, or all, property in the same way? This construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the state as custodian of the country’s resources, from being recognised as expropriation.⁹⁸

Froneman also argues that even if what is required is acquisition by the state, the state in this case acquired the right to allocate and dispose of the right to exploit the minerals.⁹⁹

In the conclusion to his 2012 DE JURE article, van der Vyver argued that nationalization of the mineral and petroleum resources under the MDRNA “clearly constitutes an instance of expropriation within the meaning of section 25 of the Constitution.”¹⁰⁰ He further argued that if expropriation required acquisition, then “vesting the ownership in the State, either as the personification of “all the people of South Africa” or as a public trustee of the people’s ‘common heritage,’

⁹⁷ *Id.* at para. 103.

⁹⁸ *Id.* at para. 105.

⁹⁹ *Id.* at para. 81, 106. Note that the result here can be contrasted with the result in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a case involving the determination that the plaintiff’s property was subject to a federal navigable servitude. The Supreme Court held that since the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” this amounted to a taking. *Id.* at 176. Similarly, in *Hodel v. Irving*, the Supreme Court found that federal regulations that prevented Native Americans from devising small fractional interests in Indian trust lands, was also a taking since “the right to pass on property—to one’s family, in particular—has been “part of the Anglo-American legal system since feudal times.” *Hodel v. Irving*, 481 U.S. 704, 716 (1987).

¹⁰⁰ van der Vyver, *supra* note 81, at 141.

fully satisfies this demand.”¹⁰¹ For better or worse, the majority of the Constitutional Court did not agree.

D. Contrasting Cases from the U.S.

Agri SA, can be contrasted to two U.S. Supreme Court cases, one concerning the abrogation of inheritance rights and the other involving the granting of public access to a privately developed waterway.

The first, *Hodel v. Irving* (1980), concerned a federal law preventing the inheritance of Sioux Nation land that consisted of less than two percent of the owner’s land and that had earned less than \$100 in the prior year. Any land devised in this way would revert back to the tribe.¹⁰² Because this abrogated the right to pass on property to one’s heirs, the Court held it to be a taking.¹⁰³ Here the taking was not based on the U.S. government taking title to property, nor even occupying the property, but of abrogating a right in the property. Remember in *Agri SA* one was no longer allowed to sell, lease or cede the “old order” mineral rights and even if converted to new order rights, one could not transfer or encumber the right and the right was no longer perpetual, but limited in duration. Nonetheless, the *Agri SA* Court did not find an expropriation had occurred.

The second case, *Kaeser Aetna v. U.S.*, involved a property owner that dug a channel connecting its pond to the ocean. Once this was complete, the U.S. Corps of Engineers determined that, under federal law, this made the water a navigable waterway that was open for use by the public at large.¹⁰⁴ Here the right to exclude others was taken from the property owner. Again, this can be contrasted to mineral rights owners in *Agri SA* who lost the right to sterilize, or in other words, who lost the right to exclude others from extracting minerals from their land, and who in fact lost much of the use of the right in question. Although more sticks in the bundle of rights were lost in *Agri, SA* than in *Kaeser Aetna*, the Court found no expropriation.

E. Legislation in the Wake of Agri SA

In the aftermath of the *Agri SA* decision, South Africa drafted a

¹⁰¹ *Id.* at 141. He further notes that this was the position taken by the Supreme Court of Appeal in *Agri South Africa*.

¹⁰² *Hodel*, 481 U.S. at 704, 722-23.

¹⁰³ *Id.* at 715-17.

¹⁰⁴ *Kaiser Aetna*, 444 U.S. at 167.

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Preservation and Development of Agricultural Land Framework Bill,¹⁰⁵ a new Expropriations Bill,¹⁰⁶ and a Property Valuations Bill.¹⁰⁷ These Bills have caused a stir amongst some segments of the population, and especially by members of the Democratic Alliance, who opposed these bills.¹⁰⁸ The Draft Preservation and Development of Agricultural Land Framework Bill draws on the *Agri SA* decision by stating that “Agricultural land is the common heritage of all the people of South Africa and the Department of Agriculture, Forestry and Fisheries is the custodian thereof for the benefit of all South Africans.”¹⁰⁹ Under the draft Bill, the Department is empowered to “approve, reject, control, administer and manage any rezoning or subdivision of agricultural land.”¹¹⁰ The Expropriations Bill, which was passed by parliament in February 2016, largely tracks Section 25 of the Constitution. It defines expropriations as compulsory acquisitions, thus tracking the language of the majority opinion in *Agri SA* and it does not recognize “indirect” or “regulatory” takings.¹¹¹

This suite of draft legislation has led some people, in particular Dr. Anthea Jeffrey, Head of Policy Research at the Institute for Race Relations,¹¹² to argue that this is opening up South Africa to land grabs, regulatory takings without compensation and expropriations with below

¹⁰⁵ PRESERVATION AND DEVELOPMENT OF AGRICULTURAL LAND FRAMEWORK BILL, <http://www.nda.agric.za/docs/media/Draft%20Preservation%20and%20Development%20of%20%20Agri%20cultural%20Land%20Framenwork%20Bill.pdf>.

¹⁰⁶ MINISTER OF PUBLIC WORKS, REPUBLIC OF SOUTH AFRICA, Expropriation Bill [B 4B—2015], https://www.parliament.gov.za/storage/app/media/Docs/bill/613881_1.pdf.

¹⁰⁷ MINISTER OF RURAL DEVELOPMENT AND LAND REFORM, REPUBLIC OF SOUTH AFRICA, Property Valuation Bill [B 54—2013], http://www.gov.za/sites/www.gov.za/files/36478_gen504.pdf. http://www.parliament.gov.za/live/commonrepository/Processed/20131114/554372_1.pdf.

¹⁰⁸ See the debates over the bill; see also National Assembly 2014, <https://pmg.org.za/hansard/18525/>.

¹⁰⁹ Draft Preservation and Development of Agricultural Land Framework Bill §3(1), <http://www.nda.agric.za/docs/media/Draft%20Preservation%20and%20Development%20of%20%20Agri%20cultural%20Land%20Framenwork%20Bill.pdf>.

¹¹⁰ *Id.* § 3(2).

¹¹¹ See, e.g., E Du Plessis, *Criticism of Land Rights Bill is Off Target*, BUSINESS DAY (Feb. 26, 2016), <http://www.businesslive.co.za/bd/opinion/2016-02-26-criticism-of-land-rights-bill-is-off-target/>.

¹¹² Note that this institute is a right leaning Afrikaner Center. The Center for Race Relations promotes the following ideas:

- That the State should be small but effective in carrying out its core functions
- That people should be treated as individuals and not as members of groups
- That property rights should be protected so that the poor can accumulate wealth and assets
- That strong independent institutions in the media, judiciary, and civil society should be empowered to hold powerful interest groups in business and government to account
- That economic freedom is as important as political freedom and that people should be empowered to stand on their own feet to work, start businesses, invest, and own property in order to improve their lives.

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, WHAT WE DO, <http://irr.org.za/about-us/what-we-do>.

market compensation.¹¹³

While all of this is true, it is somewhat remarkable that it has taken until 2016 to replace the apartheid era Expropriations Act 63 of 1975. While it is true that the 1975 Act provided for market rate compensation,¹¹⁴ Section 25 of the Constitution, adopted in 1996, clearly contemplates a different mechanism for determining what compensation is just and fair for an expropriation. Thus, it would be odd in the extreme if the new legislation merely adopted the apartheid era mechanism. It would be even more off if that legislation ignored the interpretation of Section 25 by the Constitutional Court.

The values that animated compensation for expropriations under the 1975 law are not unfamiliar. As WJ Du Plessis argues, it was based on the idea that the legislator does not intend to take away rights without compensation and that no single individual should have to sacrifice their property without compensation for something that benefits the public at large.¹¹⁵ While the second consideration still animates the law, the first is put on shakier ground given the history of property rights under apartheid. Section 25 reflects this fact with the requirement to not only balance those rights against the public interest, but to scrutinize the given right's pedigree in the given case. Unfortunately, the Courts have not fully embraced the compensation requirements of the Section 25(3).

As du Plessis notes, post-apartheid decisions have largely returned to the pre-constitutional rationale for compensation and have endeavored to put the property owner in the same position he would have been, but for the expropriation.¹¹⁶ This has also resulted in the centrality of market value as the measure for compensation.¹¹⁷

¹¹³ Dr. Anthea Jeffrey, *South Africa has taken a big step towards abolishing property rights* Rand Daily Mail (May 27, 2016), <http://www.rdm.co.za/politics/2016/03/11/sa-has-taken-a-big-step-towards-abolishing-property-rights>; see also, Dr. Anthea Jeffrey, *LETTER: Expropriation Bill analysis flawed* BUSINESS DAY (Mar. 01, 2016). Dr. Anthea Jeffrey, *Zuma's land grab urgings to traditional chiefs; desperate move by a declining force*, THOUGHT LEADERS (Mar. 17, 2015), <http://www.biznews.com/thought-leaders/2015/03/17/zumas-land-grab-urgings-to-traditional-chiefs-a-desperate-move-by-a-declining-force/>.

¹¹⁴ See Expropriation Act of 63 of 1975 § 12(1) (S. Afr.).

¹¹⁵ WJ du Plessis, *Valuation in The Constitution Era* 18(5) POTCHEFSTROOM ELECTRONIC LAW JOURNAL, 1728 (2015).

¹¹⁶ *Id.* at 1731-32. Du Plessis analyzes the following cases in support of this proposition. Du Toit v. Minister of Transport 2006 1 SA 297 (CC) para. 22; Cape Town v. Helderberg Park Development (Pty) Ltd 2007 1 SA 1 (SCA) para. 21; Khumalo v. Potgieter 2000 2 All SA 456 (LCC) para. 22; Hermanus v. Dep't of Land Affairs: In Re Erven 3535 and 3536; Goodwood 2001 1 SA 1030 (LCC) para. 15; Ex Parte Former Highland Residents; In Re Ash v. Department of Land Affairs 2000 2 All SA 26 (LCC) paras. 34-35; *Haakdoornbult Boerdery CC v. Mphela* 2007 5 SA 596 (SCA) para. 48; and *Mhlanganisweni Community v. Minister of Rural Development and Land Reform* 2012 ZALCC 7 (19 Apr. 2012) (drawing on foreign dicta to show that the purpose of compensation is recompense).

¹¹⁷ *Id.* at 1733-34.

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The Court in *Ex Parte Former Highland Residents* devised a two-step approach that started with the market value and then determined whether that value should be adjusted upwards or downwards depending on the factors in Section 25(3).¹¹⁸ This approach makes some sense given that market value at least gives one a sum that can be worked with. The other factors don't give one much of a benchmark for getting the valuation going.

However, as du Plessis aptly argues, there are numerous ways for determining "market value" and these different approaches embody different substantive values, resulting in different valuations.¹¹⁹ Some ways of determining market value favor the property owner and some make it less onerous on the state.¹²⁰ Given this fact, she questions whether the market value approach is such a sure, or reliable, way of determining value and whether the "just and equitable" approach is actually less reliable.¹²¹ She also argues against the continued centrality of market value in calculating compensation.¹²²

Under Section 25(3) and the new Expropriations Bill, market value is just one factor among many. While some version of market valuation might be a starting point, it is important to remember that it is not the central point or the default point. The central point of Section 25(3) is not only just compensation, but just and equitable compensation. Neither the U.S. Constitution, nor the South African Constitution, require market value compensation for takings. In the U.S., the market value has been used to provide corrective justice, to give back in proportion to what was taken, but as noted at the outset, several factors complicate the analysis of what justice and equity may require in the South African context.

As the factors indicate, compensation may be impacted by the historical and current use of property, for instance if one is not putting the property to its full or best use, but is letting it go fallow.

¹¹⁸ *Ex Parte Former Highland Residents*; In Re: Ash v. Department of Land Affairs 2000 (2) All SA 26 (LCC) paras. 34-35. (S. Afr.).

¹¹⁹ Du Plessis, *supra* note 115, at 1743. Du Plessis not only address the three common approaches to determining market value in South Africa, namely the comparative sales approach, the income capitalization approach, and the cost approach (1737-1741), but also several approaches used in the U.S., namely harm versus benefit, highest and best use, permissible but unenacted regulations, and benefit offset and the average reciprocity of advantage (1743-1746).

¹²⁰ *See, e.g.*, Du Plessis, *supra* note 115, at 1748-51. What properties are compared for market value, who bears the cost of litigation, who bear the risk of the highest and best use of the property, whether one allows unenacted but potential regulations to bear on the cost and when one sets the date for an expropriation (e.g., should the state compensate for lower property values that result from city planning before the expropriation takes place). For some of these considerations *see* Du Plessis at 1748-51. Du Plessis relies on C. Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" 2004-2005 NWULR 688 – 692 for her analysis of U.S. market value approaches and the substantive values they entail.

¹²¹ Du Plessis, *supra* note 115, at 1728, 1743.

¹²² *Id.* at 1751.

Underutilizing one's property is a luxury in a country where so much of the population is in need and thus if one is not fully using one's property, then perhaps the compensation should reflect the value of the property as used rather than what the market might provide if the property was put to its highest use. Further, if the history of the acquisition is dubious or was the result of apartheid policies that provided land to farmers at well below market rates, then perhaps that farmer should not receive a windfall as reflected in the current market price of the land. This would also be true if the value of land increased due to state investment or subsidies in capital improvement of the property. All of the considerations thus far arguably just go to determine what corrective justice might require. In other words, these considerations of what justice requires alone could justify considerable deviations from market value. Section 25 contemplates even further deviations once concerns over distributive justice, equity and the public interest are taken into account. Section 25(4) tells us that the public interest includes "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."

As noted at the outset, the remaining subsections of Section 25 explicitly contemplate legislation that may constitute deprivations and expropriations of rights for the purposes of providing equitable access to lands, and to achieve land and water reform as a means to redress past racial discrimination. Subsection 5 reads, "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."¹²³ Subsection 8 clarifies that Section 25 cannot stand in the way of land and water reform that is designed to redress the results of past racial discrimination.¹²⁴ This contemplates legislation that goes beyond corrective justice for discrete or specific cases of past discrimination and to distributive justice to address the resulting systemic inequality that resulted from apartheid.

III. U.S. FEDERAL AND STATE REMEDIES FOR TAKING AND REGULATORY TAKINGS

The Fifth Amendment to the U.S. Constitution provides in

¹²³ S. AFR. CONST., 1996 § 25(5). For a treatment of at least one of the drafter's intentions behind this provision, see John G. Sprankling, *INTERNATIONAL LAW OF PROPERTY* 222 (2014).

¹²⁴ S. AFR. CONST., art. 25 § 8 1996. Subsection 8 states: "No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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simple language “Nor shall private property be taken for public use without just compensation.”¹²⁵ Despite the simple language, this clause has generated considerable controversy, both in cases where the state has regulated property but has not literally taken, or acquired the property, and in the case of *Kelo* where property was taken for what some considered a dubious purpose. The Supreme Court in *Kelo v. City of New London*, held that the Fifth Amendment does not require literal public use, but the “broader and more natural interpretation of public use as ‘public purpose.’”¹²⁶ In *Kelo*, the City used its power of eminent domain to seize private property (15 homes owned by 9 people) to sell to private developers, in order to help increase taxes and job creation. The property owners argued that taking private property to sell to private developers was not a public use and thus a violation of the Fifth Amendment’s takings clause. The Supreme Court held that a state may transfer property from one private party to another if future “use by the public” is the purpose of the taking.¹²⁷

As noted in the introduction, this generated considerable backlash and prompted numerous states to pass legislation to stop their state and local government from taking for public purposes and particular from taking for the purpose of stopping blight, nuisances or for business development.¹²⁸ Under the U.S. federal system it is perfectly acceptable for states to restrict their own regulatory powers in order to protect private property. The literature on the state reaction to *Kelo* and what counts as a “public purpose” is vast and will not be addressed further below. Rather, the remainder of this paper will address what counted as a regulatory taking, before the time of the Roberts Court, what counts as a regulatory taking now under the Roberts Court and recent developments of what now counts as a regulatory taking at the state level.

A. Pre-Roberts Court Regulatory Takings

Although it is unclear that the founding fathers ever contemplated that the Takings Clause would apply to regulatory

¹²⁵ U.S. CONST. amend. V.

¹²⁶ *Kelo v. New London*, 545 U.S. 469, 472 (U.S. 2005). Erwin Chemerinsky in CONSTITUTIONAL LAW (5th ed. 2015) (noting that *Kelo* did not actually create a new rule with regards to the interpretation of public use. “The decision generated enormous controversy and the media presented it as a dramatic change in the law, while in reality the Court applied exactly the principle that was articulated decades ago: A taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public. . . it is important to recognize that the case in no way changed the constitutional law in this area.” *Id.* at 693 (quoting *Berman v. Parker* 348 U.S. 26, 32-33 (1954)).

¹²⁷ *Kelo*, 545 U.S. at 475, 489-90.

¹²⁸ See *supra* note 11.

takings,¹²⁹ as early as 1922, in an opinion written by Justice Oliver Wendell Holmes, the Supreme Court found that if a regulation goes “too far” it will be recognized as a taking.¹³⁰ In *Pennsylvania Coal*, a statute that prohibited the mining of coal in any manner that would cause the subsidence of the property was enacted to prevent companies from exercising mining rights in a way that was detrimental to the surface. They were required to leave columns of coal underground to support the surface. The issue before the court was whether the government regulation constituted a taking. The Court held that it was a taking because making it commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it.¹³¹

The Court in *Penn Central Transportation Co. v. City of New York* introduced a balancing test to determine when regulations went too far.¹³² The three-part balancing test required a court to examine: (1) the character of the invasion, (2) the economic impact of the regulation as applied to the particular property, and (3) the property owner’s distinct investment backed expectations with respect to that property.¹³³ Two years later in *Agins v. City of Tiburon*, the Court adopted a two part test to determine if the regulation amounted to a taking, namely: (1) does the regulation substantially advance a legitimate governmental interest and (2) does the regulation deprive the owner of economically viable use of property?¹³⁴ In a unanimous decision, the court held that zoning ordinances that neither prevent the best use of the land nor extinguish a fundamental attribute of ownership are not takings.¹³⁵

In *Lucas v. South Carolina Coastal Council*, the Court held that the coastal protection plan, which prevented Lucas from developing the

¹²⁹ Most scholars agree that the Takings Clause was originally intended only to apply to physical takings, not regulatory takings. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (stating “[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”). Cf. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). Of course, the founding fathers did not think the federal government would regulate to the extent that it does today, and the Fifth Amendment did not originally apply to the states.

¹³⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹³¹ *Id.* at 412-15.

¹³² *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978).

¹³³ *Id.* at 137-38 (holding that there was not a taking when the government designated a building as a historical landmark and prevented the owner from constructing a substantial expansion on top of the building). The Court emphasized that the regulation did not deny the owners all profitable use of the building and, in fact, had not even precluded all development of the air rights above the building. Because designating the building a historic landmark had the effect only of decreasing the value of the property, and because it served an important purpose, the Court concluded that there was not a taking requiring just compensation. The regulation was reasonable for the public welfare.

¹³⁴ *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

¹³⁵ *Id.* at 261-63.

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one million dollar property that he bought, amounted to a taking since it deprived him all economically or productive use of his land.¹³⁶ This arguably leaves a good deal of individual landowners without a remedy when their property carries a larger share of the burden of regulations designed for the public interest. As noted in the introduction, this somewhat stingy approach to regulatory takings prompted a number of states to pass much more extensive regulatory takings laws.

Before addressing the state law expansion of protection against regulatory takings, there have been a number of relatively recent decisions by the Supreme Court that are decisively more pro-property rights and considerably less government regulation friendly.

B. Roberts Court Regulatory Takings

John Sprankling in his recent review of property under the Roberts Court argues that the Roberts Court has been much more pro-property than the Rehnquist Court.¹³⁷ *Kelo* was the last property decision of the Rehnquist Court,¹³⁸ and since then, the Roberts Court has handed down a number of cases expanding the scope, and thereby, the protection of the Takings clause, thus providing remedies that were not available before. Notable cases include: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹³⁹ *Koontz v. St. Johns River Water Management District*,¹⁴⁰ and *Horne v. Department of Agriculture*.¹⁴¹ Sprankling argues that these cases weaken the balancing approach of *Penn Central* as they usher in more “sweeping categorical rules” that make it more likely that the government’s action will be considered a taking.¹⁴²

Stop the Beach is important, not for its result, but for the fact that a majority of the Justices on the Court recognized that “a *judicial decision* which eliminates or substantially changes even a *minor* property right would violate the Constitution.”¹⁴³ *Koontz* is important because it expanded the *Nollan-Dolan* rule for conditions on development, from those that granted a permit but took an easement, to those that denied a permit for a failure to either limit the

¹³⁶ *Lucas v. South Carolina*, 505 U.S. 1003, 1016, 1019, 1027, 1032 (1992).

¹³⁷ John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 1 (2016).

¹³⁸ *Kelo v. New London*, was decided in the final year of the Rehnquist Court.

¹³⁹ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010).

¹⁴⁰ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

¹⁴¹ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015).

¹⁴² Sprankling, *supra* note 137, at 16.

¹⁴³ *Id.* at 17. Sprankling did a fair amount of intellectual work before arriving at this conclusion. As he notes, “Chief Justice Roberts and Justices Thomas and Alito would reach this result through the Takings Clause, while Justices Kennedy and Sotomayor would do so through the Due Process Clause.” *Id.*

development or spend money.¹⁴⁴ Under the *Nollan-Dolan* cases, when the government conditions a discretionary granting of a permit or variance on a property owner the government must satisfy two requirements to avoid a finding that a taking has occurred: first, there must be a “nexus . . . between the legitimate state interest and the permit condition created,”¹⁴⁵ They must be rationally related. Secondly, the burden must be roughly proportional to the justification for the condition.¹⁴⁶ In the *Koontz* case, a bare majority of the Court held that “[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.”¹⁴⁷ Further, it stated that “[s]uch so-called ‘in lieu of’ fees are utterly common-place and they are functionally equivalent to other types of land use exactions.”¹⁴⁸ It therefore held that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”¹⁴⁹

Justice Kagan writing for the four dissenters made a strong case for the breadth of impact of the decision when she wrote:

By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously ‘difficult’ and ‘perplexing’ standards, into the very heart of local land-use regulation and service delivery. Cities and towns across the nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity, as fees for liquor licenses do. All now must meet *Nollan* and *Dolan*'s nexus and proportionality tests . . . And the flexibility of state and local governments to take the most routine actions to enhance their communities

¹⁴⁴ *Koontz*, 133 S. Ct. at 2586, 2595.

¹⁴⁵ *Dolan*, 512 U.S. at 374.

¹⁴⁶ *Id.* at 388-91.

¹⁴⁷ *Koontz*, 133 S. Ct. at 2595.

¹⁴⁸ *Id.* at 2599.

¹⁴⁹ *Id.*

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will diminish accordingly.¹⁵⁰

Koontz, therefore provides a potential remedy where none existed before.¹⁵¹

The more recent case of *Horne v. Department of Agriculture* is important for three reasons: (1) it establishes that personal property gets the same protection as real property,¹⁵² (2) it expanded the test for physical takings of property established in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵³ and (3) it awarded what it considered market value compensation, but ignored the government's impact on the market value. In *Loretto*, the Court found that a city ordinance that required building owners to provide a small amount of physical space for cable companies' equipment amounted to a "permanent physical occupation of property" and was therefore a taking.¹⁵⁴ *Horne* involved a Department of Agriculture program authorized under the Agricultural Marketing Agreement Act of 1937 that was designed to help raisin growers by stabilizing the national price for raisins. The agreement required growers to set aside a certain percentage of their crop for the account of the Government, free of charge. During the years in questions this amounted to forty-seven percent of the crops. The government would then sell, donate or dispose of them in accordance with program guidelines. If there were any profits left over, the government would distribute them to the growers. The Hornes declined this "help" claiming that this was an uncompensated taking. The Supreme Court agreed, holding that since the Hornes would lose "the entire 'bundle' of property rights in the appropriated raisins— 'the rights to possess, use and dispose of them,'" this was a taking.¹⁵⁵ Although the government could have placed a regulatory limit on production without it amounting to a taking, here the government appropriated the property and thus, there was a taking.¹⁵⁶

¹⁵⁰ *Id.* at 2607 (Kagan, J., dissenting).

¹⁵¹ Sprankling, *supra* note 137, at 20 (noting "Before *Koontz* it was widely believed that the Takings Clause did not apply to fees or other general monetary obligations." *Id.* Swartz criticizes the decision thus, "Under the Court's reading of the Clause, non-elected, essentially life-tenured judges hold the power to determine the best policy to preserve wetlands in Florida. To the contrary, the Fifth Amendment does not grant judges the authority to weigh developer profits against the public interest under any interpretive theory." Andrew William Schwartz, *No Competing Theory of Constitutional Law Justifies Regulatory Takings Ideology* 34 STAN. ENVTL. L.J. 247, 249 (2015).

¹⁵² The Court rejected the Ninth Circuit reasoning that the Takings Clause accords less protection to personal property than to real property. *Horne v. Dep't of Agric.*, 750 F.3d. 1128, 1140 (9th Cir. 2014).

¹⁵³ See *Loretto v. Teleprompter*, 458 U.S. 419 (1982).

¹⁵⁴ *Id.* at 441. One might query whether this would be a taking in South Africa since the government did not acquire the title itself.

¹⁵⁵ *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435).

¹⁵⁶ *Id.*

As Sprankling notes, the difference between *Loretto* and *Horne* is that *Loretto* eliminated all of the owner's rights, whereas here the only relevant right was the right to dispose of the raisins and this was not completely destroyed because of the residual right to share in the proceeds of an any government sales.¹⁵⁷ Sprankling argues that "After *Horne*, even a government "occupation" which leaves an owner with substantial property rights would seem to be a *per se* taking, regardless of the underlying policy basis."¹⁵⁸

Horne exemplifies a very pro individual property rights stance against a government program that was designed to not only help Horne, but all other raisin growers.¹⁵⁹ This effectively unravels a program that had been in place since the great depression and the New Deal. It is uncertain at this point whether or not this will turn out badly for the raisin industry, or other industries that are potentially impacted by this decision.¹⁶⁰

C. *The Remedy?*

The remedy delivered in *Horne* was that Horne would be relieved of the obligation to pay \$483,843.53 which represented the fair market value of the raisins that he did not turn over to the government.¹⁶¹ This fair market approach makes some sense given that this was the amount the government claimed from Horne.¹⁶² However, the government argued, and Justice Breyer in his concurrence agreed, that the case should have been remanded to determine whether Horne had been justly compensated.¹⁶³ The argument was that there may not have been any compensation due if the Hornes would have complied with the order given that they would have also received a share of the proceeds

¹⁵⁷ Sprankling, *supra* note 137, at 23-24. This is because the raisins were being farmed for commercial use, and thus the rights to possess and use them were not relevant. This point is echoed in Justice Sotomayor's lone dissent where she argued that "it is not a *per se* taking if it does not result in the destruction of every property right." *Horne*, 135 S. Ct. at 2419 (Sotomayor, J., dissenting).

¹⁵⁸ Sprankling, *supra* note 137, at 24.

¹⁵⁹ The Cato institute celebrated it. Michael W. McConnell, *The Raisin Case*, 2015 CATO SUP. CT. REV. 313, 313 (2015).

¹⁶⁰ As noted by Christopher E. Mills, in *Raisin Cane: Takings Jurisprudence After Horne v. Department to Agriculture*, 23 GEO. MASON L. REV. 1 (2015). "At least thirty-seven agricultural marketing orders still exist, and at least nine of those authorize some type of volume control. Some use a reserve mechanism similar to the raisin order, and some otherwise restrict how growers can dispose of the fruits of their labor." *Id.* at 2. Of these two are most likely unconstitutional under *Horne*, while the others may be constitutional. *Id.* at 12-18.

¹⁶¹ *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2432 (2015).

¹⁶² Justice Roberts argues that "The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: \$483,843.53. 750 F.3d, at 1135, n.6. The Government cannot now disavow that valuation." *Id.* at 2433.

¹⁶³ *Id.* at 2431-32; *id.* at 2433-35 (Breyer, J., dissenting) (with Justices Ginsburg and Kagan joining).

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of any profits, and more importantly, the market price of raisins was higher because the program, namely the price support program, increased demand due to the program's quality standards and promotional activities.¹⁶⁴ The government, in fact argued that the Hornes would have received a net gain.¹⁶⁵

The Majority rejected the argument with very little analysis.¹⁶⁶ If in fact the program was working, then the government's contention has merit. The program only makes sense if on average raisin producers are better off under the program than without it. What the court allowed, in effect, was a windfall for the Hornes. They received the benefits of the program without paying any of the costs. They were in fact free riders.¹⁶⁷

As noted, Justice Breyer with Justices Ginsburg and Kagan dissented with regards to Part III of the Court's decision not to remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order's reserve requirement.¹⁶⁸ Breyer argued that the marketing order may afford just compensation and if that is the case then no taking would have taken place.¹⁶⁹ As Justice Breyer notes:

The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market . . . And any such enhancement matters. This Court's precedents indicate that, when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the

¹⁶⁴ *Id.* at 2432.

¹⁶⁵ *Id.*

¹⁶⁶ As Justice Roberts stated, "The best defense may be a good offense, but the Government cites no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking. Instead, our cases have set forth a clear and administrable rule for just compensation: 'The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.'" *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 83 L. Ed. 2d 376 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934)). *Id.* at 2432.

¹⁶⁷ *See, e.g.*, Brief of Sun-Maid Growers of California and the Raisin Bargaining Association *Amici Curiae* Brief in Support of Respondent (the U.S. Dep't of Agriculture) No 14-275, at 12-13.

¹⁶⁸ As he states: "The question of just compensation was not presented in the Hornes' petition for certiorari. It was barely touched on in the briefs. And the courts below did not decide it. At the same time, the case law that I have found indicates that the Government may well be right: The marketing order may afford just compensation for the takings of raisins that it imposes. If that is correct, then the reserve requirement does not violate the Takings Clause." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Breyer, J., concurring in part).

¹⁶⁹ This is similar to the concurrence of Froneman J in *Agri South Africa*, who felt that the new order rights were just and equitable compensation for the taking of the old order rights. *See Agri South Africa*, *supra* note 82, at para. 79.

taking to the value of the remaining (free-tonnage) raisins. More than a century ago, in *Bauman v. Ross*, 167 U. S. 548 (1897), this Court established an exception to the rule that “just compensation normally is to be measured by ‘the market value of the property at the time of the taking.’”

...

In my view, . . . the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received. And the Government does, indeed, suggest that the marketing order affords just compensation.¹⁷⁰

Of course if the program is not succeeding and the value added to the market price of raisins by the program does not offset the value of the raisins taken then, while there may be a taking, the just compensation would still not require the full market value of the raisins.¹⁷¹ Michael W. McConnell, in *The Raisin Case*, makes a strong argument that it is doubtful that the raisin reserves actually increased the price of raisins.¹⁷² Even if this is true, that does not mitigate against the need to remand to actually have the issue thoroughly vetted.

It is worth noting that it is not clear that the program in *Horne* would amount to a taking in South Africa. Following the holding in *Agri, SA*, it is not clear that the government acquired the same or similar right that the *Horne*’s lost.¹⁷³ The Raisin Committee, composed primarily of raisin growers, which takes title to the raisins does not get to do whatever it wishes with the raisins, but rather it is limited to disposing of the raisins in ways consistent with the purposes of the Act, for instance it “sells them in noncompetitive markets, . . . to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by “any other means” consistent with the purposes of the raisin program.”¹⁷⁴ The proceeds are often used to

¹⁷⁰ *Id.*

¹⁷¹ What is also odd about the decision is that the government never actually physically took the raisins. If they did, then the question would be what are the value of the raisins they took? Again, since the government (and taxpayer) was arguably responsible for the added market value of the raisins, it would be unjust to ask the government (and the taxpayer) to pay the full market value.

¹⁷² McConnell, *supra* note 159, at 328-31. He in fact criticizes justice Breyer for not being more skeptical of the government’s claims. *Id.* at 331.

¹⁷³ See *supra* note 84 (citing *Agri South Africa v. Minister for Minerals and Energy* 2013 4 SA 1 (CC) SA para. 58).

¹⁷⁴ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2424 (2015) (citing 7 CFR § 989.67(b)(5) (2015)).

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subsidize the export of raisins and as noted the individual growers retain an interest in any net proceeds from Raisin Committee sales.¹⁷⁵ In fact, the Order “ensures that reserve raisins will be sold ‘at prices and in a manner intended to maxim[ize] producer returns.’”¹⁷⁶ The federal government never actually physically took the raisins, but rather civilly fined the Hornes for not setting aside raisins for the government.

Even if the program would be found to be an expropriation under South African law, the Court would have been required to factor in the benefits of the plan, as well as the government purpose of stabilizing and increasing the market price of raisins in determining what compensation would be fair and just. Again, the factors for determining just and equitable compensation in South Africa require that the Court consider “the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.”¹⁷⁷

D. Critiques of Regulatory Takings

Not everyone has celebrated the Supreme Court expansion of regulatory takings,¹⁷⁸ and in fact some have argued that the remedy is not supported by “any of the competing theories of constitutional interpretation” but in fact stems “from a misunderstanding of the Clause as guaranteeing a laissez-faire political economy.”¹⁷⁹ As a judicially created doctrine that puts the weight of the Court behind individual property rights and against the power of political branches to enact land use laws and regulations for the common good, regulatory takings doctrine is arguably flawed from the perspective of political process.¹⁸⁰ Andrew W. Schwartz argues that “Reliance instead on

¹⁷⁵ *Id.*

¹⁷⁶ *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2449 (2015) (Sotomayor, J., dissenting) (citing § 989.67(d)(1)).

¹⁷⁷ Section 25(3) d-e.

¹⁷⁸ See J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995); Treanor, *supra* note 129. For praise of the *Horne* decision, see Brian T. Hodges and Christopher M. Kieseraa, *Horne v. Department of Agriculture: The Takings Clause and the Administrative State*, 16 *ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS* 49 (2015); McConnell, *supra* note 159, at 314-15.

¹⁷⁹ Schwartz, *supra* note 151, at 248. It is somewhat curious that Oliver Wendell Holmes, who is famous, for among other things, stating that the Constitution does not embody Herbert Spencer’s social statistics, is the one responsible for writing the majority opinion in the case that started the doctrine of regulatory takings. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In 1905 Justice Holmes wrote in his dissent in *Lochner v. New York* (1905), “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics . . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”

¹⁸⁰ Treanor, *supra* note 129. Treanor argues that “The framers did not desire substantive protection of all property interests because, contrary to much legal scholarship, liberalism was not the dominant world view

decisions by the political branches of government would promote key values of the Constitution, protect the community's interests in the environment, health, and safety, and result in greater overall fairness and efficiency."¹⁸¹ Schwartz argues for the end of the doctrine of regulatory takings in somewhat apocalyptic terms, as he states:

The Earth faces a stiff challenge in slowing environmental degradation: global warming, sea level rise, extreme weather, drought, loss of species, dying oceans and marine life, loss of arable soil, wildfires, groundwater contamination, air pollution, pandemics, congested cities, deforestation, and loss of open space. The United States suffers from a deficiency in affordable housing, homelessness, urban congestion, and dying cities . . . Drought and food shortages induced by climate change and contamination of air, water, and soils in poorer areas of the World have been, and will increasingly be, a catalyst for "global instability, hunger, poverty, and conflict." While these environmental and social problems may not wipe out civilization on Earth, a consensus in the scientific community indicates that unless developed countries change their patterns of consumption of natural resources, degradation of the Earth's natural systems may be unavoidable.¹⁸²

E. State Law Developments in Regulatory Taking

As noted, there were legislative responses by the states, both to the *Kelo* doctrine of taking for public purposes and the somewhat limited role of the Takings Clause in cases involving governmental regulation of property. While the former response gave property owners the remedy of limiting the government from being able to take property at all, the latter provides for the possibility of damages where none were available before. For the purposes of this paper, I will only address the latter response and the remedies provided under state law for regulatory takings. It should be noted at the outset, that this response was not nearly

at the time of the framing. Rather, republicanism continued to exert substantial influence on political discourse. Many of the framers believed that government could -- and in the interests of society often should -- limit individuals' free use of their property; balancing societal needs against individual property rights was left in large part to the political process." *Id.* at 783; *See also* Schwartz, *supra* note 151, at 248.

¹⁸¹ Schwartz, *supra* note 151, at 247-49.

¹⁸² *Id.* at 249-50.

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as widespread as the response to the *Kelo* decision. Efforts at passing legislative changes were only successful in a handful of states, namely, Texas, Louisiana Mississippi, Florida, Oregon, and Arizona.

While the legislation in these states was largely designed to provide damages for the disproportionate impact of regulations on an individual's property while leaving the regulation standing, the effect, in part, has been to discourage local and state land regulation efforts.¹⁸³

On the one hand, it is unfair for an individual property owner to carry a disproportionate burden for land use measures designed for the common good. On the other, this legislation has undermined the ability of state and local government to regulate for the common good and has also had the unfortunate consequence of reducing community input into land use decisions.¹⁸⁴

Because the remedy for compensation for physical takings was originally based on the idea that such takings were susceptible to process failure, Treanor argues that compensation for regulatory takings today should only be mandated when process failure is particularly likely "when there has been singling out or in environmental racism cases, where there has been discrimination against discrete and insular minorities . . . Except where process failure is likely, the decision about whether to compensate should be left to the political process."¹⁸⁵

Unfortunately, some of this legislation is actually causing process failures, as opposed to providing a remedy when such failures occur.¹⁸⁶ While there is often community input into land use regulations, there is not the same level of input into the waivers or variances often granted under this legislation.¹⁸⁷ These laws might actually have a negative effect on the ability of low income neighborhoods to change land use zoning to get out from under exiting detrimental land use regimes, which are the product of failed political processes, including

¹⁸³ John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 439, 508 (2009) (stating "The Takings clauses in Florida and Oregon were supposed to generate financial awards for property owners without necessarily compromising the regulations themselves. The reality in Florida and Oregon has been quite different, with state and local regulators waiving, repealing, or simply not adopting land use and environmental regulations essentially across the board . . . The deregulatory effect of takings measures is partly attributable to the large size of certain claims, the lack of dedicated funding mechanisms for paying claims, and the limited budgets of state and local governments."). *Id.* at 501. The starkest example of this was the result of Oregon's measure 37. There were over 7,000 claims and the government paid compensation in only one case. *Id.* at 489-90. All the other claims were settle with a waiver of the regulation. *Id.* at 487-89.

¹⁸⁴ Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1549 (2007).

¹⁸⁵ Treanor, *supra* note 129, at 784. He goes so far as to argue that this should be the case even when there has been government seizure of property. *Id.*

¹⁸⁶ *Id.* at 513-16.

¹⁸⁷ Jacobs, *supra* note 184, at 1549.

environmental racism.¹⁸⁸

F. State Legislation

Six states currently have statutes that provide compensation for land use regulations that do not “take” property, but instead, merely diminish property values. Several more have legislation that requires land use regulation impact analysis.¹⁸⁹

Legislators in Mississippi, Louisiana, and Texas all passed legislation granting landowners a remedy when land use regulations impact, but do not necessarily destroy, the fair market value of their property. Such laws risk opening up the floodgates of litigation since land use regulations often have an expansive and wide-ranging effect on the value of property, from removing all economic use of the property to a de minimis reduction in value. At the de minimis end of the spectrum, one could imagine a number of suits designed to thwart land use regulations rather than actually seeking damages for a loss in property value. These three states addressed the issue of de minimus claims and claims that may be designed to thwart regulations, rather than seek compensation, with significant thresholds. Mississippi, in 1999, was the first of three to pass this kind of legislation. The state enacted a relatively high threshold of a 40% reduction of fair market value for a landowner to bring this kind of statutory “takings” case.¹⁹⁰ Texas followed in 2000, with a lower threshold of 25%,¹⁹¹ and then Louisiana in 2005 with a threshold of merely 20%.¹⁹² As noted by Krier and Sterk, the Mississippi and Louisiana laws only apply to regulations that impact agricultural land and have not resulted in any published opinions.¹⁹³ They further note that while the Texas law is broader and has resulted in a few opinions, those opinions have not been sympathetic

¹⁸⁸ *Id.* at 1550-52. Since low income and minority neighborhoods carry a disproportionate burden of locally undesirable land uses, such as waste disposal sites, they need to be able to have a voice in future land use planning to rectify this. As noted by Jacobs, the literature firmly establishes this. See Jacobs, *supra* note 184, at 1552; see, e.g., Vicky Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1384 (1994).

¹⁸⁹ See Steven J. Eagle, *The Birth of the Property Rights Movement*, POL’Y ANALYSIS, Dec. 15, 2005, at 1, 26-27, <http://www.cato.org/pubs/pas/pa558.pdf> (discussing takings impact assessment statutes in Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Tennessee, Texas, Utah, Washington, and West Virginia); see also JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (2013) (stating that a dozen or so states require takings impact assessments.).

¹⁹⁰ MISS. CODE ANN. § 49-33-7(h) (1999).

¹⁹¹ TEX. GOV’T CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2000).

¹⁹² LA. REV. STAT. ANN. § 3:3602(11) (2005).

¹⁹³ Krier and Sterk, *supra* note 14, at 78.

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to the landowners.¹⁹⁴ In states like Florida,¹⁹⁵ Oregon¹⁹⁶ and most recently in Arizona,¹⁹⁷ the legislation in question has no such threshold to bringing a claim.¹⁹⁸

Oregon's first attempt at this type of legislation, Measure 37, which came into effect in 2004, caused considerable problems for the state.¹⁹⁹ The legislation provided that:

Owners of private real property are entitled to just compensation, equal to the reduction in the fair market value or modification or removal of the regulation, when a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property . . . and has the effect of reducing the fair market value of the property.²⁰⁰

Measure 37 also required that the landowner file a claim with the state and required the state to either settle the claim or waive the regulation within 180 days.

Pursuant to this law, landowners filed approximately 7,000 claims, worth around \$17 billion, that the state was able to process within the 180-day time limit.²⁰¹ Because the state was required to either waive the regulation in question or to pay compensation, and because the state had little time and less money to pay out the compensation, it met its deadline by waiving the regulations.²⁰² Under Measure 37, there was only one case in which compensation was made to a claimant.²⁰³

¹⁹⁴ *Id.* at text accompanying footnote 122.

¹⁹⁵ FLA. STAT. § 70.001(2012).

¹⁹⁶ OR. REV. STAT. § 197.352 (2015); *id.* § 195.305.

¹⁹⁷ Proposition 207 (Ariz. 2006) (ARIZ. REV. STAT. §§ 12-1131-1138), [http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20\(I-21-2006\)](http://www.azsos.gov/election/2006/General/BallotMeasureText/PROP%2020X%20(I-21-2006)).

¹⁹⁸ According to Krier and Sterk, there has been no reported judgement requiring compensation under the Arizona statute, and the state may easily avoid liability based on a health and safety exception to the act. Krier and Sterk, *supra* note 14, at 80.

¹⁹⁹ As noted by John D. Echeverria & Thekla Hansen-Young, "Measure 37 also generated new land conflicts. Many neighbors of Measure 37 claimants filed lawsuits challenging the issuance of waivers by the state or local governments. In several instances, cities sued counties over their approval of Measure 37 claims. The volume of controversy was even greater at the administrative level; neighboring landowners wrote over eighty-five thousand letters to the state registering objections or other comments on over two-thirds of the claims filed with the state." Echeverria & Hansen-Young, *supra* note 183, at 486.

²⁰⁰ OR. REV. STAT. § 197.352 (2005).

²⁰¹ See Oregon Department of Land Conservation and Development, Ballot Measures 37 (2004) and 49 (2007) Outcomes and Effects January 2011.

²⁰² *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ENVTL. L. REP. 10516, 10524, 10526, 10536 (2009). The authors similarly noted that "Landowners were routinely advised to reserve their Measure 37 rights by making a claim even if they had no actual plans of developing their land."

²⁰³ *Id.*

The result was the passing of Measure 49, which significantly limited the scope of the land use regulations that would be considered takings. The people of Oregon were not likely impressed by the fact that adult establishments were getting land use regulation waivers and so Measure 49 excluded this type of regulation as well as others. Specifically Measure 49 provides in part that:

This does not apply to land use regulations that were enacted prior to the claimant's acquisition date or to land use regulations that: (a) Are public nuisances under common law; (b) Protect public health and safety; (c) Are required to comply with federal law; (d) That restrict or prohibit the use for the purpose of selling pornography or performing nude dancing; (e) Rezone land to an industrial zoning classification for inclusion within an urban growth boundary; or (f) Rezone urban growth boundary to industrial zoning classification.²⁰⁴

Even with these changes, however, the Oregon legislation has had and will continue to have the effect of undermining the ability of residents to have input into decisions regarding the character of their neighborhoods. While changes to neighboring properties generally required "public participation or proof that a land use change met a minimum standard, such as public welfare or unusual hardship" the new regime results in the waiver of regulations without any public input.²⁰⁵

Like Oregon, Florida did not impose a minimum for bringing a statutory takings claim. Florida's statute requires notice to neighboring landowners whenever one claim is submitted, and so there is potential for more community input than under the Oregon legislation.²⁰⁶ However, the notified neighbor cannot make a claim under the Act if the notifying neighbor was granted relief under the Act and that relief impacted the notified neighbor's property value.²⁰⁷

When it was adopted in 1995, Florida's law was the most far reaching legislation in the nation.²⁰⁸ Section 70.001, Florida Statutes

²⁰⁴ OR. REV. STAT. § 195.305 (2007). Other changes include a different mechanism for evaluating compensation, a limit on the number of dwelling places one could request to build, and it abolished claims that sought authority to develop new commercial or industrial uses. Echeverria & Hansen-Young, *supra* note 183, at 496.

²⁰⁵ Jacobs, *supra* note 180, at 1549. "Neighbors have no legally defined opportunity to voice their concerns about the effect of zoning waivers on neighboring properties or the surrounding community."

²⁰⁶ *Id.* at 1549.

²⁰⁷ FLA. STAT. ANN. § 70.001(3)(e) (West 2015).

²⁰⁸ Echeverria & Hansen-Young, *supra* note 183, at 447.

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(2012), provides in part:

(1) [T]he Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) 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.

(3) For purposes of this section:

....

(d) 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.

(e) The terms “inordinate burden” and “inordinately burdened”:

1. 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 permanently 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 respect to the real property as a whole, or that the property 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 good of the public, which in fairness should be borne by the public at large.

On its face, the legislation is more limited than the Oregon legislation, which came after the Florida law, in that it limits claims to those effecting “existing use” and requires an “inordinate burden.” Also, unlike the Oregon statute it is not retroactive, does not apply to temporary limitations or moratoriums.²⁰⁹ Like Oregon’s Measure 49, it

²⁰⁹ FLA. STAT. ANN. § 70.001(3)(e) (West 2015).

provides exemption for efforts to abate nuisances.²¹⁰ However, the term “existing use” is defined to include future uses that are reasonably foreseeable and are non-speculative.²¹¹ While the inordinate burden requirement does have a limiting effect, the inordinate burden requirement is a weak version of the Penn Central test in that it focuses on the part of the test most favorable to a claimant, namely the “reasonable investment-backed expectations” of the party.²¹²

Two cases in 2015 threatened to push the envelope further, resulting in the state legislature amending the Act:²¹³ *Smith v. City of Jacksonville*,²¹⁴ and *FINR II, Inc. v. Hardee County*.²¹⁵ Both cases raised the question as to whether the Act is limited to regulations that apply directly to a given property or if the Act also applies to regulations of neighboring properties.²¹⁶ On the one hand, one’s property value may be just as adversely impacted by a land use regulation on one’s neighbor’s property, as a land use regulation directed to one’s own property.²¹⁷ On the other hand, the damage to property values of any land use regulation could extend indefinitely with no clear break in the legal causation chain of harm to property values.

G. *The Smith Case*

In *Smith*, the Smiths purchased a parcel of undeveloped riverfront property in 2005, which was zoned “residential low density.” The undeveloped lot next door was owned by the City and was restricted to the leisure and recreation of Duval County employees.²¹⁸ As the dissenting opinion of Makar notes, “The easterly lot had a luxury home with dock and landscaping; the westerly lot was zoned residential and had been restricted by deed—for fifty years—to be “used solely and only for the recreation and enjoyment of such employees of Duval

²¹⁰ *Id.*

²¹¹ Under the Act, a future use is an existing use if five conditions are met: the use (1) is “reasonably foreseeable,” (2) is “non-speculative,” (3) is “suitable for the subject real property,” (4) is “compatible with adjacent land uses,” and (5) creates “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).

²¹² Krier and Sterk do not believe that the statute is more expansive than existing constitutional doctrine, and they note that “the few decided Florida cases have construed it narrowly.” Krier and Sterk, *supra* note 14, at 79. While this is generally true, the FINR case threatened this interpretation prompting legislative reform.

²¹³ Laws 2015, c. 2015-142, § 1, eff. Oct. 1, 2015.

²¹⁴ *Jacksonville v. Smith*, 159 So.3d 888, 889 (Fla. Dist. Ct. App. 2015).

²¹⁵ 164 So.3d 1260 (Fla. Dist. Ct. App. 2015).

²¹⁶ *Jacksonville v. Smith*, 159 So.3d 888, 889 (Fla. Dist. Ct. App. 1st Dist. 2015). The Florida Supreme Court accepted review of the above decision on May 22, 2016.

²¹⁷ Or, as argued above, by a waiver of a land use regulation.

²¹⁸ *Jacksonville v. Smith*, 159 So.3d at 889.

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County.”²¹⁹ After the Smiths purchased the property, the City obtained a cancellation of the deed restriction, and in 2007, the City rezoned its property so that it could construct a fire station which was built between 2010 and 2011.²²⁰

The Smiths filed a complaint under the Bert Harris Act for \$470,000 arguing that the construction of the fire station “inordinately burdened” [their] property because it effectively made the property unmarketable as a luxury home site.²²¹ As the dissenting opinion of Makar describes it:

The fire station, now in existence, is used to respond to general fire and rescue emergencies, as well as marine distress calls. It utilizes a commercial-level dock, which is used not only by two fire boats, but also port security and/or Florida Marine Patrol boats. The fire station property is now separated by the Smiths’ property by an eight-foot chain-link fence, which is immediately adjacent to the fire station’s parking lot. The dock, fence, and fire station height exceed the limits allowed by residential zoning. The fire station also has a balcony overlooking the Smiths’ property upon which fire fighters congregate. The parking lot is lighted throughout the night. There is a large generator placed near the Smiths’ property, and the building has speakers facing the property from which announcements are made. Claxons are also sounded when an emergency call is received at the fire station, and emergency vehicles may use sirens when departing from it. In short, the City has essentially created a light industrial use for its parcel, without notice to the Smiths.²²²

The City argued that the Act did not apply because the City had not taken any action directly against the Smith property, but only the property next door. The trial court rejected the argument and directed that a jury be impaneled to determine the total amount of compensation due.²²³

The City appealed and the Court of Appeals overturned the trial

²¹⁹ *Id.* at 897 (Makar, J., dissenting).

²²⁰ *Id.*

²²¹ *Id.* at 898.

²²² *Id.* at 899.

²²³ *Id.* at 889-90.

court on the basis that the Smith's property was not itself subject to any regulatory action.²²⁴ As the DCA noted, the trial court's reading of the Act goes beyond the Act's intended purpose and would open the floodgates of litigations.²²⁵

In his partially dissenting opinion, Judge Swanson argued that, "The statutory phrase "directly restricted or limited the use of real property" is properly construed to refer to the issue of causation and simply requires the action of a governmental entity to immediately and detrimentally affect the value of real property without the intervention of other factors."

The dissent of Judge Makar argued that if the legislature intended the more limited application of the Act it could have used language similar to Texas, which explicitly limits the application of its Act to government action that "(i) affects an owner's private real property that is the subject of the governmental action."²²⁶ Makar further argued that the language requiring "direct impact" only applied to the first of two alternatives for making a claim.²²⁷ In other words, the definition of "inordinate burden" and "inordinately burdened" in section 70.001(3)(e)(1) provides two alternative ways to show the inordinate burden:

1. One is when the government has "directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property," and the other separated by "or" is
2. When a "vested right to a specific use of the real property with respect to the real property as a whole, or that the property 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 good of the public, which in fairness should be borne by the public at large."²²⁸

²²⁴ *Id.* at 888-89.

²²⁵ *Id.* at 894. The majority opinion relied on the text and the State Attorney General opinion that the intent of the legislation was to require direct application of a regulation to the property in question before the Act applied. AGO Fla. 95-78 (1995).

²²⁶ *Id.* at 906 (Makar, J., dissenting).

²²⁷ *Id.*

²²⁸ *Id.* at 907 (Makar, J., dissenting).

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The second option does not include language requiring a “direct” restriction or limit and thus, since the Smiths’ claim satisfy the requirement that they were “left with existing or vested uses that are unreasonable such that the [they] bear[] permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large, there was a taking under the act.”²²⁹

H. The FINR Case

In the Second District Court of Appeal case, the reasoning of the dissenting opinions of Judges Makar and Swanson from the *Smith* case won the day. Here, the facts were even more stark. The Florida Institute for Neurological Rehabilitation (FINR) brought its Harris Act claim after Hardee County Florida approved a special exception for CF Industries, Inc., to operate a phosphate mine within 150 to 207 feet from FINR’s property, rather than the quarter mile under existing county codes and plans.²³⁰ FINR claimed that the noise, vibrations and dust made it virtually impossible to operate a brain treatment and vocational service facility for veterans and survivors of brain injuries with a resulting decrease in the land’s fair market value of \$38,000,000.²³¹ This was due to the fact that the exception reduced the use of the land to “merely agricultural and recreational land.”²³²

The Second District Court of Appeal rejected the reasoning in *Smith*, holding that the owner of the property adjacent to the property that was subject to Hardee County’s governmental action, can maintain a cause of action under the Bert Harris Act.²³³ As the court held:

To limit the Act to afford a cause of action only to a property owner whose property was subject to the direct action of a governmental entity would be to rewrite the statute to insert an additional requirement not placed there by the legislature and would defeat the legislature’s stated intent . . . section 70.001(2) contains no requirement that the regulation giving rise to the inordinate burden directly affect the burdened property. The Act establishes broad protection for property owners

²²⁹ Judge Makar notes that this was the basis for the decision below.

²³⁰ *FINR II, Inc. v. Hardee County*, 164 So.3d 1261-62 (Fla. Dist. Ct. App. 2015).

²³¹ *Id.* at 1262.

²³² *Id.*

²³³ *Id.* at 1263. It then certified a conflict with *Jacksonville v. Smith*, 159 So.3d 888 (Fla. 2015).

who suffer economic loss from governmental property regulations and actions.²³⁴

The court expressly endorsed Makar J's argument that "if the Florida legislature had intended to enact a more narrow meaning of governmental action . . . they could have easily done so."²³⁵ As well as Judge Swanson's argument that 'directly restricted or limited the use of real property' is an issue of causation, simply requiring that "the action of a governmental entity . . . immediately and detrimentally affect the value of real property without the intervention of other factors."²³⁶ The Court debunked the claim by the Smith majority that this would "open a floodgate of litigation, [and] create a 'cataclysmic change in the law of regulatory takings.'"²³⁷ As the Court stated, "There is no language in the Act that would allow for its application to property that was only incidentally or remotely affected as a result of government action, and we do not read it to provide relief to those property owners who are so far removed from the action that the government could not reasonably anticipate their harm."²³⁸

Finally, the Court noted that should the Smith majority would allow for the government to disregard vested rights and legitimate interests of adjacent landowners for all sorts of land uses that could impact one's property value, e.g. "jails, landfills, airports, waste incinerators, sewage treatment plants, power plants . . . [as well as] excavation, blasting, and mining in areas previously protected from such intrusions."²³⁹

I. The Legislative Response

Despite the logic and assurances, the Florida Legislature, anticipating a flood of litigation, immediately passed a bill amending the Harris Act which was promptly signed into law by the governor.²⁴⁰ The relevant amendments changed the definition of "property owner" in section 70.001(3)(f) so as to limit the protection of the act to those who "hold[] legal title to the real property that is the subject of and directly impacted by the action of a governmental entity." The amendment also changed the definition of "real property" in subsection

²³⁴ *Id.* at 1264.

²³⁵ *Id.* at 1265.

²³⁶ *Id.*

²³⁷ *Id.* at 1266.

²³⁸ *Id.* (citing with approval Judge Makar's dissenting opinion at 908 n.26.).

²³⁹ *Id.* (citing with approval Judge Swanson's dissent at 896).

²⁴⁰ Laws 2015, c. 2015-142, § 1, eff. Oct. 1, 2015.

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(g) to clarify that it only includes, “parcels that are the subject of and directly impacted by the action of a governmental entity.”²⁴¹

J. Concluding Remarks

The Smith case is currently in front of the Florida Supreme Court and so it is hard to say whether the court will be sympathetic to the plight of the Smiths or the reasoning of the majority in the Smith case. Given the legislative change, there no longer any grounds to fear a flood of litigation. Of course, for cases brought before the amendment like Smith and *FINR*, the Court could limit its decision to the facts of Smith, given that Smith is the adjoining neighbor and at least in this context, clearly the most adversely impacted property in the neighborhood.

Critics of the Oregon and Florida legislation argue that the laws eviscerate regulatory authority,²⁴² undermine local democracy,²⁴³ benefits special interests, e.g. the timber industry in Oregon and huge landowners like the U.S. Sugar corporation, the St. Joe Paper company, and other large developers in Florida,²⁴⁴ works to the detriment of average homeowners²⁴⁵ and lower income and minority communities.²⁴⁶ As the authors of *Land Use Planning and Development Regulation Law*,²⁴⁷ point out, “[a]n arguable deficiency with these efforts to treat property owners more fairly is the notable omission of any effort to recapture for the public the windfall gains conferred on landowners by virtue of public improvements and government regulation.”²⁴⁸

While there were a few articles written in support of this legislation shortly after it was passed, there has been no defense since which evaluates the laws impacts, or which puts them in a positive light.²⁴⁹ While Krier and Sterk argue that this law and other similar legislative reforms (outside of Oregon) have had little impact, their empirical analysis is based strictly on decided cases and says little about

²⁴¹ *Id.*

²⁴² Echeverria & Hansen-Young, *supra* note 183, at 499. *See, e.g., Florida’s Private Property Rights Protection Act: Does It Inordinately Burden the Public Interest?*, 48 U. FLA. L. REV. 695 (1996) and Sylvia R. Lazos, *Florida’s Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. UNIV. L. REV. 315 (1995).

²⁴³ Echeverria & Hansen-Young, *supra* note 179, at 513.

²⁴⁴ *Id.* at 504-05.

²⁴⁵ *Id.* at 505.

²⁴⁶ *See id.*; *see also* Jacobs, *supra* note 184, at 1550-54.

²⁴⁷ Julian Conrad Juergensmeyer & Thomas E. Roberts, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 10:11 (3d ed. 2016).

²⁴⁸ *Id.*

²⁴⁹ For a complimentary article, *see* Powell, Rhodes, & Stengle, *A Measured Step to Protect Private Property Rights*, 23 FLA. ST. U. L. REV. 255, 296 (1995) (authors were drafters of the bill).

the chilling effect of such legislation on municipal land use and regulation generally.²⁵⁰ There may be less case law, and less cases won by property owners and developers, because there is less regulation and the regulations passed may be more cautious, if not more reasonable. Finally, there may be less case law because municipalities are settling or giving into the demands of developers and property owners.

IV. CONCLUSION

As detailed above, the United States and South Africa stand in sharp contrast to each other in how they balance the power of the state to regulate for the common good and individual property rights. States like Florida are pushing the envelope to the extreme of protecting individual property owners to the potential detriment of the people as a whole, while recent legislation in South Africa has the potential of over-correcting for the wrongs of the past through uncompensated takings under the guise of state guardianship. While it is too early to know how this recent legislation in South Africa will play out, the deleterious effects of the legislation in Florida and in Oregon is relatively well established. There is a need in both countries for a balanced approach, and each has arguably gone too far in opposite directions.

²⁵⁰ In fairness, Krier and Sterk noted that municipalities may be litigation averse and thus prone to making concessions to litigious developers. Krier and Sterk, *supra* note 14, at n.65. They cite with approval Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1680 (2006) (noting that the risk aversion of local governments with respect to taking claims may reduce the incidence of regulation). They do not, however, acknowledge that legislation like the Florida Harris Act may result in less case law, merely by virtue of the chilling effect of such laws on local regulations.