

NOTES

PRIVATE PROPERTY PROTECTION LEGISLATION AND ORIGINAL UNDERSTANDINGS OF THE TAKINGS CLAUSE: CAN THEY CO-EXIST?

The history of takings in the United States is often confusing, particularly when one examines the cases of the twentieth century. Many Supreme Court decisions lack coherence, thus undermining jurisprudential stability because they often collide with our traditional notions of property and property rights. With the nation's heightened awareness of environmental affairs and the enactment of accompanying legislation addressing the public's environmental concerns,¹ we are certain to find more regulatory takings² cases filling the dockets. As states continue to promulgate such legislation,³ we will find ourselves trying to define the parameters of takings without one clear perspective.⁴ How then can we protect the environment and private property while creating a coherent standard of takings which passes constitutional muster?

Environmental and other regulatory legislation arose quickly in response to the many dangers posed by pollution and waste. States and the federal government are also acting to protect private property from over-zealous regulators who take property without compensation.⁵ This Note will examine whether these attempts to protect private property comport with and further our commonly held notions of property while not unduly burdening government efforts to provide coherent guidance for regulatory agencies. Part I discusses opposition to the common law understandings of property while Part II presents a look at takings jurisprudence today, particularly focusing on the differences in theory which seem to tug at the Supreme Court. Part III looks at federal efforts to protect private property while Part IV examines state legislation. Part V evaluates whether using common law understandings is feasible and helpful in these

1. See, e.g., The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 and Supp. III 1991); The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (1988 and Supp. III 1991).

2. A regulatory taking involves rules or regulations imposed on property owners which so affect their use of that property that a taking is deemed to occur.

3. State statutes with provisions similar to CERCLA include ALA. CODE §§ 22-30-1 to 22-30B-16 (Michie 1990 and Supp. 1992); ARIZ. REV. STAT. ANN. §§ 49-901 to 49-1102 (1992 and Supp. 1993); CAL. HEALTH AND SAFETY CODE §§ 25100 to 25245.5 (West 1992 and Supp. 1993); IDAHO CODE §§ 39-4401 to 39-4432 (1993); IOWA CODE ANN. §§ 455B.411 to 455B.501 (West 1990 and Supp. 1993); KAN. STAT. ANN. §§ 65-3430 to 65-34a03 (1992); MICH. COMP. LAWS ANN. §§ 299.601 to 299.618 (1984 and Supp. 1993); MINN. STAT. ANN. §§ 115B.01 to 116C.91 (West 1991 and Supp. 1993); N.J. STAT. ANN. §§ 58:10-23.11 to 58:10-23.24 (West 1992 and Supp. 1993); OR. REV. STAT. §§ 465.003 to 466.995 (1992); WASH. REV. CODE ANN. §§ 70.105.005 to 70.105.900 (West 1992 and Supp. 1993).

4. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, each state may, within the broad confines of Supreme Court decisions, craft its own proprietary definitions.

5. U.S. CONST. amend. V.

situations.

I. OPPOSITION TO THE COMMON LAW AS A BASIS FOR TAKINGS

The common law standard is founded on the concept of nuisance as dictating what are or are not permissible uses of property. An impermissible use can be regulated by the government without compensation because the government is only doing what a private party (e.g., a neighbor) could lawfully do under nuisance theory. This is sometimes expressed in terms of harm or benefit. If a regulation prevents a harm, i.e., a nuisance, no compensation is needed. A regulation procuring a benefit, however, must provide compensation. The most influential scholar who opposes this standard as a basis for takings jurisprudence is Frank Michelman. Professor Michelman believes the harm-benefit distinction is subjective and varies with each party's point of view. Thus, the standard would not really provide coherence.⁶ As pointed out by Professor Douglas Kmiec, however, the nuisance concept provides a coherent, workable framework predating the Constitution, enabling us to determine what are harmful property uses to our communities.⁷

Another argument is that reliance on common law determinations encourages courts to behave like super-legislatures, overriding elected legislators' determinations as to what is or is not a permissible use within the community.⁸ What must be remembered though, is that the Fifth Amendment Takings and Just Compensation Clauses are constitutional guarantees of a civil right, expressly designed to guard against tyranny by the majority.⁹ The courts are the guardians of these rights and have frequently found legislation to be unconstitutional, despite being the true determination of the majority's will.¹⁰ Why cannot the same protection be accorded the right to one's property as found in the Fifth Amendment?¹¹ In this instance, the common law and the constitution provide more protection to civil rights than the positive law.¹² Furthermore, the common law of each state is established and, as *Board of Regents v. Roth* displays,¹³ is a defining point for constitutional determinations in this area of the law. Courts would reach decisions in accordance with the common law and not with unfettered discretion to determine what is or is not a nuisance. Should we fear stable protection of a constitutional right when the legislature grants government agencies

6. Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-97 (1967).

7. Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1635-40 (1988).

8. See, e.g., John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 CATH. U. L. REV. 771 (1993).

9. See, Kmiec, *supra* note 7, at 1635-40, 1659-62.

10. See e.g., *Cohen v. California*, 403 U.S. 15 (1971) (determining that a statute prohibiting certain speech violated the First Amendment).

11. This protection is not simply an exercise in substantive due process. The courts would not be saying an end is undesirable and therefore unconstitutional. The courts would be applying well founded notions of property law and determining that the means used require compensation as demanded by the Fifth Amendment.

12. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld an arrest based on the fighting words doctrine. In upholding the state's statute, the Court cites to Zechariah Chafee, *Free Speech in the United States* (1941) (315 U.S. at 572 n.4, 5). Interestingly, Chafee states at 149-50 that the common law did not provide enough protection for speech so the First Amendment's protections evolved. Can the common law provide too much protection for property owners, thus requiring the Fifth Amendment to curtail this protection?

13. *Roth*, 408 U.S. 564.

broad powers to control land use?¹⁴ If, as with CERCLA, the statute is designed to compel responsible parties to pay for clean up efforts and to provide effective responses to environmental hazards,¹⁵ are we really thwarting the legislature's goals when we rely on the common law to protect property rights?¹⁶ As will be explained, an environmental hazard is most likely a nuisance which can be regulated without compensation. Common law and original understandings of property can regulate such nuisances without harming owners' rights.

II. TAKINGS JURISPRUDENCE TODAY

Takings jurisprudence, particularly in this century, developed into a multi-faceted examination of the circumstances surrounding the government action. Unfortunately, what factors will be used can vary with the government's activity and how the particular court characterizes that activity. The application of the multiple factors can also produce unusual results, leaving the property owner to question the logic underlying the decision. This section examines the development of takings jurisprudence, looking particularly at the philosophical differences among the existing cases and how using the common law notions of property would provide coherence to an uncertain system.

A. The Current Law of Takings

1. Physical Invasion

The Supreme Court established a per se category of takings requiring compensation in *Loretto v. Teleprompter Manhattan CATV Corporation*.¹⁷ The Court determined that a "permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine."¹⁸ In *Loretto*, a New York statute required residential landlords to allow the installation of cable television equipment. Accordingly, the cable company did install some wires and a box occupying about one eighth of a cubic foot on the Loretto's roof.¹⁹ The per se category exists irrespective of the diminution in value or the area of the occupied property and compensation is required.

2. Regulatory Takings

Regulatory takings occur when government restrictions or regulations deny the owner his property rights. Compensation is required although no physical invasion or appropriation takes place.

14. See, e.g., *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), where the EPA installed many monitoring wells on neighboring property of CERCLA clean-up site and prohibited the owners from touching or coming near the wells. The EPA vigorously denied that a taking occurred.

15. See, e.g., *State of New York v. Shore Realty Co.*, 759 F.2d 1032, 1039-42 (2d Cir. 1985); *Chemical Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987).

16. In some instances, a legislature may attempt to explicitly proscribe an activity on one's property. Again, the Fifth Amendment, as with any constitutional guarantee, cannot be overridden by legislation. Any such prohibition must satisfy the underlying notions of property rights to satisfy the Constitution.

17. *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982).

18. *Id.* at 432.

19. *Id.* at 443 (Blackmun, J., dissenting).

The Court addressed the problem in *Pennsylvania Coal Co. v. Mahon*.²⁰ In this case a Pennsylvania statute proscribed coal mining when subsidence damage could result.²¹ The appellant, holding only the rights to the subsurface estate, claimed that a taking occurred because of this statute. Justice Holmes' opinion describes the portion of the subsurface estate which cannot be mined as one segment of property, the diminution in value of which is evaluated without comparison to the other holdings of the company.²² Justice Brandeis' dissent, however, examines the loss of the coal in relation to other holdings of the company.²³ In finding a taking and giving rise to the notion of regulatory takings, Justice Holmes wrote, "[i]f regulation goes too far it will be recognized as a taking."²⁴ Unfortunately, what goes too far is not always clear.

In 1978, *Penn Central Transportation Co. v. New York City*²⁵ presented the case of a New York preservation statute which severely restricted the owners of Grand Central Station from developing their property skyward although neighboring buildings were not similarly restricted.²⁶ The company could not develop without a committee's approval of the design's aesthetics and could be liable for failing to maintain the existing architecture.²⁷ In determining whether a taking occurred, the Court created the ad hoc factors of (1) the economic impact of the regulation, (2) the regulation's effect on distinct investment-backed expectations and (3) the character of the government action.²⁸ Applying these factors to the case, the Court did not find a taking. The Court also concluded that examining the value of the air rights as discrete segments of property would be an improper method of conducting the ad hoc inquiry and instead looked at the parcel's value as a whole.²⁹

*Nollan v. California Coastal Commission*³⁰ involved the state's attempt to condition a building permit on the Nollans' grant of a public easement across their beach.³¹ The state wanted to ensure "visual access" to the beach and prevent a "psychological barrier,"³² as well. The Court elaborated on the nexus required between the state interest and the regulation. That is, the regulation must substantially advance a legitimate state interest.³³ An easement along the beach, parallel to the shoreline, did not satisfy the nexus requirement for the interests put forth by the state³⁴ and was viewed as an attempt to avoid paying compensation.³⁵ Important to note is that this nexus requirement is a standard necessary to the Takings Clause itself and is not simply a retooling of due process or equal protection standards.³⁶

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

21. *Id.* at 393-94 n.1.

22. *Id.* at 413-15.

23. *Id.* at 416.

24. *Id.* at 414.

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

26. *Id.* at 111-12.

27. *Id.*

28. *Id.* at 124.

29. *Id.* at 130.

30. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

31. *Id.* at 828.

32. *Id.* at 838.

33. *Id.* at 834-37. The Court culls this nexus requirement from *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), but develops it fully as a foundation of takings jurisprudence in *Nollan*.

34. *Id.* at 838.

35. *Id.* at 841-42.

36. *Id.* at 834-35 n.3.

*Lucas v. South Carolina Coastal Council*³⁷ did much to reinvigorate the common law's applicability to takings cases.³⁸ Mr. Lucas purchased for \$975,000 two beachfront parcels on which he hoped to build two houses, but a subsequently enacted conservation statute prohibited building most anything.³⁹ In determining that the statute constituted a taking, the Court fashioned another per se test: when a regulation deprives the owner of all economically viable use of his property, to avoid a taking, the state must show that such restrictions inhered in the property from the state's laws of nuisance or property.⁴⁰ It appears, however, that in instances of less than total deprivation of value, the multi-factored analysis described in *Penn Central*⁴¹ still guides the courts.

The most recent takings case from the Supreme Court is *Dolan v. City of Tigard*.⁴² The property owner, Dolan, sought permits and approval for the expansion of her hardware store. The city conditioned approval of her plan on exactions encompassing approximately ten percent of Dolan's property for a storm drainage system and a bicycle path.⁴³ While the Court found that the exactions substantially advanced a legitimate state interest (nexus requirement of *Nollan*), it continued its inquiry and asked whether "the degree of exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."⁴⁴ The Court determined that a rough proportionality was required by the Fifth Amendment. That is, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."⁴⁵ In other words, is the government attempting to use the exactions to counter some harm created by the development, or is it using the permitting process to extract a benefit without compensation? *Dolan* shows that the classic nuisance distinction of legitimately preventing a harm versus improperly extracting a benefit is clearly imposed by the Fifth Amendment's proportionality requirement.⁴⁶ In

37. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

38. *Lucas* can be viewed quite restrictively, though. See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993).

39. *Lucas*, 112 S. Ct. at 2889.

40. *Id.* at 2899-900.

41. 438 U.S. 104.

42. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

43. *Id.* at 2314.

44. *Id.* at 2318.

45. *Id.* at 2319-20.

46. While *Nollan* did not address this issue directly because the owners did not present it, the Court did state,

If the *Nollans* were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal land owners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is to "bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole."

Nollan, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

This notion is rooted in the common law approach. While the language of nuisance is prevalent in the concept, we must remember that the paradigm deals with whether government is seeking to prevent harms caused by the landowner or is using the regulatory process to extract a benefit. In these exaction cases, the question focuses on whether the developer's activity causes the harm for which exaction is sought or whether the government is using the permitting process to gain beneficial improvements. For example, a housing development causes traffic; requiring dedications for adequate thoroughfares is an exaction designed to deal with the problem caused by the development. See Kmiec,

Dolan, the city failed to show why the owner needed to dedicate some of her property to the city, as opposed to maintaining a private greenway, for effective flood control. Furthermore, the city did not conclusively show that Dolan's development would cause additional bicycle and pedestrian traffic warranting the dedication of a pathway easement.⁴⁷

B. The Nuisance Exception in Takings Jurisprudence

The Court's takings jurisprudence often mentions the concept of nuisance and explains how nuisance abatement is a legitimate non-compensatory exercise of the police power. In *Mugler v. Kansas*⁴⁸ and *Hadacheck v. Sebastian*,⁴⁹ the Court did not find takings even though extreme diminution in value resulted from the statutes involved. A liquor plant in *Mugler* and a cement factory in *Hadacheck* could be controlled as nuisances without requiring compensation. In other words, the regulations in both cases, although diminishing value greatly, did not effect takings of property. They addressed nuisances which do not require compensation when regulated out of existence.⁵⁰

*Lucas*⁵¹ tells us that this nuisance (or harmful or noxious use) distinction was the precursor of the nexus requirement described in *Nollan*.⁵² Some commentators agree that this interpretation of *Nollan* is the modern expression of the nuisance or harm-benefit distinction,⁵³ leading one to wonder whether a more thorough understanding of those original distinctions will help us plot a course for future cases.⁵⁴ *Dolan*, with an even stronger emphasis on the nexus, indicates that the original distinctions are indeed a key to upcoming cases.

The original takings jurisprudence was largely guided by the notion of *sic utere tuo, ut alienum non laedas*⁵⁵ and private property rights remained outside the scope of governmental control unless a conflict between private right holders or between a private and public right arose.⁵⁶ The notion of nuisance or harm prevention is evident

supra note 7, at 1650-52, for more information on the nexus requirement between the landowner's activities and the exactions sought as found in the common law of takings paradigm.

47. *Id.* at 2320-22.

48. *Mugler v. Kansas*, 123 U.S. 665 (1887) (upholding statute prohibiting the manufacture or sale of liquor other than for medicinal, scientific or mechanical purposes; *Mugler* could not use his existing brewery, resulting in great diminution in value).

49. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance forced extant brick making facility to cease operation, with diminution in value from \$800,000 to \$60,000).

50. *Cf.*, *Lucas*, 112 S. Ct. at 2889, where the successful petitioner sought to build houses when neighboring parcels had similar structures.

51. *Lucas*, 112 S. Ct. at 2897.

52. *Supra* note 33 and accompanying text.

53. *See, e.g.*, Kmiec, *supra* note 7, at 1651-52; James E. Krier, *The Regulation Machine*, 1 SUP. CT. ECON. REV. 1, 7 (1982). *See also*, Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1378 (1993). *But cf.*, Frank I. Michelman, *Takings*, 1987 88 COLUM. L. REV. 1600, 1608 (1988). Michelman is a critic of the nuisance distinction as seen *supra* note 6 and accompanying text.

54. In *Dolan*, for example, the Court determined that states must make some showing that exactions are in response to the harms created by the owner's activity. This is the primary purpose of nuisance theory, i.e., to prevent harm to others' property through the use of your own. 114 S. Ct at 2319-20. Note also that the Court distinguished this standard of protection for civil rights from guarantees founded in the Due Process and Equal Protection Clauses. In other words, this is a requirement springing entirely from the Fifth Amendment itself.

55. "Use your own property so as not to injure that of another person."

56. Glynn S. Lunney, Jr., *A Critical Examination of the Takings Jurisprudence*, 90 MICH. L. REV.

in such a jurisprudential framework. If such thinking is currently expressed in the *Nollan* and *Dolan* nexus requirements,⁵⁷ other aspects of classic takings theory most likely shape our future decisions, but perhaps in obtuse ways due to the more recent regulatory takings decisions. Future takings decisions will best serve the Fifth Amendment by evolving in accordance with these long held understandings of property. Similarly, our codified laws and policies should reflect such consistent progress.

The ability of a concentrated group to alter the property rights of less organized owners is a concern found in classic takings law⁵⁸ and modern work.⁵⁹ Expressed contemporarily, the Takings Clause serves "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁶⁰ Thus, where cases like *Penn Central*⁶¹ may have drifted from this principle, perhaps *Nollan*,⁶² *Lucas*⁶³ and *Dolan*⁶⁴ signal a return. In sum, takings jurisprudence originally provided protections which disappeared in later interpretations. Property rights received protection without reference to values of the property taken or retained, as the courts interpreted the Fifth Amendment to guard those rights regardless of pecuniary value.⁶⁵ "[T]he compensation requirement protected each of these legal rights individually. Government action that effectively eliminated, modified, transferred or restricted any enforceable legal right raised the issue of whether compensation was required. To use the common metaphor, the early Court protected each 'strand' in the bundle of ownership rights individually."⁶⁶ Some modern cases, however, such as *Penn Central*⁶⁷ and *Keystone Bituminous Coal Assn. v. DeBenedictis*⁶⁸ examine property in broader terms and do not compensate the taking of one "strand" when other discrete strands with substantial value remain. While critics of that approach exist,⁶⁹ courts do not seem inclined to change their methods and continue moving farther from original understandings of property rights and the Fifth Amendment's protection.⁷⁰

1892, 1909-12 (1992).

57. See notes 50-54 and accompanying text.

58. See Lunney, *supra* note 56, at 1941-45.

59. See, e.g., Kmiec, *supra* note 7 and Kmiec, *The Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991); Lunney, *supra* note 56, at 1946-65.

60. *Nollan*, 483 U.S. at 835-36 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

61. 438 U.S. 104. Of over one million buildings in the city, only 400 were subject to the restrictions; in this case, the restrictions cost the owner at least \$3 million annually. *Id.* at 138-41 (Rehnquist, J., dissenting).

62. 483 U.S. 825.

63. 112 S. Ct. 2886. Justice Scalia writes, "Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Id.* at 2892.

64. 114 S. Ct. 2309.

65. Lunney, *supra* note 56, at 1903-04.

66. *Id.* at 1903, *citing to, inter alia*, *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914); *Curtin v. Benson*, 222 U.S. 78 (1911); *Muhlker v. New York & Harlem R.R.*, 197 U.S. 544 (1905).

67. 438 U.S. at 130-31.

68. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 498 (1987) (Although 27 million tons of coal could not be mined by its owners, the Court examined the diminution in value in comparison to all of the owners' other holdings).

69. See, e.g., Kmiec, *supra* note 7 and Epstein, *supra* note 53.

70. See notes 76-86 and accompanying text.

C. *Penn Central* and *Lucas*: Some Philosophical Differences

As mentioned above, the *Penn Central* case diverges from some long held notions of property rights and the protection afforded by the Takings Clause. The *Lucas* case in particular may set the stage for a resurgence of common law nuisance principles and the protection of individual property rights without reference to the owner's other property.

1. *The Penn Central Approach*

Earlier in this Note⁷¹ we saw that the nuisance exception was a recognized component of takings theory; state regulations which prohibited nuisances at common law were non-compensable exercises of the police power. The common law notion served as a functional guide for courts in those cases. The majority in *Penn Central*, however, broadens the idea of non-compensable police power exercises so as to make the one time guide useless.⁷² The Court describes nuisance exception cases cited by the petitioner as "better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."⁷³ The Court, therefore, opens the door for legislatures to implement regulations which harm property rights but will not require compensation so long as some widespread benefit (as defined by the legislature) is expected. The Court, to the detriment of property owners, exchanged the stable nuisance exception for an ephemeral legislative determination.

The *Penn Central* Court also presents a view of property somewhat different than traditional takings cases.⁷⁴

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole⁷⁵

This view of property still directs most takings cases, even in some more extreme circumstances. In one case,⁷⁶ an ordinance limiting the depth of quarrying operations was upheld because the owner could pursue alternate uses of the property,⁷⁷ the industry was traditionally regulated⁷⁸ and the investment backed expectations of the owner.⁷⁹ The court explained that, despite a \$31,000,000 loss in value, the owner's expectations were not harmed as it would be inappropriate to consider the unmined

71. See notes 48-57 and accompanying text.

72. *Penn Central*, 438 U.S. at 133-34 n.30.

73. *Id.* at 134 n.30.

74. See notes 65-68 and accompanying text.

75. *Penn Central*, 438 U.S. at 130-31.

76. *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377 (N.J. 1992).

77. *Id.* at 1387. The court suggested the site's use as a telephone tower or an office complex, among other things. One should consider whose judgments regarding the efficient use of property are sound, the courts' or the market's.

78. *Id.*

79. *Id.* at 1387-88.

basalt as a segmented property interest.⁸⁰ The ordinance was partially aimed at preventing asbestos emissions and water contamination,⁸¹ which seem to constitute legitimate nuisances, the prevention of which would inhere in an owner's title. Instead of using that coherent path of nuisance law, the court relies on *Penn Central* reasoning.

Another case which treats clearly individual pieces of property as one parcel is *Naegele Outdoor Advertising v. City of Durham*.⁸² Naegele owned billboards throughout the city which were subject to a subsequently enacted ordinance prohibiting off-site signs at certain locations after an amortization period.⁸³ The signs sat on land via individually negotiated leases and the city recognized them as individual structures for tax purposes. Of the company's 232 signs, 106 lost all economically beneficial use, but the court found no taking.⁸⁴ The court viewed the signs as comprising one unit of property, yet specifically denied that it aggregated unrelated property interests as criticized in *Lucas*.⁸⁵ In this instance, the formal expedient of conveying these 106 signs to another owner would dictate a different outcome, leaving us to wonder about the validity of the court's theoretical framework. If the constitutionally mandated result regarding the same property varies because of the owner's identity, are we dealing with a paradigm which serves the Fifth Amendment's purpose of protecting citizens' property?

Lower courts employ the rule articulated in *Bernardsville Quarry* and *Naegele* when characterizing property as either segmented or aggregate interests despite commonly held understandings to the contrary.⁸⁶ While admittedly this portion of *Penn Central* is good law, between the historical understanding accorded the takings issue⁸⁷ and the "hints" in *Lucas* (and *Dolan*), one wonders whether a change is due.

2. The Lucas View

Modern cases do not, of course, entirely ignore common law notions of nuisance. In *Florida Rock Industries v. United States*⁸⁸ the court found a wetlands fill permit requirement and denial would work a taking, largely because the nuisance exception could not be met.⁸⁹ Several contemporary commentators advocate the legitimacy of the nuisance exception, particularly because of the standard's stability. The relatively clear line afforded by the nuisance exception contrasts sharply with the legislative vagaries inherent in determining what constitutes a public benefit.⁹⁰ *Lucas* explicitly attempts to limit the government's ability to regulate property to the same degree as private parties when they try to regulate their neighbors' uses.⁹¹ That is, the law must

80. *Id.* at 1387-89.

81. *Id.* at 1379.

82. *Naegele Outdoor Advertising v. City of Durham*, 803 F. Supp. 1068 (M.D.N.C. 1992).

83. *Id.* at 1070.

84. *Id.* at 1073-78.

85. *Id.* at 1074 n.4.

86. See, e.g., *McAndrews v. Fleet Bank of Mass.*, 989 F.2d 13 (1st Cir. 1993); *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992); *Carter v. City of Porterville*, 22 Cal. Rptr. 2d 76 (Cal. App. 1993); *Fitzgarrald v. Iowa City*, 492 N.W.2d 659 (Iowa 1992); *Cope v. Cannon Beach*, 855 P.2d 1083 (Or. 1993).

87. See notes 48-57 and accompanying text.

88. 21 Cl. Ct. 161 (1990).

89. *Id.* at 166-67.

90. See, e.g., Kmiec, *supra* note 7, at 1638-44; Epstein, *supra* note 53, at 1377-79.

91. *Lucas*, 112 S. Ct. at 2901.

be applied consistently to the state and the citizens. This is our most coherent and mature understanding of our common law (especially nuisance).

The *Lucas* opinion is limited, however, by language restricting its application to deprivations of all economically beneficial uses;⁹² lower courts are quick to point out this limitation⁹³ and shape their opinions accordingly.⁹⁴

Lucas, however, presents a view of property which, if adopted fully in a later opinion, could restore the Takings Clause's original protection of property rights.⁹⁵ At footnote seven, Justice Scalia's opinion discusses the uncertainty in evaluating takings claims as to whether the owner's loss of the taken property is compared to the remaining value of the tract as a whole or only the burdened segment itself.⁹⁶ In the *Penn Central* facts, for example, the latter evaluation would look at the air rights above the terminal as property in and of themselves,⁹⁷ without referring to the company's earnings, etc., as was actually done.⁹⁸ Historic takings cases examined property in this segmented manner⁹⁹ as does an occasional contemporary lower court case,¹⁰⁰ but *Penn Central* is more widely followed.¹⁰¹ Critics generally state that Scalia's reasoning would lead to a requirement of compensation in any government taking because an owner will segment his property into numerous parcels so as to claim a taking occurred.¹⁰² Such conclusions may be intellectually appealing but are non sequiturs when the actual *Lucas* language is read:

92. *Id.* at 2900.

93. See, e.g., *Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1318-19 n.1 (D. Nev. 1992); *Iowa Coal Mining Co. v. Monroe County*, 494 N.W.2d 664, 670 (Iowa 1993), *cert. denied*, 124 L. Ed. 2d 638 (1993); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1274 (Mass. 1992), *cert. denied*, 124 L. Ed. 2d 249 (1993); *City of Minneapolis v. Fisher*, 504 N.W.2d 520, 526 (Minn. Ct. App. 1993), *cert. denied*, 114 S. Ct. 1306 (1994); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992), *cert. denied*, 113 S. Ct. 2929 (1993).

94. Commentators just as quickly point out the limitation. See, e.g., Epstein, *supra* note 53, at 1378-79. Epstein is concerned that in cases other than total diminution in value, the examination defaults to the *Penn Central* multi-factor analysis, particularly investment backed expectations. "Protection should only depend on the property one owns, not how it was acquired, be it by grant, original occupation or even adverse possession." *Id.* at 1376. Expectations can be unworkable, as well. For example, under *Penn Central* reasoning, does a slight regulation put me on notice to expect further regulation? Would this lead to growing intrusions, one more intrusive than the last, which were to be expected? The cycle is theoretically never ending. *Id.* at 1385-87. With *Lucas* limited to total diminution, the regulations can go on almost indefinitely without compensation.

95. The public use requirement of the Takings Clause may be irretrievably lost, though, so the protection is already weakened. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (finding the public use requirement is coterminous with the police power and subjecting legislative determinations of public use to rational basis scrutiny).

96. *Lucas*, 112 S. Ct. at 2894 n.7. "For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.S.2d 324, 333-34 (1977), *aff'd.*, 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity." *Id.* (some citations omitted).

97. See *Penn Central*, 438 U.S. at 142-43 (Rehnquist, J., dissenting).

98. *Id.* at 136.

99. See notes 65-68 and accompanying text.

100. See, e.g., *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 398 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd.*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

101. See notes 67-87 and accompanying text.

102. See, e.g., *Jeb Rubenfeld, Usings*, 102 YALE L. J. 1077, 1106-11 (1993). Rubenfeld hypothesizes that the owner in *Loretto* could deed the "right to exclude cable television equipment from her real estate" and create a compensable interest in the transferee. See also Michelman, *supra* note 6, at 1192-93.

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.¹⁰³

Thus, the conveyed segment must be recognized at state law for recognition under the Takings Clause. Remember also that the opinion spoke of estate segments existing at the time the owner took title.¹⁰⁴ The owner could not, therefore, convey a segment which was already regulated or eliminated when he took title and, by such conveyance, create a compensable interest.

Criticism of the *Penn Central* view can be virulent at times¹⁰⁵ and an occasional case explicitly adopts the *Lucas* rationale,¹⁰⁶ but the nuisance paradigm and segmented property interests are distinctly minority positions.

III. FEDERAL EFFORTS TO STRENGTHEN PRIVATE PROPERTY PROTECTION

With mounting calls for environmental protection in particular, state and federal government regulations increased rapidly. In response to this deluge of regulation, President Reagan promulgated Executive Order 12,630 in hopes of slowing regulatory activity until its impact on private property was assessed.¹⁰⁷ Environmental activists are quick to call the order an ideologically driven effort to circumvent environmental legislation by making enforcement expensive and burdensome.¹⁰⁸

A. Executive Order 12,630

The order directs executive agencies to evaluate their actions and proposed actions for takings implications in accordance with guidelines promulgated by the Attorney General.¹⁰⁹ Executive agencies are to provide the Office of Management and Budget with information identifying the public health or safety risk which is the object of the regulation, establishing that the action substantially advances the stated purpose and is not disproportionate. The agency also estimates the potential cost to the government if the action is determined to be a taking.¹¹⁰ The order recognizes that acts taken "specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings," yet still

103. *Lucas*, 112 S. Ct. at 2894 n.7.

104. *Lucas*, 112 S. Ct. at 2899.

105. See, e.g., Charles K. Rowley, *The Supreme Court and Takings Judgments: Constitutional Political Economy Versus Public Choice*, in *TAKING PROPERTY AND JUST COMPENSATION* 79 (Nicholas Mercuro, ed. 1992). "The judgment demonstrated an appalling ignorance of the nature of property rights and of the meaning of the eminent domain clause . . ." *Id.* at 115.

106. See, e.g., *Golden Gate Hotel Association v. City and County of San Francisco*, 836 F. Supp. 707, 710 (N.D. Cal. 1993), *rev'd. on other grounds*, 18 F.3d 1482 (9th Cir. 1994).

107. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted* in 5 U.S.C. § 601.

108. See, e.g., Robin E. Folsom, *Executive Order 12,630: A President's Manipulation of the Fifth Amendment's Just Compensation Clause to Achieve Control Over Executive Agency Regulatory Decisionmaking*, 20 B.C. ENVTL. AFF. L. REV. 639, 639-57 (1993); Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury and Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 442-47 (1993).

109. Executive Order No. 12,630, *supra* note 107, §§ 1(c) and 2.

110. *Id.* § 4(d)(4).

requires the action be taken in response to "real and substantial" threats to public safety.¹¹¹ Going beyond the confines of the subsequent *Lucas* decision, the order states that a taking may result although less than a complete deprivation of value occurs or when separate interests (segments) of the same property are involved.¹¹² While not creating any right or benefit for the property owner, the order did impress upon regulators the need to consider the rights of those owners. Notably, however, actions exercising formal eminent domain powers are excluded from the order's purview.¹¹³ While protecting the public purse is the stated purpose behind the order,¹¹⁴ the advocate of property rights is left wondering whether owners of covenants, leaseholds or other interests less than fees simple will face resistance to compensation claims when the underlying fee is taken via eminent domain.

B. Legislation at the Federal Level

The Private Property Protection Act of 1995¹¹⁵ is the latest effort to codify the requirements of Executive Order 12,630. Similar bills fell in 1990, 1991 and 1993 amid heavy pressure from "labor, environmental, consumer, historic preservation, planning, civil rights and other public interest groups."¹¹⁶ This Act would allow affected parties to seek judicial review of whether the Attorney General did not certify the appropriate agency's actions as in compliance with Executive Order 12,630 or similar procedures.¹¹⁷ Another more extreme attempt to provide protection to property owners is found in the Endangered Species Improvement Act of 1993.¹¹⁸ A portion of this bill would amend the Endangered Species Act of 1973¹¹⁹ and provide compensation for owners who suffer any diminution in value due to an action under the 1973 Act.¹²⁰ Admittedly, such a requirement could handcuff the government when dealing with natural resources. In fact, one must recall Justice Holmes' statement that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹²¹ Paying for any diminution most likely does not conform to our common law understandings of property, either. Any owner expects reasonable property restrictions, particularly in accordance with nuisance laws. For example, a law prohibiting strip mining in the city may keep our parcel below its maximum value, but such restriction would inhere in the property itself and is not compensable.¹²²

111. *Id.* § 3(c).

112. *Id.* § 3(b).

113. *Id.* § 2(c)(1).

114. *Id.* § 1(b).

115. H.R. 130, 104th Cong., 1st Sess. (1995) [hereinafter Property Rights Act].

116. Sugameli, *supra* note 108, at 447.

117. Property Rights Act, *supra* note 115, at § 4.

118. H.R. 1992, 103rd Cong., 1st Sess. (1993).

119. 16 U.S.C. §§ 1531, *et seq.*

120. H.R. 1992, *supra* note 118, § 8.

121. *Pennsylvania Coal*, 260 U.S. at 413.

122. This note cannot address every conceivable statute or restriction. Thus, the Endangered Species Act is simply a convenient example and not necessarily the archetype.

IV. STATE LEGISLATIVE RESPONSES

Legislative efforts to protect private property are found at the local level as well as the national. These statutes typically require a takings analysis similar to that in Executive Order 12,630 although many variations exist.¹²³ The statutes have three basic forms although overlap exists. The Utah law and a recently defeated Arizona effort closely follow the Executive Order by requiring agencies or the attorney general to create guidelines for evaluating proposed licensing or regulatory activities. Formal exercises of eminent domain, law enforcement activities, and the repeal or amendment of rules which lessen interference with private property are excluded. These statutes also provide some guidelines, derived from the case law, as to what factors may indicate a taking.¹²⁴

The Delaware and Washington statutes do not provide such guidelines. They also fail to implicitly adopt case law, as do the Arizona and Utah statutes. The Delaware and Washington statutes essentially direct the attorneys general to promulgate guidelines for regulatory agencies. The attorneys general, however, are apparently given more latitude in devising these checklists or guidelines.

The Indiana statute simply states, "the attorney general shall consider whether the adopted rule may constitute the taking of property without just compensation to an owner."¹²⁵ This clause is tacked onto a general review performed by the attorney general for any agency rule. The Delaware statute, by comparison, provides for a more explicit review to determine the effects on property rights.

Another legislative effort gaining momentum is a fifty percent diminution threshold. Such statutes compel compensation if a new rule, regulation or zoning law diminishes an owner's property value by fifty percent or more.¹²⁶ Advocates introduced such proposals in ten states and hope to do likewise in Arizona.¹²⁷ Environmental groups strenuously oppose such fifty percent laws as exposing the government to myriad claims and chilling worthy regulatory efforts.¹²⁸

V. EVALUATING THE LEGISLATIVE RESPONSES

The dearth of legislation makes one wonder whether there is more to this issue than simply "pro-takings advocates" attempting to de-claw regulatory statutes through the back door.¹²⁹ Could it be that certain cases and regulations disturbed not only pro-takings zealots but other members of society? If that is the case, from where did this unnerving feeling come? As earlier portions of this Note described, common law

123. See ARIZ. REV. STAT. ANN. §§ 37-221 to 37-223 (1992). In Arizona, environmental groups opposed to the existing law elicited 50,000 signatures within 90 days of the bill's passage, compelling a referendum Nov. 8, 1994. The vote defeated the proposed law.; DEL. CODE ANN. tit. 29, § 605 (1992); IND. CODE ANN. § 4-22-2-32 (Burns 1993); UTAH CODE ANN. §§ 78-34a-1 to 78-34a-4 (1993); WASH. REV. CODE § 36.70A.370 (1991). Pending legislation includes efforts in Colorado (S.B. 165), Hawaii (H.B. 3349), Oklahoma (H.B. 2506), South Carolina (S.B. 125) and West Virginia (S.B. 249).

124. The defeated Arizona law, for example, stated, "[g]overnmental action may amount to a taking even though the action constitutes less than a complete deprivation of all use or value or of all separate and distinct interests in the same private property or the action is only temporary in nature."

125. IND. CODE ANN. § 4-22-2-32(b).

126. Marianne LaVelle, *The "Property Rights" Revolt*, NAT'L. L.J., May 10, 1993, at 1, 34.

127. *Id.* at 34.

128. *Id.*

129. Sugameli, *supra* note 108, at 442.

understandings outside the constitution or legislation shaped our notions of property rights under the Takings Clause. We have ideas of what rights accompany ownership and cannot easily allow regulatory legislation to circumvent them without some objection.

Opposition to property protection legislation is quite real, with the defeated Arizona statute described as "the worst anti-environmental law ever passed in the United States."¹³⁰ Can these statutes really be that effective or that dangerous? Unfortunately and fortunately the answer is "no."

A great problem with such statutes, particularly ones which attempt to provide detailed guidelines themselves, is that they legitimize legislative definitions of property. Such definitions can, of course, change with each session. Thus, where *Penn Central* intimated that a legislative policy expected to produce some widespread public benefit would not be a taking under the nuisance exception to the Takings Clause,¹³¹ we may find disjointed policy statements by a legislature supplying a "benefit" to satisfy the requirements of *Penn Central*.¹³² Or legislatures may try to redefine property historically viewed as independent segments as one aggregate whole, thus reducing the ratio of value taken to value remaining.¹³³ In either case, we may encourage legislatures to reshape long held understandings of property to avoid takings claims. This causes uncertainty and instability in our concepts of property, as no one could know when the legislature may redefine some other aspect of property.

The underlying problem, though, is a takings jurisprudence built on faltering logic. So long as any opinion rendered by an attorney general relies on the uncertain hodgepodge of investment-backed expectations, character of the government action and economic impact,¹³⁴ uncertainty will exist in determining what is a taking. The statutes encourage such reliance but how helpful will any such opinion be to a regulatory agency? The State Attorney General of Delaware confesses to providing "canned" regulatory reviews when required;¹³⁵ if these factors leave scholars and attorneys wishing for a more definitive answer, how helpful could a boilerplate evaluation be to a department head?

While attorneys general must work with the current takings law, we do not aid society by encouraging or furthering such confused jurisprudence. Attempting to condense many compensable, legitimate property interests (segments) into one large estate so that the diminution in value (economic impact) is minimal simply offends our basic

130. Lavelle, *supra* note 126, at 34. One wonders whether statutory efforts to protect other civil rights would engender such responses. As Justice Stewart wrote in *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972),

[t]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right That rights in property are basic civil rights has long been recognized.

131. See notes 72-73 and accompanying text.

132. Although *Lucas*, 112 S. Ct. at 2896-2901, requires a state to do more than simply assert such a widespread public benefit, the case limits itself to incidents of total diminution in value. See notes 84-86 and accompanying text.

133. Again, *Lucas*, 112 S. Ct. at 2894 n.7 addresses the issue of property viewed as compensable segments when the state's law of property so recognized, but the case is limited. See notes 92-94 and accompanying text.

134. See notes 25-29 and accompanying text.

135. Sugameli, *supra* note 108, at 449 (citing letter from Ralph S. Tyler, Deputy Attorney General of Maryland, to Delegate Donald B. Elliot, Maryland House of Delegates 1 (Mar. 26, 1993)).

notions of fairness. If I can sell twenty-seven million tons of coal and have it recognized as a subsurface estate, why can't I receive just compensation when a regulation prevents me from doing so?¹³⁶ Attempting to avoid compensation by arguing that an owner did not have investment-backed expectations is similarly offensive. Could we adequately explain to a department head that one owner may deserve compensation but another may not because of how and why they acquired their similar property?

Groups and individuals may justifiably cringe at the aforementioned fifty percent diminution legislation¹³⁷ or legislation requiring compensation for any diminution in value.¹³⁸ Such policy is unwarranted and would produce unnecessary costs for already strapped governments. Opponents should not, however, complain that sponsors of that legislation are trying to push the constitution's requirements beyond reason.¹³⁹ Bad policy cannot substitute for the amending process or Supreme Court decisions. The legislation does, however, underscore the failure of existing jurisprudence which does not adhere to our common law understandings. Adherence to these understandings enables us to determine whether an owner who suffered any loss or a fifty percent loss requires compensation. To be more specific, the laws of nuisance permit us to determine when an individual's use of his property is allowable, providing a standard against which government regulation could be measured for takings evaluations.¹⁴⁰

If legislation is to assist state agencies in forming meaningful guidelines, statutory efforts to define property or explain takings should be avoided. Statutes which rely on legislatively crafted definitions of property would improperly validate such legislative determinations (which can change from session to session). Furthermore, explanations of takings which rely on the uncertain standards found in much of current takings jurisprudence only perpetuate the unpredictable results which accompany these standards. Reliance on these standards produces "canned" opinions from attorneys general who cannot apply the standards without much certainty outside the narrow *Loretto*¹⁴¹ and *Lucas*¹⁴² per se categories. The solution lies elsewhere.

If, as this Note argues,¹⁴³ certainty in takings can be found in common law understandings and not in ephemeral checklists, appropriate statutes should reflect this fact. The Indiana statute¹⁴⁴ simply provides that "the attorney general shall consider whether the adopted rule may constitute the taking of property without just compensation to an owner." Perhaps more useful is the Washington statute:

The state attorney general shall establish . . . an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property

136. See *Keystone*, 480 U.S. 470.

137. See notes 126-28 and accompanying text.

138. See notes 118-20 and accompanying text.

139. See, e.g., Sugameli, *supra* note 108, at 448-50.

140. See, e.g., Epstein, *supra* note 53, at 1378; Kmiec, *supra* note 7, at 1638-41. See also, Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 204-12 (1992) (discussing the unwritten natural law as the basis for protecting property rights in the 18th and 19th centuries).

141. 458 U.S. 419. See notes 17-19 and accompanying text.

142. 112 S. Ct. 2886. See notes 37-41 and accompanying text.

143. More precisely, this Note uses the theses of legal scholars and applies them to legislation.

144. *Supra* note 125.

protections provided in state and federal constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with case law.¹⁴⁵

Both statutes provide the flexibility to apply existing common law to proposed regulations. The largest problem, however, is that the statutes do no more than direct the attorney general to evaluate the proposed rule or agency action under the existing framework of takings jurisprudence. That framework, as this Note explains, (1) often conflicts with our original understandings of private property and (2) is likely shifting as seen particularly in *Lucas* and *Dolan*. Furthermore, the current statutes, while motivated by attempts to restore private property rights, cannot function effectively by themselves. That is, they cannot protect these property rights when agencies act under the auspices of authorizing statutes which provide expansive powers to intrude upon property rights as in *Penn Central*. It is unreasonable to expect an attorney general to proscribe agency actions which were regularly carried on in the past under existing authorizing statutes, regardless of whether those acts would be considered takings under the original understandings and emerging *Lucas-Dolan* standards. This is particularly true when a purported private property protection statute only mimics the unsound standards of less recent Supreme Court decisions such as *Penn Central*. Legislative efforts must also reflect the fact that agencies' powers cannot transgress constitutional protections. If existing authorizing statutes give the impression that agencies may effect regulatory takings without compensation, legislators must change them.

Legislators must rewrite these authorizing statutes and limit the power of agencies to regulate property in accord with our original understandings of private property rights. Only then will meaningful protection from regulatory takings be complete. Therefore, the legislature should limit the agencies' powers with appropriate legislation and not simply make the attorney general a gatekeeper.¹⁴⁶ Authorizing statutes must restrict the agencies' ability to regulate uses of property to our common law notions of nuisance. They must limit the scope of the delegated power to the agencies so we do not employ legislatively sanctioned regulations which extend beyond our inherent understandings of property rights. As to private property protection itself, any review power should not unduly burden often overworked attorneys general as well. Initial review could be made by administrators with general guidance from the attorney general (and reformed authorizing statutes):

In evaluating the proposed rule or regulation [or in establishing this process] the [designated agency official] shall also consider the state's law of nuisance and property as it relates to the ability to control the use of property. The attorney general shall prepare and maintain a guide book for agency officials making this evaluation. Such considerations may or may not be dispositive under the constitutions of the United States and [this state].

This clause would direct the agency official to use the objective standard of the com-

145. *Supra* note 123.

146. The time and resources of the attorney general's office must be considered when asking it to perform these evaluations. In fact, an estimated \$10,000 cost would accompany takings appraisals for each commercial or industrial property affected by a regulation in Maryland. This information is an attorney general's estimate in response to an unsuccessful private property protection bill. Sugameli, *supra* note 108, at 449.

mon law for determining whether a taking is a likely result from a proposed rule. The proposed statute uses the agency itself to make the evaluation based on general information provided by the attorney general's office. This would reduce the burden on the attorney general's office while offering the agency some direction. The last sentence recognizes that, while the nuisance paradigm heavily influences our takings law, additional protections may lie in the state and federal constitutions. Procedures for amending state constitutions are generally less regimented than the federal constitution. Appropriate amendments which provide enhanced protection could be drawn by the legislature and submitted to the state's citizens.

These alternatives point out that the legislatures play an important role in restoring private property protection. If lower courts continue to stray from original understandings of the Fifth Amendment, no attorney general opinion will resolve the concern for property rights regardless of the applicable statute's design. If the attorney general's office uses the common law nuisance standard while the courts muddle through the shifting multi-factor analysis, further confusion will ensue. Legislators concerned with regulation impinging on private property must realize that they make the ultimate decisions; they decide to distribute the state's resources and how to delegate regulatory authority. It is not feasible to provide expansive regulatory authority so quickly and then expect the attorney general's office to complete the job without the legislature's support. Step A (the delegated regulatory authority) was easy; step B (the appropriate private property protection) also requires the legislators' attention. Not in the form of legislative redefinitions of property but in properly adjusting the authority of regulatory agencies so our long held notions of property rights are not unconstitutionally sacrificed to other goals.

VI. CONCLUSION

As we continue to recognize the importance of protecting the environment, legislation governing the use of land is certain to increase.¹⁴⁷ Accordingly, regulations will emerge from such legislation and heated battles will inevitably follow as owners protest regulations which curtail their use of their property. Conceding that both those who seek to regulate the uses of property and property owners have valid interests, we must arrive at some method which allows us to determine when government regulation goes too far. Using standards which do not provide meaningful guidance or which foster seemingly inconsistent results does not serve justice. Such attempts only too often defy our long held understandings of property and property rights, bringing decisions which lack coherence and foster confusion. Outside the *per se* categories of physical invasion and total deprivation of economic viability lie a vast array of questions which cannot be adequately answered without any objective measure.

Legislative efforts to protect property owners have overlooked the objective standards provided by the common law. Traditionally, the common law has validated the rightful expectations of property owners while legitimately restricting harmful land use. If we continue to use multi-factor tests we only encourage litigation on the issue of takings when resources are better directed toward other ends.

This Note emphasizes that the most appropriate method of protecting our guaranteed property rights is the courts' return to our original understandings found in the

147. See *supra* notes 1 and 3.

common law. The most recent cases of *Lucas* and *Dolan* strongly indicate that this return is occurring. Our legislatures, too, can protect our civil rights. They should not, however, use legislative tools which legitimize easily changed legislative definitions of recognized property interests. Nor should they use statutes which force executive agencies into the quagmire of evaluations based on incoherent case law such as *Penn Central*. Statutes or even constitutional amendments at the state level which codify traditional common law principles are appropriate to protect private property rights. Legislatures should also modify the powers granted to state agencies, ensuring that their regulations will not run afoul of the Takings Clause.

Our constitution provides explicit protection for property which our environmental policy cannot ignore. If the common law does not allow a non-compensable regulation, we must pursue alternatives such as condemnation or restrictive covenants. As one court reminds us, "There is little good in protecting the environment for the sake of a society which fails to insist on fair treatment of its citizens."¹⁴⁸

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148. *People v. Department of Hous. and Community Dev.*, 119 Cal. Rptr. 266, 276 (Ct. App. 1975).

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