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Regulatory Takings - The Weak and the Strong

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REGULATORY TAKINGS — THE WEAK AND THE STRONG

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In recent years, concern over environmental quality has prompted a spate of regulations designed to safeguard land,[1] air,[2] and water.[3] In some instances, these regulations have been held to contravene the takings clause of the Fifth Amendment to the United States Constitution.[4] More often, however, environmental regulations have withstood Fifth Amendment challenges,[5] causing disgruntled property owners to pursue nonjudicial avenues to stave off the perceived threat of these regulations to their private ownership rights. One such avenue has been the state legislatures.[6] Recently, Arizona, Delaware, Indiana, Utah, and Washington have adopted laws that attempt to stem the tide of environmental regulation.[7] These laws are modeled after an executive order issued by President Reagan in 1988.[8] They require state agencies to assess, before implementing any new regulatory program, whether the takings clause of the Fifth Amendment will require the payment of just compensation to the affected property owners.[9] This approach is quite similar to the National Environmental Policy Act,[10] which requires federal agencies to prepare an environmental impact statement before undertaking any major program.[11] In Missouri, Governor Carnahan recently issued an executive order requiring a takings assessment by state agencies before they promulgate new regulations.[12]

In many states,[13] property rights advocates have succeeded in introducing legislation that goes a step further than the laws patterned after the Reagan executive order. Basically, this legislation would entitle a property owner to obtain compensation automatically if his or her land declined in value by fifty percent or more as a result of a new environmental regulation.[14] "Strong" property rights bills of this type are a response to the recent Supreme Court decision in *Lucas v. South Carolina Coastal Council*.[15] Although *Lucas* sustained a landowner's challenge to an environmental regulation,[16] the Court stated that even a 95% decline in value may not constitute a compensable taking, depending on the facts of the case.[17]

Environmental groups ardently oppose both types of property rights legislation.[18] These groups foresee a major expansion in the takings concept that could rein in environmental regulation.[19] This comment will discuss the background of the regulatory takings concept and analyze the decision in *Lucas*. Next, both types of property rights legislation will be examined. Finally, this comment will explore the potential ramifications of property rights legislation, and conclude that the tension between environmental groups and property rights advocates will escalate significantly as a result of these statutes.

I. BACKGROUND

A) The Fifth Amendment

The Fifth Amendment to the United States Constitution provides ". . . nor shall private property be taken for public use, without just compensation."[20] This portion of the Fifth Amendment is known as the takings clause. In addition to restricting the federal govern-

1 *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988); National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(a) (1988).

2 *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).

3 *See, e.g.*, Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C. §§ 1251-1387 (1988).

4 *See, e.g.*, Lucas v. South Carolina Coastal Council, __U.S.__, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (1991), *cert. denied*, __U.S.__, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991).

5 *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1978); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

6 *See* Marianne Lavelle, *The 'Property Rights' Revolt*, 15 NAT'L L.J. 1 (May 10, 1993).

7 *Id. See also* Barbara Marsh, *Small Firms Win Big in Many Statehouses This Year*, WALL ST. J., Sept. 17, 1993, at A11.

8 Lavelle, *supra*, note 6, at 34. *See* Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988).

9 Lavelle, *supra*, note 6, at 34. *See also* notes 126-27 and accompanying text.

10 *See supra*, note 1.

11 *See* 42 U.S.C. § 4332 (1988).

12 Exec. Order No. 93-13 (July 2, 1993). This executive order was in response to Senate Bill 315. Governor Carnahan vetoed this bill because "it contain[ed] a burdensome review process" that would make certain decisions reviewable by the Attorney General. *See* Letter from Governor Mel Carnahan to the Secretary of State of the State of Missouri (July 2, 1993) (on file with the Missouri Secretary of State's office). The executive order's takings assessment requirement is not substantively different from the one in the bill. Moreover, the executive order has essentially the same force and effect as a legislative pronouncement.

13 Washington, Idaho, Michigan, New Hampshire, South Dakota, North Dakota, Minnesota, Wisconsin, Alaska, New York. Lavelle, *supra*, note 6, at 34.

14 *See* Lavelle, *supra*, note 6, at 34.

15 __U.S.__, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992).

16 __U.S.__, 112 S.Ct. at 2902.

17 __U.S.__, 112 S.Ct. at 2894.

18 *See* Lavelle, *supra* note 6, at 34.

19 *Id.*

20 U.S. CONST. amend. V.

ment's power to appropriate private property, the takings clause also is applicable to the states via the due process clause of the Fourteenth Amendment.[21] The Fifth Amendment was not intended to prohibit the taking of property by the government; rather, it "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[22] Thus, the government can take private property consistent with the Fifth Amendment, provided it pays just compensation to the owner.

B) The Nuisance Doctrine as an Exception to the Fifth Amendment

Under principles of nuisance, a regulation promulgated to prevent serious harm to the public does not effect a taking of private property, and consequently just compensation is not required.[23] The first significant Supreme Court case addressing the nuisance exception was *Mugler v. Kansas*.[24] In *Mugler*, the defendant was convicted of manufacturing beer for purposes of sale in violation of state regulations that prohibited the sale of intoxicating liquors.[25]

The defendant challenged the validity of the prohibition, relying on *Pumpelly v. Green Bay Co.*,[26] an eminent domain decision, for his contention that the regulation constituted a deprivation of his property requiring just compensation.[27]

Rejecting the defendant's reliance on *Pumpelly*, the Court declared that:

> [a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[28]

After disposing of the defendant's takings claim, the Court subjected the liquor prohibition regulation to rational-basis due process analysis.[29] The Court then held that the regulation was constitutionally valid.[30] As a result of the decision in *Mugler*, regulations that had the effect of impinging on property rights could be challenged only by demonstrating that they were not rationally related to the furtherance of a legitimate state purpose.[31] The regulatory takings doctrine had yet to surface.[32]

The Supreme Court consistently applied the *Mugler* framework in subsequent decisions involving challenges to the validity of land use regulations. In *Reinman v. City of Little Rock*,[33] the plaintiffs were seeking to enjoin enforcement of a municipal ordinance that prohibited the operation of livery stables in the city of Little Rock.[34] The Court responded to the plaintiffs' takings contention by stating that it was within the City's police power to restrict the operation of livery stables, so long as the rational-basis standard of the due process clause was satisfied.[35] In *Hadacheck v. Sebastian*,[36] the Court upheld a regulation that prohibited the manufacture of bricks within the city of Los Angeles.[37] The Court again gave wide latitude to the state to regulate through its police power.[38] These decisions confirmed the viability of the nuisance exception to the takings clause.[39]

C) Regulatory Takings

1) Nature of the Doctrine Prior to *Lucas*

The origin of the regulatory takings doctrine in the Supreme Court was the 1871 case of *Pumpelly v. Green Bay Co.*[40] In *Pumpelly*, the plaintiff sought compensation from the government for damages to his land caused by flooding.[41] The flooding

21 *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897).
22 Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).
23 Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).
24 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887).
25 123 U.S. at 624-26, 31 L.Ed. 207-08.
26 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871). *See infra*, notes 40-44 and accompanying text for a discussion of *Pumpelly*. For decisions declining to find a regulatory taking, see Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996 (1897); Transportation Co. v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1879); and Legal Tender Cases, 79 U.S. (12 Wall.) 457, 20 L.Ed. 287 (1870).
27 *Mugler*, 123 U.S. at 667, 8 S.Ct. at 300.
28 123 U.S. at 668-69, 8 S.Ct. at 300-01.
29 123 U.S. at 669, 8 S.Ct. at 301.
30 123 U.S. at 671, 8 S.Ct. at 302.
31 *See* Robert M. Washburn, *Land Use Control, The Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162, 180 (1993).
32 *See* Washburn, *supra*, note 31, at 179. *Cf. Pumpelly, supra*, note 26, 80 U.S. (13 Wall.) at 177-78, 20 L.Ed. at 560-61.
33 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915).
34 237 U.S. at 172, 35 S.Ct. at 511.
35 237 U.S. at 176-77, 35 S.Ct. at 513.
36 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).
37 239 U.S. at 414, 36 S.Ct. at 147.
38 239 U.S. at 410, 36 S.Ct. at 145.
39 For other cases applying the *Mugler* framework *see* Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (regulation prohibiting sand and gravel mining did not violate the Fourteenth Amendment); and Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (requiring owner of infected cedar trees to cut them down was valid exercise of the police power; no due process violation). *See also* Rosenthal v. New York, 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed. 212 (1912); Austin v. Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224 (1900); Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346 (1888); Powell v. Pennsylvania, 127 U.S. 678, 8 S.Ct. 992, 32 L.Ed. 253 (1888); Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984); *Matter of Quanta Resources Corp.*, 739 F.2d 912; Hardy v. Gissendaner, 369 F. Supp. 481 (M.D. Ala. 1974); and Izaak Walton League of Am. v. St. Clair, 353 F. Supp. 698 (D. Minn. 1973). For a case in which the exercise of the police power by a state was successfully challenged, see Curtin v. Benson, 222 U.S. 78, 32 S.Ct. 31, 56 L.Ed. 102 (1911).
40 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871).
41 *Id.*

resulted from a regulation which permitted a lake abutting the plaintiff's land to rise.[42] In response to the state's argument that no "taking" of the plaintiff's land had occurred,[43] the Court stated "[i]t would be a very curious and unsatisfactory result, if in construing [the takings clause of the Fifth Amendment] . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public[,] it can destroy its value entirely . . . without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use."[44] The Court thus recognized that regulations can have such an extreme effect on ownership rights that a de facto taking will result, even though legal title is not affected. Notably, *Pumpelly* involved a regulation that resulted in a physical invasion of the plaintiff's land, making the regulation one that in effect resulted in a physical taking even absent transfer of title.

The Supreme Court had occasion to refine the regulatory takings doctrine in *Pennsylvania Coal Co. v. Mahon.*[45] Pennsylvania enacted a statute that prohibited the mining of anthracite coal "as to cause . . . subsidence of . . . any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed."[46] The surface estate of the property in question was owned by the Mahons, but the mineral estate was owned by the coal company.[47] The Mahons sought to enjoin the mining operations of the coal company as a violation of the statute.[48] The coal company responded by claiming that the only value of the mineral estate was the right to mine the coal, and that the statute thus resulted in the functional equivalent of a taking by eminent domain,[49] entitling the coal company to compensation under the Fifth Amendment.[50]

The Court initially addressed the coal company's argument by recognizing that generally, the state was free to regulate even if property values fluctuated as a result.[51] The Court then noted that, unlike most regulations, the statute at issue "ha[d] very nearly the same effect for constitutional purposes as appropriating or destroying [the coal]."[52] Central to the Court's analysis was the fact that the only value that inhered in the coal was the right to mine it for a profit.[53] Justice Holmes, writing for the majority, held that the Fifth Amendment required compensation for property taken for a public use,[54] and stated "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[55]

Thus *Pennsylvania Coal* extended the *Pumpelly* reasoning to a situation that did not involve a physical invasion, giving recognition for the first time to the regulatory takings doctrine, even if its contours were not well-defined. The doctrine lay dormant at the Supreme Court level for over fifty years until the decision in *Penn Cent. Transp. Co. v. New York City.*[56] New York City passed the Landmarks Preservation Law[57] and pursuant to this regulation, the Landmarks Preservation Commission designated Grand Central Terminal to be an historic landmark, to which alterations could not be made without the prior approval of the Commission.[58] Penn Central Transportation Company, which owned the terminal, challenged the Landmarks Law when the Commission denied its application to construct a multistory office building addition over the terminal.[59] Penn Central contended that the regulation effected a taking of its property, in violation of the Fifth and Fourteenth Amendments.[60]

In determining whether an unconstitutional taking had occurred, the Supreme Court announced "several factors that have particular significance [including] [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations[,] . . . [and] the character of the governmental action."[61]

The Court noted that, after the regulation became effective, the appellants had air rights "suitable for the construction of new office buildings."[62] The Court found that

42 80 U.S. (13 Wall.) at 177, 20 L.Ed. at 560.
43 *Id.*
44 80 U.S. (13 Wall.) at 177-78, 20 L.Ed. at 560-61. The Court's analysis was directed at the Wisconsin State Constitution because the Fifth Amendment did not apply to the states at the time of this decision. See *supra*, note 21 and accompanying text.
45 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).
46 PA. STAT. ANN. tit. 52, §§ 661-71 (1966) (originally enacted as Act of May 27, 1921, 1921 Pa. Laws 1198).
47 Mahon v. Pennsylvania Coal Co., 118 A. 491, 498 (Pa.) (Kephart, J., dissenting), *rev'd*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).
48 Pennsylvania Coal Co. v. Mahon, 260 U.S. at 412, 43 S.Ct. at 159.
49 260 U.S. at 401-04 (unavailable in S.Ct. or L.Ed.)
50 260 U.S. at 414-15, 43 S.Ct. at 159-60.
51 260 U.S. at 413, 43 S.Ct. at 159.
52 260 U.S. at 414-15, 43 S.Ct. at 159-60.
53 260 U.S. at 414, 43 S.Ct. at 159-60.
54 260 U.S. at 415, 43 S.Ct. at 160.
55 *Id.*
56 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).
57 N.Y.C. Admin. Code, ch. 8-A, §§ 205-1-0 (1976).
58 Penn Cent. Transp. Co. v. New York City, 438 U.S. at 115-16, 98 S.Ct. 2654-55 (1978).
59 438 U.S. at 116-18, 98 S.Ct. at 2655-56.
60 438 U.S. at 119, 98 S.Ct. 2656-57.
61 438 U.S. at 124, 98 S.Ct. at 2659. *See also* Hodel v. Virginia Surface Min. and Reclamation Ass'n, 452 U.S. 264, 101 S.Ct. 447, 72 L.Ed. 842 (1981) (upholding Surface Mining Control and Reclamation Act); Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed. 106 (1980) (upholding restrictive residential zoning).
62 438 U.S. at 137, 98 S.Ct. at 2665-66.

these valuable rights[63] indicated that the regulations did not interfere unduly with appellants' investment-backed expectations. The Court also concluded that the Landmarks Law was "substantially related to the promotion of the general welfare,"[64] and was thus in the same category as "previously upheld regulations such as taxing acts, zoning ordinances, and laws prohibiting dangerous or harmful uses of property."[65] The Court did suggest, however, that a taking would have occurred if the property had been physically invaded.[66]

The Supreme Court applied the *Penn Central* factors in *Agins v. City of Tiburon*.[67] In *Agins*, the appellants purchased five acres of unimproved land for the purpose of residential development.[68] Subsequently, the city of Tiburon enacted a zoning ordinance that restricted acceptable uses of the property to single-family dwellings, accessory buildings, and open space uses.[69]

The appellants challenged the zoning ordinance and requested a declaration that it was unconstitutional on its face.[70] They claimed that it had the effect of "taking" their property without just compensation, in violation of the Fifth Amendment.[71] Because the appellants did not actually seek to develop their property in the manner provided by the ordinance (i.e., by submitting a development plan to the city)[72] the only issue presented to the Court was "whether the mere enactment of the zoning ordinance[s] constitute[d] a taking."[73]

The Court held that a regulation constitutes a taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[74] The Court concluded that the ordinance substantially advanced a legitimate state interest in that it "discourage[d] the 'premature and unnecessary conversion of open-space land to urban uses.'"[75] The Court also determined that the best possible use of the land — residential development — was permitted by the statute.[76] Thus, the statute did not unduly interfere with appellants investment backed expectations.[77]

Nollan v. California Coastal Comm'n,[78] which involved a challenge to the governmental purpose behind the enactment of a regulation, presented the next case in which the Supreme Court wrestled with the regulatory takings doctrine. In *Nollan*, the plaintiffs applied for a permit to build a home on a beach front lot.[79] Pursuant to statute,[80] the California Coastal Commission required the Nollan's to grant a public easement across their property as a condition to receiving a permit.[81] The Supreme Court held that the easement requirement was constitutionally invalid because it did not "substantially advance legitimate state interests."[82] The Court also stated that the easement requirement was "not a valid regulation of land use but 'an out-an-out plan of extortion.'"[83]

In the same year as the *Nollan* decision, the Supreme Court further refined the regulatory takings doctrine in the case of *First English Evangelical Lutheran Church v. County of Los Angeles*.[84] In *First English*, the church owned a twenty-one acre tract of land that it used as a summer camp.[85] After the property was seriously damaged by a flood,[86] the County of Los Angeles prohibited rebuilding for a three year period.[87] The church claimed that it was entitled to com-

63 *Id.*
64 438 U.S. at 138, 98 S.Ct. at 2666.
65 *Washburn, supra*, note 31 at 171. As examples of cases finding zoning restrictions to be protective of the public welfare, the Court cited Nectow v. Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); and Welch v. Swassey, 214 U.S. 91, 29 S.Ct. 567, 53 L.Ed. 923 (1909).
66 438 U.S. at 124, 98 S.Ct. at 2659. By "physically invaded," the Court is requiring that some actual intrusion of the property occur. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (where property was physically invaded by the installation of cable television wiring, the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (the federal government physically intruded upon an easement in property and the court held that "'the right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."). *Cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). For a decision applying the *Penn Central* factors to a facial challenge to a zoning ordinance, *see* Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (taking occurs "if the ordinance does not substantially advance legitimate state interests. . . or denies an owner economically viable use of his land."); and Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); and San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981).
67 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).
68 *Id.*
69 *Id.*
70 447 U.S. at 258, 100 S.Ct. at 2140.
71 *Id.*
72 447 U.S. at 260, 100 S.Ct. at 2141.
73 *Id.*
74 *Id. See* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 138, 98 S.Ct. at 2666; and Nollan v. California Coastal Comm'n, 483 U.S. at 834, 107 S.Ct. at 3147.
75 Agins v. City of Tiburon, 447 U.S. at 261, 100 S.Ct. at 2141-42 (citing CAL. GOVT. CODE ANN. § 65561[b] [West Supp. 1979]).
76 447 U.S. at 262, 100 S.Ct. at 2142.
77 *Id.*
78 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).
79 483 U.S. at 828, 107 S.Ct. at 3143-44.
80 Cal. Pub. Res. Code §§ 30000-30900 (West 1986) (Coastal Act of 1976).
81 Nollan v. California Coastal Comm'n, 483 U.S. at 828, 107 S.Ct. at 3143-44. The easement would have made it much easier for the public to access a nearby public beach and recreation area. 483 U.S. at 827-28, 107 S.Ct. at 3143-44.
82 483 U.S. at 834, 107 S.Ct. at 3147.
83 483 U.S. at 837, 107 S.Ct. at 3148-49 The Court quoted *Loretto* for the proposition that "'the right to exclude [is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" 483 U.S. at 831, 107 S.Ct. at 3145-56.
84 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).
85 482 U.S. at 307, 107 S.Ct. at 2381-82.
86 *Id.*
87 482 U.S. at 307, 107 S.Ct. at 2381-82. *See* Los Angeles County Interim Ordinance No. 11,855 (January, 1979). The prohibition on rebuilding was made permanent after three years. *See* Los Angeles County Code §20.44.220 (1981).

pensation for not being allowed to rebuild during the three year moratorium.[88]

The Supreme Court held that damages are recoverable for a temporary taking.[89] The Court stated: "Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[90]

While *Nollan* reinvigorated the reasoning of *Pumpelly*, that a regulation resulting in a physical intrusion may require compensation, and while *First English* recognized temporary takings as being compensable, neither decision provided insight into how to apply the enumerated factors in *Penn Central*[91] for determining when a taking had occurred.

The Supreme Court did apply the *Penn Central* factors, however, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[92] which involved another a statute which prohibited coal mining that would cause subsidence damage to surface buildings.[93] In reliance on the statute, the State Department of Environmental Resources prohibited the mining of fifty percent of the coal under protected structures.[94] The coal association challenged the statute on the grounds that it effected a taking without just compensation, in violation of the Fifth Amendment.[95]

The Court upheld the statute.[96] The Court found the statute prevented "a significant threat to the common welfare."[97] The Court also noted that members of the coal association would still be able to pursue their business profitably after the enaction of the statute;[98] thus, their "investment-backed expectations" were not overly diminished.[99]

Nollan, *First English*, and *Keystone* appeared to signal a willingness of the Supreme Court to entertain regulatory takings claims. *Nollan* stands for the proposition that a regulation which results in a physical invasion is invalid if it was promulgated for an improper governmental purpose.[100] *Keystone* reiterated that a regulation is valid if it does not interfere with investment backed expectations.[101] *First English* recognized that temporary takings can be compensable.[102] *Loretto v. Teleprompter Manhattan CATV Corp.*[103] likewise recognized that physical invasions of property are compensable.[104] According to a commentator, the state of the law after these decisions was as follows:

> [T]here was and is no question that a land use regulation will constitute an unconstitutional taking of private property entitling the affected property owner to just compensation unless it is enacted for a legitimate public purpose, *and* it substantially advances that legitimate purpose, *and* it does not involve any physical invasion of the regulated property.[105]

88 482 U.S. at 308, 107 S.Ct. at 2382.

89 482 U.S. at 318, 107 S.Ct. at 2387-88. The Supreme Court did not decide whether an actual taking had occurred. On remand, the California Court of Appeals found that no taking requiring just compensation had occurred. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 894 (Cal. Ct. App. 1989).

90 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. at 321, 107 S.Ct. at 2389 (1987).

91 *See supra*, note 61 and accompanying text.

92 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).

93 PA. STAT. ANN. tit. 52, § 1406.4 (1986).

94 *Keystone*, 480 U.S. at 477, 107 S.Ct. at 1238.

95 480 U.S. at 478-79, 107 S.Ct. at 1238-39.

96 480 U.S. at 479-81, 107 S.Ct. at 1238-40.

97 480 U.S. at 485, 107 S.Ct. at 1241-42.

98 *Id.*

99 *Id. Cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124, 98 S.Ct. at 2659 (the Court held that the New York City Landmark Preservation Law did not effect a taking of the plaintiff's property as they could still realize a "reasonable return" on their investment and there was no physical invasion of the property.)

100 *See* Nollan v. California Coastal Comm'n, 483 U.S. at 837, 107 S.Ct. at 3148-49. *Cf.* Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Reinman v. City of Little Rock, *supra*, notes 33-35 and accompanying text; and Mugler v. Kansas, *supra*, notes 24-32 and accompanying text.

101 *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. at 485, 107 S.Ct. at 1241-42. *Cf.* Pennsylvania Coal Co. v. Mahon, *supra*, notes 45-55 and accompanying text; and Penn Cent. Transp. Co. v. New York City, *supra*, notes 56-66, and accompanying text.

102 *See First* English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. at 318, 107 S.Ct. at 2387-88.

103 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

104 *See Loretto*, *supra*, note 66. *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); and PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

105 *Washburn*, *supra*, note 31 at 177. For other discussions of the regulatory takings doctrine prior to *Lucas*, *see* Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); Lawrence Blume & Daniel L. Rubinfeld, *Compensations for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM.U. L. REV. 297 (1991); John J. Costonis, *Presumptive & Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP.CT. REV. 1 (1988); William A. Falik & Anna C. Shimko, *The 'Takings' Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989); William W. Fisher, III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988); Douglas Kmiec, *The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Earl M. Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990); Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to be Borne by Society as a Whole*, 40 CATH.U. L. REV. 549 (1991); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1630 (1988); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II — Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53 (1990); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I — A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1301 (1989); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265 (1987); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S.CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U.PA. L. REV. 829 (1989); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH.U. L. REV. 847 (1989); (continued on page 71)

More recently, the United States Court of Appeals for the Federal Circuit found a compensable taking to have occurred in a situation somewhat similar to *Pennsylvania Coal.* In *Whitney Benefits, Inc. v. United States,*[106] a mining company sought just compensation for being denied, by the Surface Mining Control and Reclamation act (SMCRA),[107] the right to mine its coal.[108] The court noted that the SMCRA deprived the coal company of "'all economically viable use' of its property."[109] The court then rejected the government's claim that *Keystone* stood for the proposition that no compensable taking occurs if the challenged regulation serves a valid public purpose.[110] Rather, a taking occurs under *Keystone* "if [a regulation] *either* (1) 'does not substantially advance legitimate state interests,' *or* (2) 'denies an owner economically viable use of his land.'"[111]

The court's finding that the coal had no economic value apart from the right to mine it is beyond cavil. It was unclear, however, if the Court would extend the "no economic viability" rationale to property other than mineral rights. Theoretically, the analysis should be the same, yet most forms of property have varied uses, and regulations typically impact less than all of these uses. It is this issue that the Supreme Court faced in *Lucas.*

2) The *Lucas* Decision

In *Lucas v. South Carolina Coastal Council,*[112] the plaintiff owned two beachfront lots[113] on which he intended to construct single-family residences.[114] Two years after his acquisition of the lots, however, South Carolina passed the Beachfront Management Act (Act).[115] That Act prohibited the construction of dwellings on the lots.[116] Lucas admitted that the state validly exercised its police power in enacting the statute.[117] He contended, however, that the Act denied him all reasonable economic use of his lots, thus entitling him to compensation regardless of the Act's validity.[118]

The Supreme Court of South Carolina denied Lucas' takings claim.[119] It concluded that no taking had occurred because the statute was a valid exercise of the police power designed to preserve public resources.[120] The South Carolina Supreme Court agreed with Lucas that the Act caused his lots to be valueless,[121] but found the validity of the statute to be controlling.[122] In effect, the South Carolina Supreme Court determined that the purpose of the Act was to prevent a nuisance, creating an exception to the requirement of just compensation.[123]

The United States Supreme Court[124] took cognizance of the lower court's finding that Lucas' lots were rendered valueless by the Act.[125] This finding was accepted by the Court for purposes of its decision.[126] The Court then stated that two situations categorically required that just compensation be paid to a property owner. The first was when

105 (Continued) Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain, *Proceedings of the Conference on Takings of Property and the Constitution,* 41 U. Miami L. Rev. 49 (1986); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale,* 64 Notre Dame L. Rev. 1 (1989); Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas,* 36 Emory L.J. 1219 (1987); Lawrence W. Andreas, Comment, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement,* 54 Brook. L. Rev. 991 (1989); Cynthia J. Barnes, Comment, *Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove,* 74 Iowa L. Rev. 1243 (1989); David B. Fawcett, III, Comment, *Eminent Domain, The Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis,* 47 U. Pitt. L. Rev. 491 (1986); W. Keith Noel, Comment, *Just Compensation: The Constitutionally Required Remedy for Regulatory Takings,* 55 U. Cin. L. Rev. 1237 (1987); Terri Pandolfi, Comment, *Putting the Cart Before the Horse: Just Compensation for Regulatory Takings in First English Evangelical Lutheran Church v. County of Los Angeles,* 54 Brook. L. Rev. 1413 (1989); Stuart Minor Benjamin, Note, *The Applicability of Just Compensation to Substantive Due Process Claims,* 100 Yale L.J. 2667 (1991); Nicholas V. Morosoff, Note, *"Take" My Beach, Please!: Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions,* 69 B.U. L. Rev. 823 (1989); Note, *Taking a Step Back: A Reconsideration of the Takings Test of Nollan v. California Coastal Commission,* 102 Harv. L. Rev. 448 (1988); and William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment,* 94 Yale L.J. 694 (1984).

106 926 F.2d 1169 (Fed. Cir. 1991).

107 30 U.S.C. §§ 1202-1328 (1988).

108 *Whitney Benefits, Inc. v. United States,* 926 F.2d at 1171.

109 *Id.* at 1172.

110 *Id.* at 1176.

111 *Id.* at 1176, (quoting *Keystone Bituminous Coal Ass'n. v. DeBenedictis,* 480 U.S. at 490, 107 S.Ct. 1244-45, quoting *Agins v. City of Tiburon,* 447 U.S. at 260, 100 S.Ct. at 2141, and citing *Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659). These factors are essentially a reformulation of the factors listed in *Penn Central. See Penn Central,* 438 U.S. at 124, 98 S.Ct. at 2659.

112 __U.S.__, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992).

113 __U.S.__, 112 S.Ct. at 2889.

114 *Id.*

115 S.C. Code Ann. §§ 48-39-10–48-39-360 (Law. Co-op. Supp. 1992).

116 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2889. The construction of certain nonhabitable improvements was allowed by the Act. *See* S.C. Code Ann. §§ 48-39-290(A)(1),(2) (Law. Co-op. Supp. 1992).

117 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2890. *Cf. Mugler, Reinman,* and *Hadacheck, supra,* notes 23-39 and accompanying text.

118 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S.Ct. at 2890.

119 Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).

120 *Id.* at 898.

121 *Id.* at 900.

122 *Id.* at 896.

123 *Id.* at 899. The South Carolina Legislature determined that erosion in the beachfront areas of the state was a problem only when structures were erected near the beach dunes system. *Id.* at 380-81. *See supra,* notes 22-38 and accompanying text for a discussion of the nuisance exception to the Fifth Amendment requirement of just compensation.

124 Justice Scalia wrote for the majority and was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas.

125 *Lucas v. South Carolina Coastal Council,* __U.S.__, 112 S. Ct. at 2896.

126 *Id.* at n.9. Several justices questioned the validity of the "zero value" finding, however. *See* dissent and concurring opinion.

a regulation caused a physical invasion of the property to occur.[127] The second was when a "regulation denies all economically beneficial or productive use of land."[128] Based on the finding that Lucas' lots had been deprived of all economic value, he fit within the second category.

Even though Lucas' land had been deprived of all economic value, the state contended that the nuisance exception to the Fifth Amendment did not allow Lucas to obtain compensation.[129] The Supreme Court agreed that the *Mugler* line of cases[130] did allow property values to diminish from regulation without a duty by the state to provide just compensation.[131] The Court observed, however, that defining a nuisance often is difficult.[132] In many instances, the legislature simply could frame the statute so that it purported to prevent a public harm.[133] This approach to takings cases essentially would "nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power."[134] The Court then held that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[135]

In determining whether "the proscribed use interests were not part of his title to begin with," common law nuisance principles should govern.[136] Thus, if a regulation proscribes uses of property that are not a common law nuisance and the property loses all value as a result, compensation to the owner is required. Essentially, this formulation of the regulatory takings doctrine seeks to protect investment backed expectations.[137] If a use of property is considered a common law nuisance, the owner should have known that the use was subject to proscription. Property owners, however, have no way of knowing whether future regulations will proscribe uses of their property that are currently permitted.

II. Discussion

A) Implications of *Lucas*

Lucas confirmed the applicability of the "no economic viability" framework to rights in property other than mineral interests. This framework, conceptually, is easy to grasp. If a regulation is not a valid exercise of the police power *or* the property loses all value as a result of the regulation, just compensation to the property owner is required.[138] Viewed in this light, *Lucas* did not cause the protection of property rights to be extended; it merely affirmed and clarified existing law.

Lucas should not be viewed as a groundbreaking decision in the property rights arena.

> As the majority suggests, . . . the vastly greater number of controversial land use regulations do not involve the control of noxious uses, do further a legitimate state interest, and diminish — but do not destroy — the economic value of the affected properties . . . Further, in the increasing number of non-categorical cases involving environmental and similar socially desirable regulations, the takings determination will continue to be an ad hoc balancing of the sufficiency of the public interests supported by the regulation under challenge with the significance of the private costs.[139]

The *Lucas* majority acknowledged that the categorical rule it announced did not clarify the property interest "against which the loss of value is to be measured."[140] "When, for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is unclear whether [the Court] would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole."[141] Since property is rarely devalued entirely by a regulation, much litigation can be expected over this issue.

The majority acknowledged an anomaly created by the *Lucas* decision that was observed by Justice Stevens.[142] Only landowners suffering a *total* devaluation of their property are able to claim the benefits of the categorical rule; those with less than a total

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127 __U.S.__, 112 S.Ct. at 2893 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d (1982); Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); and United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)).

128 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2893 (citing Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); and Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

129 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2896-97.

130 *See supra* notes 23-39 for a discussion of the *Mugler* line of cases.

131 __U.S.__, 112 S.Ct. at 2896-98.

132 *Id.*

133 __U.S.__, 112 S.Ct. at 2898. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." __U.S.__, 112 S.Ct. at 2898 n.12.

134 __U.S.__, 112 S.Ct. at 2899.

135 *Id.*

136 __U.S.__, 112 S.Ct. at 2901.

137 The ramifications of both the South Carolina Supreme Court and the United States Supreme Court's decision in *Lucas* have been the focus of much discussion. *See, e.g.*, Richard C. Ausness, *Wild Dunes & Serbonian Bogs: The Impact of the* Lucas *Decision on Shoreline Protection Programs*, 70 Denver U. L. Rev. 437 (1993); Ingrid Brydolf, *Property Right: Takings* 22 Envtl. L.J. 1115 (1992); Steven S. Eagle & William H. Mellor, III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights*, 29 Cal. Western L. Rev. 209 (1992); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892 (1992); Washburn, *supra* note 31; Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. Colo. L. Rev. 573 (1993); Natasha Zalkin, Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Takings Doctrine Through and South Carolina's Coastal Zone Statute*, 79 Calif. L. Rev. 207 (1991); Laurie G. Ballenger, Note, *A House Built on Sand: Lucas v. South Carolina Coastal Council*, 71 N.C. L. Rev. 928 (1993); and Ann T. Kadlecek, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 Wash. L. Rev. 415 (1993).

138 *See supra*, note 105 and accompanying text.

139 Washburn, *supra*, note 31 at 202-03 (citing Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2894).

140 Lucas v. South Carolina Coastal Council, __U.S.__, 112 S. Ct. at 2894 n.7.

141 *Id. See also* Bino v. Hurley, 76 N.W.2d 571 (1956) (denial of riparian's right to use surface of lake for public water supply).

loss are limited to the *Penn Central* balancing approach.[143] "It is true that in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all or nothing' situations."[144]

After *Lucas*, two situations that are potential breeding grounds of litigation remain: (1) What is the relevant property interest for purposes of measuring a total deprivation from a regulation?; and (2) What is the status of property owners who have suffered less than a total deprivation from a regulation? State property rights statutes have attempted to address these concerns.

B) "Weak" Property Rights Statutes

"Weak" property rights legislation is the type that requires a study of the takings impact of a regulation before it is promulgated. Arizona, for example, requires "[s]tate agencies [to] be sensitive to, anticipate and account for the obligations imposed by the fifth and fourteenth amendments of the Constitution of the United States and article II, § 17 of the Constitution of Arizona in planning and carrying out governmental actions to avoid imposing unanticipated or undue additional burdens on the public treasury."[145] The statute then specifies guidelines for performing a "constitutional taking implication assessment."[146] Utah requires state agencies, before promulgating a regulation that could affect property rights, to hold a public hearing and prepare a written statement regarding the rights of the affected property owners.[147]

Notably, "weak" property rights statutes do not provide property owners any protection beyond that guaranteed by the Fifth Amendment.[148] Thus, this form of legislation does not provide any guidance in the situations left open by *Lucas*. Although this legislation is sponsored by advocates of property rights,[149] it may further their cause only indirectly by creating awareness of the property rights impact of regulations; it won't lead to an extension of property rights. In fact, it may be financially prudent for states to enact this type of legislation. States must balance their goal of preserving the environment with their goal of conserving the fisc. In *Whitney Benefits*, the government was required to pay a property owner over sixty million dollars in just compensation.[150] A takings assessment prior to the implementation of the regulation would have allowed the government to determine if the benefits produced by the regulation were worth $60 million, possibly avoiding a needless drain of resources.

Although environmentalists are averse to "weak" property rights legislation,[151] it will not effect any significant change in takings law. It may assuage the fears of property owners, however, that the government is running roughshod over their constitutional rights. Further, this legislation will allow states to make more informed choices about regulation. This legislation has much to recommend it.

C) "Strong" Property Rights Legislation

"Strong" property rights legislation addresses one of the issues left open by *Lucas*. Specifically, a 50% "trigger point" is established at which a property owner can obtain compensation for a deprivation in value. This type of legislation has been introduced in ten states,[152] but has yet to be enacted. Environmentalists call "strong" property rights statutes "the worst anti-environmental [legislation] ever [proposed] in the United States."[153]

"Strong" property rights legislation does not directly address the first issue left open by *Lucas* — measuring the property interest that has been affected. Presumably, this omission is cured by setting a bright-line 50% rule. In theory, a bright line rule is desirable to reduce uncertainty and litigation. In practice, however, the uncertainty and litigation may continue, only over different issues.

Measuring property values is an extremely subjective determination. Appraisal testimony is notoriously unreliable.[154] Thus, rather than litigation over constitutional takings issues, this legislation could engender litigation over the decline in value of the property. The uncertainty and litigation are not diminished, they are merely transferred to different issues.

III. Conclusion

The idea behind "strong" property rights legislation is noble. Providing a clear cut standard could conserve judicial resources and provide a degree of certainty to all concerned; however, legislatures should think carefully before implementing these statutes. Some means to ascertain property values must be provided before this legislation can be effective. Perhaps an independent appraisal board could be established. Determinations of this board would be entitled to deference by the courts, and could be overturned only upon a showing of abuse of discretion. If the uncertainties inherent in "strong" property rights statutes can be ironed out, this legislation could prove to be beneficial. The tension between environmental groups and property rights advocates, however, can be expected to escalate significantly as the state legislatures become the battleground in the "war" over property rights which a property owner can obtain compensation for a deprivation in value. This type of legislation has been introduced in ten states,[155] but has yet to be enacted. Environmentalists call "strong" property rights statutes "the worst anti-environmental [legislation] ever [proposed] in the United States."[156]

142 __U.S.__, 112 S.Ct. at 2919.
143 __U.S.__, 112 S.Ct. at 2895 n.8; *see supra*, note 61 and accompanying text.
144 __U.S.__, 112 S.Ct. at 2895.
145 Ariz. Rev. Stat. Ann. § 37-222(B)(1) (1993).
146 Ariz. Rev. Stat. Ann. § 37-223 (1993).
147 Utah Code Ann. §§ 17A-2-1211(A)(1)(A)(B), 17-A-2-1211(A)(2) (1953).
148 Lavelle, *supra* note 6, at 34.
149 *Id.*
150 Whitney Benefits, Inc. v. United States, 926 F.2d at 1178.
151 Lavelle, *supra*, note 6, at 34.
152 *Id. See supra*, note 12 for a list of states in which this type of legislation has been introduced.
153 Lavelle, *supra*, note 6, at 34.
154 *See* Grant S. Nelson & Dale A. Whitman, Real Estate Transfer, Finance, and Development, Cases and Material 49 (4th ed. 1992).
155 *Id. See supra* note 12 for a list of states in which this type of legislation has been introduced.
156 Lavelle, *supra* note 6, at 34.