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Matthew T. Newton

Southern Illinois University Carbondale

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THE TAKINGS CLAUSE: A HISTORICAL AND DEVELOPMENTAL ANALYSIS

by

Matthew T. Newton

**Dr. Melone
POLS 494b
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CASES NOTED

Florida Rock Company Inc. v. United States, 18 F3d 1560

Keystone Bituminous Coal Association v. DeBenedictis, 480 US 496

Loveladies Harbor Inc. v. United States, 28 F3d 1171

Lucas v. South Carolina Coastal Council, 505 US 1003

Mungler v. Kansas, 123 US 623

Penn Central Transportation Co. v. City of New York, 438 US 104

Pennsylvania Coal Co. v. Mahon, 260 US 393

Plymouth Coal Co. v. Pennsylvania, 232 US 531

Williamson County Planning Commission v. Hamilton Bank, 472 US 172

INTRODUCTION

*... nor shall private property be taken for public use,
without just compensation.*

-- Takings Clause of the 5th Amendment of the US Constitution

Until recently, Congress had been content to let the judiciary draw the line on takings by deciding when the government must pay compensation to private property owners. However, some members of the US Congress have proposed new legislation which would significantly change the current federal approach to regulatory takings. (1) These legislative proposals are seeking to replace much of the case law interpreting the Fifth Amendment Takings Clause. Despite judicial decisions favoring private property owners in the last few years, many in Congress believe that a clear standard on regulatory takings is needed, a standard which will better protect private property rights in the face of government regulation by reducing the amount of property value diminution required before the government must compensate private property owners. These members believe expanded protection of property rights is consistent with the intentions of the framers of the Fifth Amendment Takings Clause. At the heart of the conflict is the historical tension between individual rights and the interests of the public, or, as some would say, the will of the majority. There are no easy answers to this timeless dilemma.

Recent case law and legislative proposals reflect a general hostility toward government regulations, especially those

designed to protect the environment and natural resources. Opponents of the proposals are concerned that these court decisions and pieces of legislation would, if enacted, create a cost deterrent to needed regulations. (2)

Proponents argue that needed regulations would still be enforced, but would no longer be "on the backs of particular individuals." The government should bear the costs when society as a whole benefits from the use of private land. (3) Proponents also argue that the costs would not be prohibitive if government agencies act efficiently. (4) By inference, acting efficiently would mean foregoing regulations necessary for the protection of public welfare and safety. The only other option under these pieces of legislation and case law would be to compensate landowners, because the proposals make compensation mandatory for regulations which affect property values even minimally. However, both the House and Senate proposals found it unnecessary to allocate additional funds for landowner compensation required by the proposals. Instead, the money must come from an agency's existing budget. This forces government agencies to decide between bearing the expense of certain regulations or foregoing their promulgation altogether.

The view that government regulation is overburdensome, and interferes with the landowner's ability to prosper is a familiar theme. This theme to some extent finds its roots in the libertarian ideology which advocates the limited role of government. In turn, the roots of the libertarian ideology may

be found to some extent in the classical philosophy of property espoused by John Locke in the late 17th century. (5) Locke contended that property rights existed before government and therefore government's role is limited to that of protector of preexisting individual rights which are inherent in man. Many people believe that the libertarian ideology as stated by Locke was the inspiration behind the Fifth Amendment, but there are still many arguments to contrary. For example, it can be stated that Locke's ideas are overly broad and ineffective solution to a problem which requires a balancing of the public interest with the protection of private property rights.

The justifications of this new wave of legislation, case law, and the underlying ideas about property rights have been hotly debated both politically and academically. The underlying clash of ideas will no doubt continue as it has for over two centuries. Supporters of property rights view the issue of "takings" through the perspective of classical property theory. This perspective ignores the historical case law and even departs from from current case law such as *Lucas v. South Carolina Coastal Council* (6). Ultimately, these ideas fail to acknowledge that a balance of interest is necessary. Property rights proponents claim that protection of private property rights must be restored in order to carry out the intentions behind the Fifth Amendment Takings Clause. This contention finds no basis in the early case law. A review of the history and development of the Fifth Amendment Takings Clause through legislation and

case law can present more balanced alternatives to the types of legislation being presently proposed. We will begin by discussing current issues and then move through the history of this controversial piece of the Constitution in order to find the roots of today's debate.

RECENT LEGISLATIVE ISSUES

The property rights protection bill that passed in the 104th House in 1995 is H.R. 925 or the "Private Property Protection Act of 1995." House of Representatives 925 falls under the category of "compensation" bills as opposed to the "assessment" bills. Compensation bills focus on paying the landowner for diminution in the value of his or her land. Assessment bills propose a "taking impact analysis" by federal agencies before they promulgate any regulation which might adversely impact the value of private property.

House of Representatives 925 would affect all federal agencies which promulgate regulations under the authority of those acts specified in the proposal. The proposal requires federal agencies to compensate any landowner whose land value has been decreased by 20% or more by such regulation. If the diminution reaches 50% of the land value, the landowner can force the agency to buy the land outright for "fair market value." Additionally, the bill requires only the affected portion of the property to be considered in measuring the affect of the federal agency action, thus making it significantly easier to obtain compensation. Even if the landowner cannot meet the 20% level

of diminution for the entire piece of property, he may make a compensation claim for a smaller portion.

Section 3(B) of this act prohibits indefinitely a restricted use for which the agency has paid compensation, even if the restriction is later withdrawn. If the agency later rescinds the restriction and the landowner wishes to pursue the previously restricted use, he or she must repay the compensation with the amount adjusted for inflation. In ssence, the government is buying from the landowner the particular land use being prohibited by the agency action.

Despite the attempt to clarify this area of law, ambiguities would arise if courts encounteres the nuisance exception proposed in both bills. Two types of nuisance exceptions exist; those which defer to the existing state law and those which are defined in the legislation themselves. The House proposal contains both types. It requires the avoidance of inconsistency between state law and the federal Act. Under this provision, anything already prohibited by state nuisance law or local zoning will not be compensable. Those courts whcih have traditionally been more deferential to state legislatures in the area of land use law may find a more expansive definition of public nuisance possible. Thus, the bill will likely have a disparate affect on olandowners according to thesitus of the property. The second exception in H.R. 925 seeks to avoid compensation for the federal prohibition of those land uses which would cause a hazard to public health or safety or damage to "specific property" other than the regulated

property. This may be a difficult distinction for courts to draw given the interdependence of land and the broad effect land uses are now known to have.

Additionally, proponents also attempted to pass a bill in the Senate that would expand the protection of property rights from its current judicial interpretation under the Fifth Amendment. The Senate version, S 605 was the second introduced by former Senator Bob Dole. Senate 605 or the "Omnibus Property Rights Act of 1995," is more comprehensive than H.R. 925 in that it is not limited to compensation but also has an extensive provision on agency assessment. In addition, the Senate proposal is not limited solely to the coverage of laws aimed at environmental protection. The proposal applies to all agency regulations regardless of the law under which the regulation was promulgated. This proposal also applies to state agency regulations required or funded by the federal government. The Senate version requires 33% or greater before a property owner would be awarded compensation.

The proposal has five sections, the first of which is the statement of findings and purpose. The statement of findings in the proposal reiterates the traditional libertarian position of property rights advocates. The findings state that "there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people." The bill also states that the Supreme Court's current

interpretation of the Fifth Amendment is "ineffective" and "costly." The bill attempts to "clarify the law" and "vindicate property rights." Title II sets forth the compensation provision. Section 204 is somewhat an attempt to codify existing law. This section provides for "just compensation" when private property is taken or invaded or when the owner is "deprived of all or substantially all economically beneficial or productive use of the property. This rule is similar to the one articulated by the Supreme Court in *Lucas v. South Carolina Coastal Council*. However, the rule as stated in *Lucas* requires that "all economically beneficial use" be prohibited by the regulation before a taking may be found on this factor alone. The rule state in S. 605 has modified the *Lucas* "total takings" test to include the loss of "substantially all economically beneficial use." How much of a loss "substantially all" would require is unclear from the proposals, but the rule appears to be more in line with the "partial takings" rule articulated in *Florida Rock Ind., Inc. v. United States*, which found a 95% diminution in value substantial enough to constitute a taking under the Fifth Amendment. Section 204(D) provides for compensation when the "fair market value of the affected portion of the property" is diminished by 33% or more.

Senate 605 also establishes a nuisance exception equivalent to that in *Lucas*. The "total takings" test in *Lucas* is subject to one exception. If a landowner is denied all economically beneficial use of his or her land, the prohibition

must inherein the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must "do no more than duplicate the result that could have been achieved in the courts, under the state's law of private nuisance or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Thus, the government would have the burden of showing that the regulation merely prevents a use which would be considered a nuisance in accordance with state common law. Whether this will have a clarifying effect is doubtful given the uncertainty inherent in the nuisance exception created by *Lucas*.

Authors of the Senate proposal also attempted to make it easier for landowners to overcome procedural hurdles which may prevent court from deciding the merits of certain cases. First, they proposed an amendment to the Tucker Act which is seen as an obstacle to landowners in seeking judicial relief. Under the Tucker Act, the landowner must choose whether he or she wishes to challenge the law itself, either facially or as applied, in which case the landowner must proceed to Federal District Court. However, if the landowner wishes to pursue a compensation claim, he is to proceed in the Federal Court of Claims. The proposal's amendment expands the jurisdiction of the Federal Court of Claims under the Tucker Act so that the landowner could bring actions under the proposed legislation. It would also allow the Federal Court of Claims to "grant injunctive and declaratory

relief when appropriate" and assert ancillary jurisdiction in certain cases. Additionally, under current law there are requirements which the landowner must meet before the claim is considered "ripe." The ripeness doctrine for inverse condemnation causes of action is sometimes difficult to overcome. The landowner must show that the decision of the governmental entity denying the landowner's request for the use of his or her property is final and that compensation has been sought through any other channels provided by the land use entity as espoused in *Williamson County Reg. Planning Commission v. Hamilton*. By creating an independent cause of action and conferring standing on anyone "adversely affected by an agency action," reaching the merits of a takings claim would prove much easier. Of course, this is only true if a federal agency action, or one mandated or funded by the federal government, is at issue. These proposals, if enacted, would have a great impact on the federal agencies' ability to effect land use management regulations. Although H.R. 925 was adopted by the 104th House of Representatives, the 104th Senate failed to pass any kind of property rights protection legislation and it is speculative to presume that similar proposals will be presented with any success in future sessions. Whether or not further proposals are successful, the ideas which these proposals have already brought to the forefront may not fade as easily as the political tide which brought them. (7) In other words, the view of property rights represented by the failed proposals survives. Thus, any concerns which surround the

proposals and the view of property rights and the Takings Clause should not end with the adjournment of Congress.

LIBERTARIAN PERSPECTIVES

The libertarian view of property rights is represented by the legislative proposals in more ways than one. First, the proposals adopt only those rules which reinforce a limited government role in promulgating regulations which affect land use. The proposals make the finding of diminution particularly easy for the land owner by setting a low percentage level of diminution and by allowing the landowner to show that only a portion of his property has been diminished. These rules would severely limit federal agencies from promulgating regulations which in any way affect the monetary value of land. By forcing the federal agencies to pay for every diminution in property value over 20% or 33%, these rules would have in effect forced the end of regulation which has up to this point been constitutionally permissible. These regulations in many cases may still be considered necessary to the public good.

Proponents contend that regulations causing a decrease in private property values are either inefficient or overburdensome, and must be paid for. (8) This contention is premised on the libertarian view of property rights: the rights of the landowner to do what he see fit with his property as an inherent right which should not be abridged by any government action, aside from common law nuisance. Any restriction on land use is viewed as an imposition upon these God-given rights.

Secondly, proponents have asserted that the proposals are in line with the original intent of the Fifth Amendment Takings Clause because it is based on libertarian principles. There are several instances in the congressional record where supporters of this proposed legislation have expressed that at least one reason to enact such legislation is that it is required by the libertarian principles behind the Fifth Amendment Takings Clause. Representative Emerson indicated on the floor of the House that "clearly the Fifth Amendment to the U.S. Constitution is one of the greatest liberties ever given in the free world. However, in recent years, private landowners have seen the Federal Government and radical "preservationist" groups infringing on the private property rights protected by the Fifth Amendment." Representative Hayworth concurred saying, "in supporting this legislation, we in Congress have the opportunity to reaffirm what Locke referred to as the "root of all liberty" - the right of own property." Representative Tom DeLay also joined saying, "ownership of property is a right protected by the Constitution, a precious right which should not be infringed upon except in the most grave of circumstances. Of course, such statements may be more political rhetoric rather than well thought out reasons for the proposed legislation. Michael Wolf, in his book *Overtaking the Fifth Amendment* asserts that such statements as the ones made by the Congressmen noted above, are framed to embrace Constitutional values, the protection of property rights, and free enterprise, are "key rhetorical strategies employed by

legislative champions of the property rights movement..." He conclude that this "private property offensive" has targeted the Endangered Species Act, but that a more wide ranging attack on regulation, ordinance, statutes and even principles of judicial interpretation that shield the public at large from extant and anticipated harms. Whether political rhetoric or heart-felt beliefs, the statement still express the proponents' view of their position. The statement may be a true reflection of why proponents support the proposed legislation, and while Wolf and others may doubt this, the courts when interpreting legislation must presume that these statements represent the true intent of the legislature. Thus even a political realist must admit that because these statements may effect how a law is later interpreted they are of some importance.

UNDERLYING PHILOSOPHIES OF PROPERTY RIGHTS

The proponents' contention, that the proposals we have discussed are consistent with the original intent behind the Fifth Amendment Takings Clause, depends on the assertion that libertarian principles were the basis for this original intent. The proposals' restriction on government regulation or interference with the right of land owners are based in the libertarian principle of a limited government role and more specifically Locke's idea of property as an inherent right which deserves protection from intrusion. William M. Treanor in his book *The Original Understanding of the Takings Clause and the Political Process* provides an in depth analysis of the ideology

and development of the Fifth Amendment. Treanor contends that "the takings clause was intended to apply only to physical taking," and points to the *Pennsylvania Coal* decision as a departure from the limitations of the Takings Clause as originally understood. Treanor then argues that liberalism was not the dominant political ideology at the time of the framing, but shared influence with republicanism. He examines James Madison's conception of the Takings Clause as support for the arguments that the Takings Clause was intended to apply only to physical takings and the argument that more than one ideology was influential. Treanor then proposes using the translation model to develop a current analysis of takings consistent with underlying principles. He concludes that "compensation should be mandated only in those types of cases where the political process is particularly unlikely to consider property claims fairly." (9) These proposals also adopt very libertarian views from the current case law, focusing on monetary value rather than the balancing of interests which had been pursued through years of Fifth Amendment interpretation of regulatory takings. Such a grouping of justifications seems to assume that the Fifth Amendment rested solely on Locke's view of property rights and role of government. The assertion that the Takings Clause was based solely on the Lockean view of property may previously have been unchallenged, but it is certainly in dispute today.

Scholars dispute which theories were most influential during the framing of the the Fifth Amendment. John F. Beggs, author of

several books analyzing the Takings Clause, evaluates the historical assumptions made by Justice Scalia and Justice Blackmun in *Lucas*. Beggs argues that oriinal intent behind that Takings Clause was not influenced solely by the "classical liberal model." Beggs also argues that continuing reliance on the framer's intent to resolve the regulatory taking question is misguided due to the evolution of the human condition. (9) Some commentators argue that the original intent behind the Fifth Amendment was a liberal and expansive view of property rights in the face of a potentially overbearing government. Thus, the definition of property as used in the Takings Clause willaffect the extent to which the Takings Clause will limit legislative action. Thus, the definiton should bot promote intuitive fairness and observe the structural limitations on governmental power without denying the existence of that power. Accepting a "nuisance based" definition of private property would limit the legislative ability to redefine property right by manipulating the distinction between harm and benefit. This is in line with the Founders' desire to protect the individual from overreaching majoritarian decisions. This particular argument rests on the idea that the line between compensable actions and noncompensable action should be drawn according to whether the government seeks a public benefit from private property or prevention of a public harm. This view of limited Government intrusion with the rights of property can be traced to the philodophy and writings of John Locke. Locke's political philosophy was of great influence at

the time and his views were embraced by many involved in the framing of the Constitution. Locke espoused a theory of private property rights which was novel for his time. He believed that the individual's right to property exists in nature and that government should exist only to protect this and other inherent rights of man. Locke once said, "Political power is that power which every man having in the state of Nature has given up into the hands of the society, and therein to the governors whom the society hath set over it self, with this express or tacit trust, that it shall be employed for their good and the preservation of their property. The counter view to Locke's view is presented by James Harrington, who holds the republican view of property. Harrington contends that only the distribution of land will enable people to be involved in the political process. (10) Therefore, land was not thought of as a political right but as a political necessity. Property was the means to facilitate political balance and avoid the oppression of the minorities by the majority.

The equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke has no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as the ideology of the framing. Thus, the belief that the expansion of property rights protection is aligned with the originalist view of the Fifth Amendment may be inaccurate.

COMPARATIVE CASE LAW

There is, of course, no requirement that legislation follow case law. In rare instances, legislation has been enacted to reject a specific decision with which Congress was unsatisfied, as was the case with the Religious Freedoms Restoration Act. However, the development of case law should at least inform Congress of the balance of interests which exist. Even if Congress chooses to create more protection for a certain category of rights, the work of the judiciary in dealing with the balance of interests in a difficult area of law should not be cast aside without consideration. However, the authors of these proposals have done just that. As a result, the authors fail to consider the current proposals have done just that. As a result, the authors fail to consider the public interest which has influenced regulatory takings decisions in the past.

Now I will examine the early case law on takings, pointing out that regulation was not considered significant enough by the courts to warrant compensation under the Fifth Amendment until the decision in *Pennsylvania Coal v. Mahon* in 1922. The development of regulatory takings law and the courts' struggle to create a workable standard include the consideration of interests on both sides of the issue. While in the fifty years the cases have become more protective of private property right under the Fifth Amendment, they still have not rejected the need for balance between private property rights and necessary regulations which represent the public interest. The authors of pro-property

legislation have ignored this struggle. The proposals embrace the emergence of rules in the recent case law that reflect a more restrictive standard for regulations which govern the use of land. the proponents have focused only on the portions of the case law which support the most protective and thus most libertarian ideas about property rights. These ideas, which may further protect property rights by making it easier to show total diminution or no residual use, such as segmentation and partial takings, have appeared in recent regulatory takings cases, such as *Loveladies Harbor, Inc. v. United States*. While current regulatory takings decisions may reject the balancing of interests present in previous case law, this is true in only the most extreme situations, as in *Lucas*.

Even if correct about the underpinning of the Fifth Amendment Takings Clause, the current pieces of legislation proponent's fail to acknowledge the Takings Clause's evolution through judicial interpretation. Early case law decision provide no basis for the adoption of the restricted role of government with respect to the property rights. Just the opposite is true. The early case law did not find it necessary to compensate for the impact of government regulation. The early Supreme Court interpretation of the Takings Clause extended property protection only to physical takings or its close equivalent. In the famous case of *Munzler v. Kansas* the Court reasoned that regulation adopted for the protection of the public interest did not constitute a taking. The regulation at issue in *Munzler* was a

state prohibition on the manufacture and sale of alcohol. (12) Two brewers challenged the regulation claiming that it constituted an unconstitutional taking because it rendered their breweries valueless. The Court held that the regulatory actions of the government did not seriously impinge on the rights of the property owners because the state was only limiting those actions which were "prejudicial to the public interests." "A prohibition simply on 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.

Several of the early takings cases are indistinguishable from public nuisance cases. In both situations the government was allowed to restrict the property owner's use without compensation because the government was acting to protect the public health and welfare. In these cases, no one claimed that the government would have to compensate the landowner. The Court found the right of the government to restrict certain land uses to be inherent in the property interest or a valid exercise of the police power. The Court's only inquiry concerned the validity of the statute and this was undertaken with great deference to the legislature. The Court recognized that "the discretion cannot be parted with any more than the power itself." (12)

Now, the public nuisance doctrine and the right of the government to exercise its police power fall into different legal

categories. However, both the police power and public nuisance doctrine are derived from the idea that property ownership and use dictate the need for balancing the individual's right against that of the community. the balancing became more complicated as the number of land uses expanded along with the number of landowners. Government, in adopting regulations that prohibit certain land uses in certain areas, necessarily engages in a balancing process, considering, among other things, which activities are most socially useful. However, the definition of social utility is an evolving notion.

Traditional case law analysis focused on monetary value, but only in conjunction with other factors such as the character of the governmental intrusion and the investment-backed expectations. In *Penn Cent. Transp. Co. v. City of New York*, the Court found no set formula for determining what constitutes a taking under the Fifth and Fourteenth Amendments, but instead finding that a number of significant factors must be considered in each case; including the economic impact, investment-backed expectations, and the character of the government intrusion. (13) The first case to find that a government regulation violated the Fifth Amendment Takings Clause was the 1922 case, *Pennsylvania Coal v. Mahon* (14). *Pennsylvania Coal* dealt with a state statute prohibiting the mining of coal, despite ownership, that would cause the subsidence of surface property owned by someone other than the coal company. The coal company challenged this law when faced with an injunction obtained by a private surface property

owner and claimed that the regulation resulted in a taking of private property. Since this land use regulation was authorized by the state, the loss of this coal should be compensated, or the statute held invalid. Justice Holmes found that the economic impact on the coal company imposed by this regulation was a factor in finding that the government regulation in this case violated the Fifth Amendment Takings Clause, but was not dispositive. "One factor for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." While this case seems to embrace the notion of private property rights protection in the face of an overburdensome regulation, other factors likely contributed to this outcome.

One other explanation for this decision is that the Court believed that the state was interfering with private contract rights. The individual landowners who were losing their homes to land subsidence had agreed to sell the support estates to the coal mining companies. Thus, the risk of subsidence was inherent in the ownership of the surface property and was probably reflected in the prices paid by the surface owners versus that paid by the coal companies. The state regulation had gone "too far" in this case not only because the state regulation interfered with a private agreement. This can be seen in the case of *Plymouth Coal Co. v. Pennsylvania*, which the Court distinguished in *Pennsylvania Coal*, in *Plymouth Coal*, the state

passed a law mandating that a pillar of coal be left between adjacent mines for the safety of the mine workers. Here, the Court found the law valid because it was for the safety of the mine workers and "secured an average reciprocity of advantage that has been recognized as a justification of various laws." The mine workers may not have bargained for this additional amount of safety, but this imposition was acceptable given that the mining company stood to benefit as well. This implies that the thrust of Justice Holmes concern may have been the level of government intrusion into private contracts and not the percentage of property at stake. This created a windfall for the surface landowners. In short, the government was reallocating a property interest to that handful of people who had knowingly sold their rights in the first place. "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought" Justice Holmes observed. The argument that *Pennsylvania Coal* is based, at least in part, on the fact that the government regulation interfered with private contract rights is also discussed in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, decided sixty years after *Penn Coal*, dealt with a similar government regulation restricting coal extraction that caused subsidence. The Court in *Keystone* (16) discussed the distinction between the two statutes stressing that the more recent statute was not limited to subsidence on private lands,

but on public lands as well.

Despite the existence of private contract rights as a contributing factor, *Penn Coal* still set a new precedent for regulatory takings. After this case, government regulation could violate the Fifth Amendment. But, a clearer rule had not been articulated and thus courts continued to struggle to find the proper balance between private property rights and the public interest.

The next significant case which made progress in stating a rule for regulatory takings was *Penn Central Transportation Co. v. New York City*. This case involved the right to build on top of Grand Central Station in New York City. Designated a "landmark site," all plans to change the structure had to be approved by the city. After two building proposals were denied, the station's owner, Penn Central, brought suit claiming these denials constituted a regulatory taking under the Fifth Amendment. Rather than identify a particular level of diminution in value or specific government actions which may be found overly intrusive, the Court in *Penn Central* found, that because of important interests on both sides, the consideration of various factors was necessary. The Court has recognized that the Fifth Amendment guarantee is designed 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. The Court quite simply has been unable to develop any "set formula" for determining when "justice and fairness" require that economic

uninjuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. The Court articulated factors that "have particular significance;" the economic impact of the regulation on the claimant, the extent to which the regulation interferes with investment backed expectations, and the character of the government action. In essence, the Court created a balancing test requiring the examination of these articulated factors in every case.

The balancing test articulated in *Penn Central* continues to remain the focus of analysis in questions of regulatory takings, except in situations that involve total diminution of all viable economic use. You can recognize this in *Lucas v. South Carolina Coastal Comm'n* where someone whose land is diminished in value by 95% will not get the benefit of the categorical rule applied in this case, but that finding that an application of the balancing test articulated in *Penn Central* may result in finding a compensable taking. During the evolution of the regulatory takings law, the Court found no absolute test, short of the total diminution test articulated in *Lucas*, that would fairly evaluate the interests of both private property owners and the public interest in the regulation of land use. Instead, the Court consistently found that the circumstances in each case must determine the outcome. In *Lucas*, the rule was established that a regulation which prohibited all development, and therefore decreases the value of the land to zero, went "too far" and

compensation was required. Lucas was a developer and bought two beach front lots on which to build million dollar homes. Before he sought a building permit, the South Carolina Coastal Council, a state land planning agency, passed a law to preserve the coastal lands. The law moved the set-back line for development to exclude Lucas's lots, prohibiting him from building the homes he had intended and causing him the potential loss of the money he had paid for the lots (6).

The South Carolina Supreme Court found no taking even though the trial court record established that the value of the land had been zeroed by the regulation. The South Carolina Supreme Court relied on the purpose underlying the Beach Front Management Act. It was designed to "prevent serious public harm" by avoiding erosion of the beach that may cause flooding and destruction of the homes already in existence there. The justification for the Act was the history of problems that plagued the South Carolina coast in the past, threatening damage and destruction of homes.

The Supreme Court did not question the underlying purpose for the Act or the justifications presented by the state. Instead, the Court focused solely on the diminution in value in Lucas's land. The Court felt that in situations where the landowner was deprived of all development possibilities, and therefore all land value, the balancing test need not be employed. In such cases, the only important factor is the "zeroing out" of all property value. It did not matter that the state sought to prevent "serious public harm." The

Court established a nuisance exception to this per se rule, but in doing so refused to accept current legislative definitions because any action can be justified as "harm preventing." Instead, the regulating bod must now show that the use is prohibited under existing state nuisance or common law.

The authors of the recent legislation we have mentioned have failed to consider the difficulty which led the courts to reject any absolute test. Proponent ignore the factors articulated by the courts in favor of only one consideration: diminution of value. First, the legislators ignore the fact that the earliest Fifth Amendment cases did not require compensation for mere regulatory action. This undermines any argument that the proposals are needed to "restore" protection of property rights since no significant protection from government regulation existed prior to *Pennsylvania Coal*. The lack of protection in the early case law also tends to refute any claim that the current case law is not in alignment with the original intent behind the Fifth Amendment Takings Clause. If that were true, the early case law would have reflected this intent, unless the early interpretations were completely erroneous.

Secondly, the legislators ignore the judicial development of the balancing test used in cases where the property has not been rendered valueless. The *Lucas* decision recognized that those situations involving the depletion of all viable economic use were the rare exception, thus implying that a consideration of the balancing factors is unnecessary only in those situations

where the regulatory effect is the most extreme. Yet legislators insist that 50% devaluation is significant enough to warrant total compensation. This rule rejects even the most protective measures taken by the Supreme Court, one which recognized the need for a less stringent rule in most regulatory takings cases.

The authors of the legislative proposals have not ignored the case law altogether. However, they used the current cases on regulatory takings as a grab bag of ideas from which they select only the ideas which support their notions of property rights. Recent years have seen the emergence of new ideas in the case law which represent the libertarian view espoused in the legislative pieces. First is the notion of segmentation. Segmentation shifts the focus in regulatory takings cases from the entire property interest to only that portion or right affected by the regulation. Property rights advocates use this concept to claim further devaluation than would exist if the denominator was defined as the entire interest. Second is the concept of incomplete diminution, or "partial takings". The effects are similar to that of segmentation in that the less diminution required, the more protection for property rights. Both of these concepts appear in the legislative proposals discussed above.

The Court in *Penn Central* rejected the use of segmentation as a way to circumvent the interest balancing it had imposed, finding that "taking jurisprudence does not divide a single parcel into discrete segment and attempt to determine whether rights in a particular segment have been entirely abrogated..."

The plaintiff argued that the air space above Grand Central Station constituted a separate right that was being taken, and thus required government compensation. If accepted, this approach would have made it easier for courts to find regulatory interference with property rights by focusing only on the use which was lost. The proposals would probably accept this argument in favor of segmentation. Both H.R. 925 and S. 605 would allow the landowner to assert a claim for compensation if the affected portion of the property is diminished. Since air space may be considered a stick in the bundle of property rights, it may constitute the affected portion of the property for purposes of compensation under the rules state in the proposals.

The concept of segmentation was reasserted in *Keystone v. Debenedictis* (15). In this case, the Supreme Court evaluated a Pennsylvania statute similar to the one found unconstitutional in *Penn Central*. Instead, the Court considered all the holdings of the coal company in evaluating the effects of the statute on their property interests, finding that only a relatively small portion of the interest was affected by the mining restriction. The Court recognized that the segmentation argument taken to its logical extreme would prohibit even the most minor government regulation of property: Under the petitioner's theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for taking law purposes (72).

Furthermore, the Court rejected the segmentation argument even in light of Pennsylvania's recognition of a support estate as a separate property interest, although Pennsylvania property law does, or at least it did at that time, recognize the support estate as a separate and therefore alienable property right, the Court stated "that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights. The Court backed away from this assertion in finding, with reliance on determinations made by the Court of Appeals, that the support estate's value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface.

Despite the Court's past refusals to consider segmentation arguments, the issue is still unsettled. In *Lucas*, Justice Scalia wrote the opinion for the Court and addressed the issue of segmentation in a footnote (6). Scalia expressed disagreement with how the Court's decision in *Penn Central* dealt with the issue of segmentation. Scalia stated that because the rule concerning the correct "property interest" against which the loss of value is to be measured is unresolved, it has created inconsistencies in past decisions. Scalia asserts that "the answer to this difficult question may lie in how the owner's reasonable expectation have been shaped by the state's law of property." Scalia did not attempt to square this opinion with the Court's decision in *Keystone*. However, the issue in *Lucas* did not call for a resolution of this question.

It seems that the dicta in *Lucas* found its mark in the Federal Circuit Court's decision in *Loveladies Harbor*. (11) Rather than focusing on the entire development project, the litigation in *Loveladies* concerned only that 12.5 acres for which a Corps of Engineers permit had been denied. The Federal Circuit Court referred to this as the "denominator problem," recognizing that the outcome in many cases would differ depending on what portion of the property is considered in the equation. The Court found that the decision about what portion of the property constitutes the denominator in any given case should be informed by the time at which the regulatory scheme was implemented. The court in *Loveladies* found that the government had not attempted to curtail development until after most of the development had occurred. Since there was no preexisting regulatory scheme, the portion of the land which was already developed should be excluded from consideration in applying the current regulatory scheme. Thus timing is a key factor in determining what portion of a property interest constitutes the "denominator" in a regulatory takings analysis. Although it expands the segmentation issue beyond prior case law, *Loveladies* also potentially limits the application of segmentation to factually similar situations where the regulatory scheme was not in place at the time of the original purchase.

The second idea to emerge in the recent case law, is that of "partial takings." This notion holds that a partial diminution in value may be sufficient for the court to find, without

consideration of other factors, that a government regulation violates the Fifth Amendment Takings Clause. The partial takings issue arose in *Florida Rock Industries v. United States*, another Federal District Court decision. (17) In *Florida Rock*, the plaintiff challenged the denial of a wetlands mining permit required under regulations imposed by the Corps of Engineers. The claim was first asserted in the United States Court of Federal Claims, which found that the permit denial constituted a taking under the Fifth Amendment and awarded Florida Rock \$1,029,000.

On appeal, the Federal Circuit Court remanded the case with instructions to focus on the "fair market value" of the property after the permit denial and not just the use denied. On remand the Claims Court found the appraisal of Florida Rock, \$500 per acre, was the correct assessment of fair market value because they reflected they reflected the buyer's knowledge of the Current regulatory situation. Given Florida Rock's appraisals the land was still not "valueless". The Claims Court found the 95% reduction in value a sufficient enough to impact on Florida Rock's property to find a taking when also considering the landowner's inability to recoup its investment.

The government appealed again, and the Federal Circuit Court instructed the Claims Court to take the government's appraisals into account when determining the fair market value. The Federal Circuit Court then found that it would be necessary to determine if partial diminution would be sufficient to find a taking, and

if so, how much diminution was necessary. The court noted, nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.

Addressing the "partial takings" issue, the Federal Circuit Court found that *Lucas* implicitly suggested that a less than 100% diminution in value would not necessarily leave the landowner uncompensated. However, in *Lucas* the Court called for an application of the traditional balancing test (stated in *Penn Central*) in situations involving less than total diminution. Despite this discussion in *Lucas*, the Federal Circuit Court conclusion in *Florida Rock* was that at some point "mere diminution" becomes "a compensable 'partial taking'".

Both segmentation and partial takings are part of the broader notion of "conceptual severance (18)". This notion maintains that property, understood as the bundle of rights to which the property owner is entitled, may be broken down into individual fragments. The extent of this deconstruction may be dependent only upon the conceptual limitation of the ingenious property lawyer. The argument is that each fragment should enjoy the protection of the Fifth Amendment Takings Clause, thus immensely increasing the overall protection for private property rights.

THE NEED FOR BALANCE

No right is absolute. Even rights to free speech are qualified when it comes to the possibility of public harm. Different kinds of speech are protected less than others. Our notions of fairness to the individual, values about our society, and community standards control the extent to which these rights should be qualified. It is always necessary to find a current balance of interests, and property rights are no different. The debate about land use, government interests, and private property rights is as polarizing today as the debate about the propriety of seditious libel before the turn of the century. While it is easy to see the parallel between the Free Speech Clause and the Takings Clause in that both have been controversial and require the courts to consider important factors on all sides of the debate, this is where the analogy has to end. the factors which inform each issue are the same only to the extent that the balance of interest often involve the projection of individual rights in conjunction with the prevention of harm to the society. The harms are values which must be considered differ greatly with each issue.

The libertarian urge by the courts and the legislature to sever property rights into discrete segments reflects an individualistic, atomistic view of the world that is out of step with life in the last decade of the twentieth century. In an increasingly crowded world this reactionary impulse to return to a simpler time is understandable, but is inadequate for an era in

which interdependencies become more apparent with each passing day.

Recently enacted legislation in Florida demonstrates both the need for and feasibility of compensation legislation that seeks to maintain a balance of interests. (20) The Bert J. Harris, Jr. Private Property Rights Protection Act (or the "Harris Act") is a compromise between environmentalists, the property rights movement, and big business. The Harris Act is less clear cut and confers less extensive private property rights than the federal legislative proposals that we discussed earlier. The Act contains a compensation provision but does not attempt to establish a quantitative value. The Harris Act is much less definite and leaves room for judicial interpretation, prompting some to question whether the Act is really much of an advantage over preexisting law. The Harris Act creates a cause of action for landowners who feel that local government action has caused an "inordinate burden" on individual property use. Just what constitutes an inordinate burden under the new Act is not clearly defined and is left open for a judicial interpretation using a balancing of the public and private interests involved. The Act does give general guidance, stating that an inordinate burden may result when local action causes a permanent loss of reasonable investment backed expectations of an existing use or vested right. No compensation is given for temporary interferences, nuisance abatement, or inordinate burdens which result from "transportation activities".

As of the completion of this study, there have been no reported decisions applying the Harris Act. Several reasons may explain this lack of judicial interpretation. First, the Harris Act only applies to applications of statutes, rules, and ordinances enacted after May 11, 1995. Second, the Act only applies to protect a "vested right" or "existing use" or real property. Lastly, the Harris Act has a provision requiring the landowner to notify in writing the government entity that has imposed the alleged burden 180 days prior to filing the suit. The government may make a settlement offer during this period.

CONCLUSIONS AND FUTURE DIRECTIONS

With the wave of property rights protection legislation has come some recognition by opponents that steps need to be taken to remedy those frustrations which have been the impetus of such harsh political reactions. Private property rights have been burdened by sometimes heavy-handed regulations. The effect have been detrimental not only for landowners, but also to the advocates of land use planning and environmental protection. It does no good to polarize on an issue of such importance. Steps need to be taken to avoid alienating landowners to the point where destruction rather than cooperation becomes more individually beneficial. We must find solutions which make more sense and which would help allocate the burden of managed restraint and thus maintain the necessary balance between private property rights and the public interest. Property rights, economic liberties, and other vested rights to many political

thinkers were around long before our government was founded. As such, the doctrine of vested rights not only precluded infringements, but also extended to damaging interference on future economic benefits and contractual obligations as well. Certainly, the government has compelling interests to balance against those of individuals. It is a dilemma that hasn't been resolved over two centuries and a clear answer is not on the horizon. All due to one small clause in the Fifth Amendment, the Takings Clause, which seems to be rather clear to the average reader, but has power over the things we hold most dear in life.

END NOTES

1. H.R. 925, 104th Congress, 1st Sess. (1995) and S. 605, 104th Congress, 1st Sess. (1995).
2. Barbara Moulton, *Takings Legislation: Protection of Property Rights or Threat to the Public Interest?*, 37 Env't 44 (Mar. 1995).
3. Symposium, *Taking 'Takings Rights' Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin L.J. Am. U. 253, 266 (1995).
4. 141 Cong. Rec. H2498
5. John Locke, *Second Treatise On Civil Government: Two Treatises of Government*, in *Social Contract*, (Ernest Barker, ed 1947).
6. 505 US 1003 (1992)
7. John Tibbett, *Takings Laws Just Won't Die*, Planning, Feb 1996.
8. 141 Cong. Rec. H2501
9. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L. Rev. 782 (1995).
10. James Harrington, *The Commonwealth of Oceana*, *The Political Works of James Harrington*, 155 (J.G.A. Pocock ed., 1997)
11. 28 F.3d 1171 (1994)
12. 123 US 623 (1887)
13. 438 US 104 (1978)
14. 260 US 413 (1922)
15. 480 US 470 (1987)
16. 480 US 496 (1987)
17. 791 F.2d 893 (1986)
18. Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988).

19. Symposium, *Waiting for the Go: Currency, Takings, and the Property Rights Act*, 20 Nova L. Rev. 661, 681 (1996).

20. Florida Statute 70.001(4)(a-d) (1995).