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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, air, and water. In some instances, these regulations have been held to contravene the takings clause of the Fifth Amendment to the United States Constitution. More often, however, environmental regulations have withstood Fifth Amendment challenges, 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. Recently, Arizona, Delaware, Indiana, Utah, and Washington have adopted laws that attempt to stem the tide of environmental regulation. These laws are modeled after an executive order issued by President Reagan in 1988. 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. This approach is quite similar to the National Environmental Policy Act, which requires federal agencies to prepare an environmental impact statement before undertaking any major program. In Missouri, Governor Carnahan recently issued an executive order requiring a takings assessment by state agencies before they promulgate new regulations.

In many states, 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. "Strong" property rights bills of this type are a response to the recent Supreme Court decision in Lucas v. South Carolina Coastal Council. Although Lucas sustained a landowner's challenge to an environmental regulation, the Court stated that even a 95% decline in value may not constitute a compensable taking, depending on the facts of the case.

Environmental groups ardently oppose both types of property rights legislation. These groups foresee a major expansion in the takings concept that could rein in environmental regulation. 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." This portion of the Fifth Amendment is known as the takings clause. In addition to restricting the federal govern-
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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. The first significant Supreme Court case addressing the nuisance exception was *Mugler v. Kansas*. 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.

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

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.

After disposing of the defendant's takings claim, the Court subjected the liquor prohibition regulation to rational-basis due process analysis. The Court then held that the regulation was constitutionally valid. 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. The regulatory takings doctrine had yet to surface.

The Supreme Court consistently applied the *Mugler* framework in subsequent decisions involving challenges to the validity of land use regulations. In *Reinlein v. City of Little Rock*, the plaintiffs were seeking to enjoin enforcement of a municipal ordinance that prohibited the operation of livery stables in the city of Little Rock. 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. In *Hadacheck v. Sebastian*, the Court upheld a regulation that prohibited the manufacture of bricks within the city of Los Angeles. The Court again gave wide latitude to the state to regulate through its police power. These decisions confirmed the viability of the nuisance exception to the takings clause.

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.* In *Pumpelly*, the plaintiff sought compensation from the government for damages to his land caused by flooding. The flooding...
resulted from a regulation which permitted a lake abutting the plaintiff's land to rise. In response to the state's argument that no "taking" of the plaintiff's land had occurred, the Court stated "[i]t would be a very curious and unsatisfactory result, if in construing [the takings clause of the Fifth Amendment] . . . it should 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." 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. 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." The surface estate of the property in question was owned by the Mahons, but the mineral estate was owned by the coal company. The Mahons sought to enjoин the mining operations of the coal company as a violation of the statute. 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, entitling the coal company to compensation under the Fifth Amendment.

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. 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]." 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. Justice Holmes, writing for the majority, held that the Fifth Amendment required compensation for property taken for a public use, 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.

Thus Pennsylvania Coal extended the Pumpelly reasoning to a situation that did not involve a physical invasion, giving recognition to 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. New York City passed the Landmarks Preservation Law, 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. 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. Penn Central contended that the regulation effected a taking of its property, in violation of the Fifth and Fourteenth Amendments.

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

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42 80 U.S. (13 Wall.) at 177, 20 L.Ed. at 560.
43 Id.
44 80 U.S. (13 Wall.) at 177-8, 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).
47 260 U.S. 401-04 (unavailable in S.Ct. or L.Ed.)
48 260 U.S. at 414-15, 43 S.Ct. at 159.
49 260 U.S. at 414-15, 43 S.Ct. at 159-60.
50 260 U.S. at 415, 43 S.Ct. at 160.
51 260 U.S. at 415, 43 S.Ct. at 159.
52 260 U.S. at 414-15, 43 S.Ct. at 159-60.
53 438 U.S. at 116-18, 98 S.Ct. at 2655-56.
54 438 U.S. at 119, 98 S.Ct. 2656-57.
these valuable rights 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," 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." The Court did suggest, however, that a taking would have occurred if the property had been physically invaded.

The Supreme Court applied the Penn Central factors in Agins v. City of Tiburon. In Agins, the appellants purchased five acres of unimproved land for the purpose of residential development. 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.

The appellants challenged the zoning ordinance and requested a declaration that it was unconstitutional on its face. They claimed that it had the effect of "taking" their property without just compensation, in violation of the Fifth Amendment. 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) the only issue presented to the Court was "whether the mere enactment of the zoning ordinance[ ] constitute[d] a taking." 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." 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.'" The Court also determined that the best possible use of the land — residential development — was permitted by the statute. Thus, the statute did not unduly interfere with appellants' investment-backed expectations.

Nollan v. California Coastal Comm'n, 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. Pursuant to statute, the California Coastal Commission required the Nollan's to grant a public easement across their property as a condition to receiving a permit. The Supreme Court held that the easement requirement was constitutionally invalid because it did not "substantially advance legitimate state interests." The Court also stated that the easement requirement was not a valid regulation of land use but an out-of-court settlement.

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. In First English, the church owned a twenty-one acre tract of land that it used as a summer camp. After the property was seriously damaged by a flood, the County of Los Angeles prohibited rebuilding for a three year period. The church claimed that it was entitled to com-
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 diminshed.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. Telepromter 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:

[There 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]
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 lots113 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 Court124 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

a regulation caused a physical invasion of the property to occur.\textsuperscript{127} The second was when a "regulation denies all economically beneficial or productive use of land."\textsuperscript{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.\textsuperscript{129} The Supreme Court agreed that the 	extit{Mugler} line of cases\textsuperscript{130} did allow property values to diminish from regulation without a duty by the state to provide just compensation.\textsuperscript{131} The Court observed, however, that defining a nuisance often is difficult.\textsuperscript{132} In many instances, the legislature simply could frame the statute so that it purported to prevent a public harm.\textsuperscript{133} This approach to takings cases essentially would "nullify Mahon's affirmation of limits to the noncompensable exercise of the police power."\textsuperscript{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."\textsuperscript{135}

In determining whether "the proscribed use interests were not part of his title to begin with," common law nuisance principles should govern.\textsuperscript{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.\textsuperscript{137} If a use of property is considered a common law nuisance, the owner should have known that the use was subject to prosection. Property owners, however, have no way of knowing whether future regulations will proscribe uses of their property that are currently permitted.

II. 

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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{142} Only landowner suffering a total devaluation of their property are able to claim the benefits of the categorical rule; those with less than a total
loss are limited to the Penn Central balancing approach.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{145}

The statute then specifies guidelines for performing a “constitutional taking implication assessment.”\textsuperscript{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.\textsuperscript{147}

Notably, “weak” property rights statutes do not provide property owners any protection beyond that guaranteed by the Fifth Amendment.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{152} but has yet to be enacted. Environmentalists call “strong” property rights statutes “the worst anti-environmental [legislation] ever [proposed] in the United States.”\textsuperscript{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.\textsuperscript{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,\textsuperscript{155} but has yet to be enacted. Environmentalists call “strong” property rights statutes “the worst anti-environmental [legislation] ever [proposed] in the United States.”\textsuperscript{156}

\textsuperscript{142} _U.S._, 112 S.Ct. at 2919.
\textsuperscript{143} _U.S._, 112 S.Ct. at 2995 n.8; see supra, note 61 and accompanying text.
\textsuperscript{144} _U.S._, 112 S.Ct. at 2995.
\textsuperscript{148} Lavelle, supra note 6, at 34.
\textsuperscript{149} Id.
\textsuperscript{150} Whitney Benefits, Inc. v. United States, 926 F.2d at 1178.
\textsuperscript{151} Lavelle, supra, note 6, at 34.
\textsuperscript{152} Id. See supra note 12 for a list of states in which this type of legislation has been introduced.
\textsuperscript{153} Lavelle, supra, note 6, at 34.
\textsuperscript{155} Id. See supra note 12 for a list of states in which this type of legislation has been introduced.
\textsuperscript{156} Lavelle, supra note 6, at 34.