"IT'S A REGULATORY TAKING, *CLAUSE* THE COURTS SAY SO" PURIFYING THE TEST FOR REGULATORY TAKINGS

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I. INTRODUCTION

The right to own land has long been the backbone of the United States. Land is defined as ground considered as property.[1] The right to private property is of great importance in the United States because of its relationship with each citizen's expression of liberty. Farm owners have an essential link to land. Without land to utilize, a farmer could not develop a product. Agricultural production is invariably tied to private property. An ongoing dispute has arisen between a farmer's right to private property and the government's interest in land management. At the center of this dispute is the "regulatory taking" issue.

The essential right to own private property is only available because the government recognizes the expression of this right by its citizens. The right to private property is a fundamental right. The United States Supreme Court in *Wilkinson v. Leland* stated:

> [F]undamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no Court of Justice in this country would be warranted in assuming, that the power to violate and disregard them--a power so repugnant to the common principles of justice and civil liberty--lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being . . . .[2]

Because government grants the private property interest, it also may define its scope. Even though courts hold the right to private property as a fundamental right, the private owner must yield to a certain degree of government control over the property

1. WEBSTER'S NEW COLLEGIATE DICTIONARY 473 (7th ed. 1969).
2. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

because the government defines the scope of private ownership.[3] The goal of this note is to discuss: the historical theory surrounding the fundamental right to private property; the history of regulatory takings; what factors now determine a regulatory taking; and a new path for clarifying the regulatory takings test.

II. HISTORICAL THEORY SURROUNDING THE RIGHT TO PRIVATE PROPERTY

To appreciate the regulatory takings issue, it is important to understand how the theory behind the right to private property originated. The Fifth Amendment to the United States Constitution offers protection of the private property interest, but it does not explicitly create this right.[4] While courts do not allude to the historical background behind the right to property, "[i]t is settled law that the Constitution does not create property interests."[5] The courts find the "property" entity to be a creature of "independent origins."[6] In *Nixon*, the Court of Appeals for the District of Columbia Circuit stated, "[t]he essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement."[7]

The reasoning behind the right to private property quite possibly originated from newspaper articles published by T. Gordon and J. Trenchard in England during the 1720s.[8] Gordon and Trenchard wrote, "And as Happiness is the Effect of Independency, and Independency is the Effect of Property; so certain Property is the Effect of Liberty alone, and can only be secured by the Laws of Liberty."[9]

In 1753, the authors of the *Independent Reflector*, attempted to utilize the works of Gordon and Trenchard to clarify the origin and importance of the right to private property. Elizabeth V. Mensch explains in the Buffalo Law Review:

> According to their (the authors of the Independent Reflector) account (drawn somewhat vaguely from the natural law theorists), before civilization, "every Man might take to his Use what he pleased." This "Use" led to an original and natural right derived directly from occupancy

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3. Matthew B. Smith, *Defining Property in the Post-Lucas World*, 1994 U. ILL. L. REV. 443, 445 (1994).

4. U.S. CONST. amend. V.

5. Nixon v. United States, 978 F.2d 1269, 1275 (D.C. Cir. 1992).

6. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Tarpeh-Doe v. United States, 904 F.2d 719, 723 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992).

7. *Nixon,* 978 F.2d at 1275; *see* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (property consists of recognized expectancies); Perry v. Sindermann, 408 U.S. 593, 601(1972) (property involves mutually explicit understandings); Hall v. Ford, 856 F.2d 255, 265 (D.C. Cir. 1988) (property is an expectation based on rules or understandings).

8. Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights,* 31 BUFF. L. REV. 635, 641 (1982).

9. *Id.* (quoting J. Trenchard & T. Gordon, 1-4 CATO'S LETTERS NO. 28 (Wilkins et al. eds., 1724)).

> and labor. Claims based on use alone, however, led inevitably to insecurity and disorder. Therefore, under the social contract designed to protect "liberty" by defining property relations, all property was necessarily "centered in the supreme Head," or sovereign. Thus, no man in civilized society could assume to himself a natural use right without "breaking in upon the rights of the Sovereign," which had wholly superseded natural rights.[10]

Gordon and Trenchard's correlation linking happiness, independence, property, liberty, and stability, possibly deciphers why courts have always held the right to property in high regard. Property rights are often described as a significant part of the foundation on which America has developed.[11] The correlation between the right to property and the liberty interests that the framers of the Constitution require the judicial branch to protect helps explain the importance bestowed upon this issue. The significance of the right to property, though, is one of the largest factors that has made it difficult for the courts to develop a definitive test for the regulatory takings issue.

III. THE HISTORY OF REGULATORY TAKINGS

A regulatory taking is not easily defined. A "taking" is generally understood

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10. *Id.* at 641-42 (quoting *The Absurdity of the Civil Magistrate's Interfering in Matters of Religion,* Pt. 2 No.XXXVII, Aug. 9, 1753, *in* W. Livingston et al., *The Independent Reflector: or, Weekly Essays on Sundry Important Subjects More Particularly Adapted to the Province of New York* 313 (M. Klien ed. 1963)).

11. Page Carroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 248 n.16 (1994) (quoting Senator Steve Symms, THE PRIVATE PROPERTY RIGHTS ACT (1991)).

> [A] second [fallacy] is "human rights, not property rights." Are these rights in any way inconsistent or mutually destructive? Is not the right to have and be protected in property a valuable "human right"? Are not those rights mutually consistent and even dependent? Any thoughtful observation of history will reveal that, where private property rights have not been respected and protected, there has not been what we call "human rights." Private-property rights are the soil in which our concept of human rights grows and matures. As long as private-property rights are secure, human rights will be respected and will endure and evolve.

Id. at 248 n.16 (citing JUSTICE CHARLES E. WHITTAKER, RETURN TO LAW, OR FACE ANARCHY (1966)).

"'Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.' (citing William H. Taft, 27th President of the United States (1906))."

"'That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint.' (citing Wilkinson v. Leland, 27 U.S. 627, 657 (2 Pet. 1829))."

"'The moment the idea is admitted into society that property is not as sacred as the laws of God, and there is not force of law and public justice to protect it, anarchy and tyranny commence.' (citing John Adams, 2d President of the United States (1821))." *Id.*

as an action by which the government "directly interferes with or substantially disturbs the owner's use and enjoyment of the property."[12] Before the Constitution, "the traditional principle at common law was that one could freely enjoy one's property unless the use injured or damaged one's neighbor."[13] The Fifth Amendment of the Constitution incorporated principles long utilized through common law. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[14]

The authors of the Constitution likely developed the Fifth Amendment from the theory behind the English doctrine of "eminent domain."[15] The language in the Fifth Amendment is deceptively simple. There is a strong possibility the authors of the Constitution intended simplicity in the Fifth Amendment. The framers of the Constitution possibly believed individual property rights were of great importance, and specific takings issues required examination by the courts.

Even though the Fifth Amendment arose out of the theory of eminent domain, some of the first applications of takings law argued due process and natural law theory.[16] Case law discussing the takings issue before 1920 varied in the amount of

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12. Brothers v. United States, 594 F.2d 740, 742 (1979) (citing Pete v. United States, 531 F.2d 1018, 1031 (1976)).

13. Dringman, *supra* note 11, at 248.

14. U.S. CONST. amend. V.

15. The authors of the Constitution presumably created the Fifth Amendment to protect property rights from the government utilizing an over extensive eminent domain policy.

> The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good. Thus, in time of war or insurrection, the proper authorities may possess and hold any part of the territory of the state for the common safety; and in time of peace the legislature may authorize the appropriation of the same to public purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel.

BLACK'S LAW DICTIONARY 523 (6th ed. 1990).

16. In 1798 the U.S. Supreme Court explained the theory on which natural law is based. Justice Chase delivered the opinion:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B: it is against all reason and justice, for a people to entrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit, of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property.

protection allowed for property rights because the test determining this issue often was manipulated.

In 1869, the Louisiana State Legislature granted "exclusive right to maintain a central slaughter-house south of New Orleans" to a private corporation.[17] The butchers in the corporation were allowed to use the facility at no charge in exchange for their maintenance and upkeep of the slaughter-house.[18] Butchers who were not shareholders in the corporation could use the facility only if they paid a fee.[19] Butchers who were required to pay a fee to use the facility challenged the State of Louisiana's action in federal court.[20] The independent butchers pursued, among other points, a due process argument. The independent butchers stated that "the right to labor was property and the butchers were being deprived of that right without the due process of law."[21] The court ruled against all arguments presented by the independent butchers because the state's legislation served a legitimate interest.[22] The Slaughter-House cases were significant though because they identified the beginning of the era of "substantive due process", the preceding standard to takings.[23]

Twenty-three years later, the Supreme Court outlined the standards for evaluating challenges to government regulation under the Due Process Clause. The Court explained in *Lawton v. Steele* : "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[24] The "substantive due process" standard for evaluating challenges to government regulation remained consistent until the 1920s.

In 1922, the U.S. Supreme Court confronted *Pennsylvania Coal Co. v. Mahon*.[25] The Mahons brought the action to prevent the Pennsylvania Coal Company from mining under their house in a way that would compromise the structural soundness of their home.[26] The Pennsylvania Coal Company believed it had the right to mine this coal because the coal company's deed reserved the right to remove "all the coal" under the Mahons' house.[27] The deed also explained in

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Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

17. Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 632 (1994).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 634.

22. *Id.* at 637.

23. Dringman, *supra* note 11, at 251.

24. Lawton v. Steele, 152 U.S. 133, 137 (1894).

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

26. *Id.* at 412.

27. *Id.*

express terms that the grantee (Mahon) assumed the risk and waived damage claims arising from mining the coal.[28] The Mahons claimed that the Kohler Act superseded the coal company's contract rights to the property.[29] The Kohler Act was a statute forbidding "the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation . . . ."[30] Justice Holmes, delivering the opinion of the court, asserted that the Kohler Act "[d]oes not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protested rights."[31] Justice Holmes further held "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[32] *Mahon* was not the first case to recognize the power of the Fifth Amendment.[33] *Mahon* was the first case though to recognize a relationship between the takings clause in the Fifth Amendment and regulation of property.[34] The Fifth Amendment's Taking Clause was at this point open to inverse condemnation claims.[35]

Justice Brandeis dissented in *Mahon*.[36] Brandeis believed the Kohler Act was legitimate because "any restriction imposed to protect the public health, safety or morals from threatened dangers is not a taking."[37] Brandeis also pointed out that the majority's opinion overruled the Court's previous holding that "restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can be profitably put."[38]

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28. *Id.*

29. *Id.*

30. *Mahon*, 260 U.S. at 412-13.

31. *Id.* at 414.

32. *Id.* at 415.

33. *See* Chicago B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

34. Justice Holmes opinion states:

> [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. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact 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. So the question depends upon the particular facts.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

35. Inverse condemnation is defined as:

> [A]n action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. It is a remedy peculiar to the property owner and is exerciseable by him where it appears that the taker of the property does not intend to bring eminent domain proceedings.

BLACK'S LAW DICTIONARY 825 (6th ed. 1990).

36. *Mahon*, 260 U.S. at 417.

37. *Id.*

38. *Id.* at 418; *see* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (finding the state possessed the power to regulate the sale of intoxicating liquors, which in turn did not amount to a taking of

The Takings Clause surfaced occasionally before the Supreme Court during the fifty years after the *Mahon* opinion. In 1978, the Supreme Court encountered a case dealing with New York City's Landmarks Preservation Law.[39] The Landmarks Law was enacted to protect historic landmarks from "precipitate decisions to destroy or fundamentally alter their character."[40] The Grand Central Terminal, owned by Penn Central Transportation Co., was designated a "landmark".[41] Soon after the landmark designation was assigned, Penn Central entered into a contract to build a multi-story office building over the terminal.[42] Because the terminal was a landmark, the Landmark Commission would not allow the multi-story building to be built over the terminal.[43] Penn Central brought suit in state court claiming that the "application of the Landmark Law had 'taken' their property without just compensation in violation of the Fifth and Fourteenth Amendments."[44]

The Supreme Court held the Landmark Law was not a taking because the law did not interfere with Penn Central's primary expectation concerning the use of the property.[45] The Court also found New York City was allowing "Penn Central not only to profit from the terminal, but also to obtain a 'reasonable return' on its investment."[46] As for the air rights above the terminal the court found that:

> [I]t can simply not be maintained, on this record, that the appellants [Penn Central] have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal. The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition "would harmonize in scale, material, and character with [the Terminal]."[47]

The Court held that Penn Central did not experience a "taking" due to the denial of the right to build because Penn Central was not unequivocally denied the right to that air space for future development.[48]

Even though the Court did not find the Penn Central situation to be a "taking",

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property from a malt liquor producer who had invested $10,000 in a liquor manufacturing facility); *see also* Powell v. Pennsylvania, 127 U.S. 678, 682 (1888).

39. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
40. *Id.* at 104.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Penn Central Transp. Co.*, 438 U.S. at 119.
45. *Id.* at 136.
46. *Id.*
47. *Id.* at 136-37.
48. *Id.* at 136.

the Court acknowledged Penn Central's right to "investment-backed expectations."[49] The Court explained "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."[50] The recognition of investment-backed expectations by the Court added another significant piece to the regulatory takings puzzle. Regulatory takings developed its foundation within *Pennsylvania Coal Co. v. Mahon* in 1922, but during 1987, this foundation was disturbed.

In 1987, the Court confronted a case arising from a dispute over the 1966 Bituminous Mine Subsidence and Land Conservation Act.[51] The act prohibited coal mining that caused "subsidence damage to pre-existing public buildings, dwellings, and cemeteries."[52] The act required fifty percent of the coal beneath protected structures to be kept in place to provide surface support. The act also extended similar protection to water courses.[53] An association of coal mine operators, known as the Keystone Bituminous Coal Association, filed an action in federal court to enjoin officials from enforcing the Subsidence Act and its implementing regulations.[54]

Keystone Bituminous Coal Ass'n v. DeBenedictis was similar to *Mahon*. Both the Kohler Act in *Mahon* and the Bituminous Mine Subsidence and Land Conservation Act in question in *Keystone* dealt with the issue of controlling coal mine subsidence.[55] Even though the Court had ruled the Kohler Act a regulatory taking, the Bituminous Mine Subsidence and Land Conservation Act was ruled a legitimate exercise of the Commonwealth's police power.[56]

Justice Stevens, delivering the opinion of the Court, explained it was "obvious and necessary" to distinguish *Mahon* from *Keystone*.[57] The Court held that land use regulation can effect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[58] Justice Stevens stated in the opinion:

> Application of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the Subsidence Act constitutes a taking. First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a

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49. *Id.* at 124.
50. *Id.*
51. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).
52. *Id.*
53. *Id.*
54. *Id.* at 478.
55. *Id.* at 474.
56. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 488.
57. *Id.* at 484.
58. *Id.* at 485.

> significant threat to the common welfare. Second, there is no record in this case to support a finding, similar to the one the Court made in *Pennsylvania Coal,* that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations. . . . The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas.[59]

In distinguishing the Subsidence Act from the Kohler Act, the Court explained it was not overturning *Pennsylvania Coal*.[60] The *Keystone* decision did create the new standard upon which regulatory taking issues would be judged, at least until 1992.

David H. Lucas, a developer from South Carolina, purchased two residential lots during 1986 on the Isle of Palms in Charleston, South Carolina for $975,000.[61] Lucas was not required at the time of purchase of the property to obtain any type of permission or permits to develop the property.[62] During the bench trial, the factual determination was made that, "'at the time Lucas purchased the two lots, both were zoned for single-family residential construction and . . . there were no restrictions imposed upon such use of the property by . . . the State of South Carolina, the County of Charleston, or the Town of the Isle of the Palms.'"[63]

The South Carolina Legislature ended Lucas' planned development for the two lots in 1988, however, by enacting the Beachfront Management Act.[64] Because of the Beachfront Management Act, the South Carolina Coastal Council was directed to "establish a 'baseline' connecting the landward-most point[s] of erosion . . . during the past forty years in the region of the Isle of Palms that includes Lucas' lots."[65]

Lucas filed suit contending that "the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives."[66]

Justice Scalia, delivering the opinion of the Court, explained that in past

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59. *Id.* at 485-86. Section 2 of the Subsidence Act provides:

> [T]his act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety, and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal . . . to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands.

Id. (citing PA. STAT. ANN., tit. 52, § 1406.2 (West Supp. 1986)).

60. *Id* . at 487.

61. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1006 (1992).

62. *Id.* at 1007.

63. *Id.* at 1009.

64. *Id.* at 1007.

65. *Id.* at 1008.

66. *Id.* at 1009.

regulatory takings cases, at least two categories of regulatory action were found to be "compensible" without inquiry into the "public interests advanced in support of the restraint."[67] The first category consists of regulations that cause an actual physical "invasion" of property.[68] The second category occurs when regulation denies all "economically beneficial or productive use of the land."[69]

Scalia further explained that many prior opinions by the Court had suggested "harmful or noxious uses" of property may be regulated by the government without compensation.[70] The "harmful or noxious uses" principle, Scalia believed, was the Court's early attempt to rationalize why government may, consistent with the Takings Clause, "affect property values by regulation without incurring an obligation to compensate--a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power."[71]

Within the *Lucas* opinion, Scalia then questioned the difference between regulations that "prevent a harmful use," which are sustainable without compensation, and regulations that "confer benefits," which require compensation by the government.[72] Scalia explained it was nearly impossible to evaluate objectively whether a regulation is "harm-preventing" or "benefit-conferring" because the regulation is often in "the eye of the beholder."[73] Through questioning the utilization of the well established "noxious use" logic, legislatures no longer possessed the ability to utilize a state's police power. The *Penn Central* opinion stated, "where [a] State 'reasonably conclude[s] that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land,' compensation need not accompany prohibition."[74] A concern by a legislature for the health, safety, morals, or general welfare of the people previously was a large factor in determining the "harm-preventing" verses "benefit-conferring" status of legislation.

After abolishing a legislature's ability to utilize a noxious-use justification to avoid the compensation associated with regulatory takings, Scalia described a new standard by which regulatory takings were to be judged. Scalia stated:

> [W]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally

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67. *Id.* at 1015.

68. *Id.* (construing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

69. *Id.* (construing Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987)).

70. *Id.* at 1022.

71. *Id.*

72. *Id.* at 1025.

73. *Id.* at 1024.

74. *Id.* (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978)).

> been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.[75]

Scalia further explained that "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."[76] Scalia concluded that individuals connected to commercial dealings should be aware of the possibility that new regulation might render their property economically worthless because of the property's economically productive use.[77] In the case of land, though, Scalia explained that if the State were to "eliminate all economically valuable use," the State would be inconsistent with the "historical compact recorded in the Takings Clause that has become part of our constitutional culture."[78]

IV. WHAT FACTORS NOW DETERMINE A REGULATORY TAKING?

"The pragmatic ethical issue [embedded in the takings problem] defies reduction to formal rules."[79] Because *Lucas* is a plurality opinion, the assumption that the regulatory takings issue will not be further manipulated by the Court is quite unbelievable. Considering past case history of the takings issue, there are four questions to consider when determining whether a governmental regulation is a taking. First, did the governmental regulation physically appropriate the property?[80] Second, did the regulation cause excessive loss of the property's market value?[81] Third, does the regulatory restriction bear a close enough relationship to the government's true interest?[82] Finally, because *Lucas* was a plurality opinion and will likely be reexamined, did the regulation intend to prevent a public harm or provide a public benefit?[83]

Within *Lucas*, Justice Scalia undertook the "noxious or harmful use" police power of legislators and abolished it; only to replace that power in the hands of the courts by stipulating that a "total wipeout of the value of the property is a taking *per se* unless the regulation affecting the property is based in the background of nuisance law."[84] Scalia's critique of the "harm-preventing" verses "benefit-conferring"

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75. *Id.* at 1027.

76. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

77. *Id.*

78. *Id.* at 1028.

79. John S. Harbison, *Constitutional Jurisprudence in the Eyes of the Beholder: Preventing Harms and Providing Benefits in American Takings Law,* 1 (1995) (unpublished material, on file with the DRAKE J. AGRIC. L.) (quoting Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1684 (1988)).

80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 6 (construing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992)).

distinction utilized by legislators stated:

> [T]he distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in either fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[85]

Scalia believes that by basing the test to determine whether a taking occurs upon the belief that a legislative body must be attempting to prevent a harm is senseless.

The *Lucas* opinion requires a judge to look to the nuisance laws of the state, and then determine the standards on which the regulatory taking issue should be judged. The determination also should be consistent with the multi-factor balancing test endorsed by the Restatement (Second) of Torts.[86]

A possible problem with Scalia's regulatory takings test, though, is the test's inability to evolve. By entwining the determination of a taking with present nuisance laws, and removing the police power from the legislators, nuisance law is in stasis. Justice Stevens' dissent in *Lucas* explains:

> Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution--both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and rights of property owners. [For example, a better] appreciation of the significance of endangered species, the importance of wetlands, and the vulnerability of coastal lands shapes our evolving understandings of property rights.[87]

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85. *Id.* at 8 (quoting *Lucas*, 505 U.S. at 1024).

86. *Id.* at 11. Examples of the factors utilized are:

> [T]he degree of harm to the public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.,* RESTATEMENT (SECOND) OF TORTS §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, *see, e.g., id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by claimant and the government (or adjacent landowners) alike, *see, e.g., id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, *see* RESTATEMENT (SECOND) OF TORTS, *supra,* § 827, comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030-31 (1992).

87. Harbison, *supra* note 79, at 16 (quoting *Lucas*, 505 U.S. at 1069-70).

The only "truth" that has held throughout history is that all things change. The need for change is blatantly obvious within almost every aspect of society. Justice Scalia's opinion within *Lucas*, the presently applicable authority for regulatory taking cases, has challenged this truism.

V. A NEW PATH FOR CLARIFYING THE REGULATORY TAKINGS TEST

For the Court to develop a consistently dependable and less controversial test regarding the regulatory takings issue, it must confront the association between the Due Process Clause and the Takings Clause within the Fifth Amendment of the Constitution. An examination of the specific language utilized within the Fifth Amendment could "purify" the muddled theory surrounding regulatory takings.

The Court's assertion within the *Lawton v. Steele* opinion laid the foundation for the evaluation of challenges to government regulation under the Due Process Clause.[88] The Court illustrated within the *Lawton* opinion: "[t]o justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[89]

Pennsylvania Coal Co. v. Mahon was the first case to involve the Takings Clause within governmental regulation.[90] Within *Mahon*, the Court chose not to evaluate the public or private interests associated with regulation of coal mining under the Kohler Act.[91] Since 1922, the courts have muddled the Due Process Clause and the Takings Clause together within the issue of regulatory takings.

The Court's merger of the Due Process Clause and the Takings Clause has now developed into a significant problem. In the past, the court demonstrated uncertainty over remedy when a taking was found, and could not develop a quality test upon which the court system as a whole could depend. Now, because of Justice Scalia's opinion in *Lucas*, the public no longer has a significant voice when nuisance regulation is considered. The plurality opinion "shackled" legislators' ability to work with the common law.[92]

A solution to the confusion surrounding the development of a consistent regulatory takings test could be achieved through a clear reading of the constitutional

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88. John D. Echeverria & Sharron Dennis, *The Takings Issue And The Due Process Clause: A Way Out Of A Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993) (construing Lawton v. Steele, 152 U.S. 133 (1893)). (The laid foundation serves little purpose within the courts today though because the Due Process Clause has fallen into relative disuse.)

89. Lawton v. Steele, 152 U.S. 133, 137 (1893).

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

91. Echeverria & Dennis, *supra* note 88, at 697.

92. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022-24 (1992) (by questioning the utilization of the "harm-preventing" versus "benefit-conferring" authority afforded to legislators through the common law police power, this power was "shackled" and the courts were conferred the power of determining when there is a nuisance, in the regulatory takings setting).

text.[93] The unique language expressed within both clauses "strongly suggests that each clause has a different scope and meaning."[94] After evaluating the constitutional text, John D. Echeverria and Sharon Dennis rationalized:

> [T]he difference in language between the Due Process and Takings Clauses strongly suggest that each clause has a different scope and meaning. Virtually any economic regulation could be said to "deprive" a person of some property interest; the word "deprivation" focuses simply on the effect of the regulation on the property owner. In contrast, the Takings Clause appears, on its face, to be narrower in scope, triggered not merely by the owner's deprivation, but by appropriation of the property by the government as well.[95]

To discern the original intent of the Fifth Amendment, it is important to study its conception and historical background. A note written by William Micheal Treanor, for the Yale Law Journal, offered the insight needed to discern the historical background of the Just Compensation Clause in the Fifth Amendment.[96] Treanor's note stated:

> [N]either colonial statutes nor the first state constitutions recognized a right to receive compensation when the government took property from an individual. Crown officials justified uncompensated takings by appealing to royal prerogative and limitations contained in original land grants. The absence of a just compensation clause in the first state constitutions accorded with faith in the legislatures that was the central element of republican thought and with the position held by many republicans that the property right could be compromised in order to advance the common good.[97]

The right to property was not considered an inalienable right in republican ideology.[98] Thomas Jefferson utilized the phrase, "life, liberty, and the pursuit of happiness," instead of the Lockean-liberal standard, "life, liberty, and property" because he did not construe property to be an inalienable right.[99] Benjamin Franklin exhibited great conviction in his position that private property "is subject to the calls

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93. Echeverria & Dennis, *supra* note 88, at 709.

94. *Id.*

95. *Id.* at 709-10.

96. William Micheal Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

97. *Id.* at 695.

98. *Id.* at 699.

99. *Id.* at 700 (construing G. WILLS, INVENTING AMERICA 229-39 (1978); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 484 (1976)).

of that society."[100]

James Madison, the author of the Fifth Amendment, believed the federal government should be obligated to observe that "no land or merchandize . . . shall be taken *directly* even for public use without indemnification to the owner."[101] Madison attempted to serve two purposes with the Takings Clause of the Fifth Amendment. First, he wanted to "explicitly bar" the uncompensated taking by the national government.[102] Second, Madison hoped the Just Compensation Clause would serve a greater purpose and create an educative function that would be construed as a "paper barrier," which could "impress on the people the sanctity of property."[103]

A possible solution is to lend the proper credence to the original intent of the Takings Clause and the Due Process Clause in the Fifth Amendment. The end result of this new standard would allow the courts to move forth with a consistent test for regulatory taking claims. The new test would no longer entwine the present requirement of compensation with regulatory takings. By utilizing only the Due Process Clause, the confusion associated with the Takings Clause could be eliminated by requiring compensation only in situations involving actual, physical takings. The "harm-preventing" verses "benefit-conferring" conflict would no longer be pertinent because compensation would no longer be a factor in regulatory taking disputes. Legislatures also would regain the power to create nuisance law through the police power because the *Lucas* opinion, and the majority of regulatory taking history, would no longer be applicable.

The Takings Clause has been separated from the Due Process Clause occasionally by the court system. The most recent occurrence of an attempt to separate the Takings and Due Process Clauses to purify a standard for a regulatory taking claim occurred in *Fred F. French Investing Co. v. City of New York.*[104] The New York Court of Appeals held:

> [W]hen the state "takes," that is appropriates, private property for public use, just compensation must be paid. In contrast, when there is only regulation of the uses of private property, no compensation need be paid. Of course, and this is often the beginning of confusion, a purported

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100. *Id.* Benjamin Franklin illustrated that the state could restrict property rights in his declaration stating:

> [P]rivate Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contributions therefore to the public Exigencies are . . . to be considered . . . the Return of an obligation previously received, or the Payment of a just Debt.

Id. (quoting B. Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania,* 10 THE WRITINGS OF BENJAMIN FRANKLIN 54, 59 (A. Smythe ed. 1907)).

101. *Id.* at 712 (quoting J. Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, at 14).

102. *Id.* at 710.

103. *Id.* at 712.

104. Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y.), *cert. denied*, 429 U.S. 990 (1976).

> "regulation" may impose so onerous a burden on the property regulated that it has, in effect, deprived the owner of the reasonable income productive or other private use of his property and thus has destroyed its economic value. In all but exceptional cases, nevertheless, such a regulation does not constitute a "taking," and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid.[105]

The furtherance of this line of analysis will lead to a more applicable rule for the courts to follow, and in opposition of Justice Scalia's opinion delivered within *Lucas*, will give legislators and the general public the ability to influence nuisance law development through the police power afforded by common law. This ability to change is a vital ingredient within society and should not be limited.

VI. CONCLUSION

The historical viewpoints surrounding the theory and origin behind the right to property, and its connection to liberty and stability, explain why the courts have always held the right to property in high regard. High regard for the right to private property by the courts must not entwine the Takings Clause with property regulation because of the Supreme Court's desire to utilize a higher standard on which to evaluate taking situations. Courts should utilize a rational basis standard to determine the importance of land regulation because the government has a legitimate interest in property regulation. This is not to state, though, that the rational basis standard should not evolve into heightened scrutiny. The rational basis standard is a necessary step in removing the Takings Clause from property regulation issues, but it is for the individual state governments, who are more familiar with the needs in each area of the country, to develop new standards on which important governmental interests are served in certain situations.

Through lowering the standard on which regulation is judged by removing the Takings Clause, and allowing state legislatures to heighten the scrutiny that should be utilized to evaluate regulatory situations through state action, important governmental interests will be more easily achieved. State specific standards will be created so state citizens will be placed in a position allowing greater input in determining the need of certain regulatory actions. The issue of regulatory compensation has evolved past the realm of the judicial system and into the legislative branch. By following the original intent of the Fifth Amendment, and untying the tangled Due Process and Takings Clauses, the door will be opened to legislation confronting this complicated issue. Through the discovery of the original intent of the Fifth Amendment and the legislative branch's effort to determine a fair standard on which compensation may be granted, the government will find an acceptable resolution for this disturbing problem.

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105. Echeverria & Dennis, *supra* note 88, at 712 (quoting Fred F. French Investing Co. v. City of New York, 350 N.E.2d at 384-85 (N.Y. 1976)).