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A House Built on Sand: *Lucas v. South Carolina Coastal Council*

The question of whether governments have taken private property and transformed it for public use without compensating the owner¹ has perplexed courts and commentators for many decades.² When the United States Supreme Court issued its decision in *Lucas v. South Carolina Coastal Council*,³ the decision was expected to have far-reaching implications for land-use law.⁴ The owner of an oceanfront lot had challenged a state setback regulation that prohibited the construction of any habitable structure on the property.⁵ Stating that the regulation was a valid exercise of the state's police power, the South Carolina Supreme Court reversed the lower court's decision to compensate the landowner.⁶ The United States Supreme Court granted certiorari, reversed, and remanded.⁷ When the dust had settled, both property rights advocates and proponents of land-use regulation claimed victory.⁸

In *Lucas*,⁹ the Supreme Court articulated a categorical rule that any regulation which deprives a landowner of all economically beneficial or productive use of property requires compensation, unless the regulating authority can show that the proposed use of the property would not have been permitted under common-law nuisance principles.¹⁰ While *Lucas* raises a number of fascinating issues involving administrative and nui-

1. The Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court has incorporated the Fifth Amendment's Takings Clause into the Fourteenth Amendment's Due Process provision so that it applies to the states. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897).

2. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3-31 (1985); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165-72 (1967); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1301-02 (1989).

3. 112 S. Ct. 2886 (1992).

4. See, e.g., John R. Nolon, *High Court's "Lucas" Decision Leaves Shifting Sands in Regulatory Takings Law*, N.Y. L.J., July 8, 1992, at 1, 7 (1992) (noting that more than 50 amicus briefs were filed in the case).

5. See *infra* notes 16-20 and accompanying text.

6. See *infra* notes 21-23 and accompanying text.

7. See *infra* notes 24-25 and accompanying text.

8. See John Echeverria, *A Troubling New Ruling on Property Rights*, CHRISTIAN SCI. MONITOR, July 16, 1992, at 19; Jeremy Paul, *Scalia's Pursuit of Holy Grail Has Its Price*, 131 N.J. L.J. 1087, 1093 (1992).

9. 112 S. Ct. 2886 (1992).

10. See *id.* at 2895, 2899-2901.

sance law,¹¹ this Note will focus only on the Court's creation and description of its categorical rule. First, the Note presents a brief summary of the history of *Lucas* and the Court's opinion.¹² The Note then discusses how courts have treated the issue of deprivation of economic use.¹³ The ambiguities of the case are then highlighted as the Note explores the issue of whether the *Lucas* rule will prove so narrow as to be almost useless, or whether it might conceivably represent a broadening of the scope of compensable takings.¹⁴ The Note concludes by agreeing with Justice Souter that "[w]hile the issue of what constitutes total deprivation deserves the Court's attention, . . . the Court should confront these matters directly."¹⁵

In 1986, David Lucas paid \$975,000¹⁶ for two oceanfront lots on the Isle of Palms in South Carolina, on which he planned to erect two single-family luxury homes.¹⁷ Two years later, South Carolina passed the Beachfront Management Act of 1988,¹⁸ which effectively prevented Lucas from building any permanent habitable structures on the two lots.¹⁹ Lucas filed suit in the South Carolina Court of Common Pleas, alleging that, because the Coastal Council's regulations governing building requirements had effectively taken his property, he was entitled to compensation.²⁰ In a bench trial, the trial judge awarded him \$1.2 million.²¹ The South Carolina Supreme Court reversed, holding that under *Mugler*

11. The question of whether the *Lucas* case was ripe for decision generated much debate among members of the Court. See *id.* at 2890-92, 2906-09 (Blackmun, J., dissenting); *id.* at 2917-18 (Stevens, J., dissenting); *id.* at 2925-26 (Souter, J., separate statement). Similarly, the Court's assertion that a regulation that deprives a property owner of all economically viable and productive use must be supported by common-law nuisance principles also created much furor among the Justices; Justices Blackmun and Stevens accused the Court of both misinterpreting the line of "police power cases" and of dramatically restricting the ability of legislatures to enact regulations in order to prevent nuisance-like activity. See *id.* at 2910-17 (Blackmun, J., dissenting); *id.* at 2920-22 (Stevens, J., dissenting); see also *id.* at 2903-04 (Kennedy, J., concurring) (criticizing the Court's nuisance exception as being too narrow).

12. See *infra* notes 16-51 and accompanying text.

13. See *infra* notes 52-120 and accompanying text.

14. See *infra* notes 121-55 and accompanying text.

15. *Lucas*, 112 S. Ct. at 2926 (Souter, J., separate statement); see *infra* note 155 and accompanying text.

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

17. *Id.*

18. S.C. CODE ANN. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1991).

19. *Lucas*, 112 S. Ct. at 2889-90. The statute in question established a "baseline" using erosion rates. S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1991). Construction of habitable structures was prohibited seaward of this baseline. *Id.* § 48-39-280(A). Lucas' lots were entirely seaward of the line. See *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 377, 404 S.E.2d 895, 896 (1991), *rev'd & remanded*, 112 S. Ct. 2886 (1992).

20. *Lucas*, 112 S. Ct. at 2890.

21. *Id.* (quoting the trial court's finding that the South Carolina Coastal Council "de-

v. *Kansas*²² compensation is not required when a regulation is designed to prevent harmful or noxious uses of property.²³ The United States Supreme Court granted certiorari,²⁴ reversed, and remanded.²⁵

Justice Scalia, writing for the majority,²⁶ maintained that, although regulatory takings cases have traditionally been decided on a fact-specific basis,²⁷ two categories of regulation have *always* required compensation: (1) those that required an owner to suffer a "physical invasion" of his property, and (2) those that deprived an owner of all "economically beneficial or productive use" of his property.²⁸ The Court justified the latter category by suggesting that "total deprivation of beneficial use" is, from the landowner's point of view, the equivalent of a physical appropriation.²⁹ Although recognizing that the legislature has a right to readjust the benefits and burdens of financial life,³⁰ and that the government

prive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless'").

22. 123 U.S. 623 (1887). *Mugler* upheld a prohibition on the manufacture of intoxicating liquors on the grounds that local officials had the right to determine "what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." *Id.* at 661; see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (prohibiting gravel quarry from excavating below the water table); *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (prohibiting brick manufacturing within a residential area).

23. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376, 404 S.E.2d 895 (1991).

24. 112 S. Ct. 436 (1991).

25. *Lucas*, 112 S. Ct. at 2902.

26. *Id.* at 2886. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined. *Id.* at 2889-902. Justice Kennedy filed an opinion concurring in the judgment. *Id.* at 2902-04 (Kennedy, J., concurring in the judgment). Justices Blackmun and Stevens filed dissenting opinions. *Id.* at 2904-17 (Blackmun, J., dissenting); *id.* at 2917-25 (Stevens, J., dissenting). Justice Souter did not take part in the decision and filed a separate statement. *Id.* at 2925-26 (Souter, J., separate statement). Justice Scalia first addressed the Coastal Council's contention that the case was not ripe for review because there had been amendments to the Beachfront Management Act in 1990, which, the defendants claimed, would possibly enable Lucas to build on his lots. See *id.* at 2890-91. The Beachfront Management Act was amended in 1990 to allow for "special permits" to be issued for construction of habitable structures seaward of the baseline. *Id.* at 2891 (citing S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1991)). Noting that the South Carolina Supreme Court had chosen to decide the case on its merits, the Court stated that unless it intervened at this time Lucas would lack any recourse for a temporary takings claim for 1988-90, the period between the Act's passage and the effective date of the amendments. *Id.*

27. *Id.* at 2893; see *Pennsylvania Cent. Transp. Co. v. New York City (Penn Central)*, 438 U.S. 104, 124 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4.

28. *Lucas*, 112 S. Ct. at 2893. In earlier cases, the Court had defined this second category as a deprivation of all "economically viable" uses. See *infra* notes 71-84 and accompanying text.

29. *Lucas*, 112 S. Ct. at 2894.

30. *Id.* (citing *Penn Central*, 438 U.S. at 124).

would cease to exist if it had to pay for every diminution in the value of property,³¹ the Court found that these assumptions do not apply to total deprivations and held "that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . . he has suffered a taking."³² Nevertheless, the Court articulated an exception to its total deprivation rule. It stated that a landowner who has suffered a taking by being deprived of all "economically beneficial and productive use" will not be compensated when the landowner's use would have been prohibited by common-law property and nuisance principles.³³

In an opinion concurring in the judgment, Justice Kennedy differed with the majority over its exception to the categorical rule.³⁴ Asserting that the common-law nuisance exception was too narrow in scope, Justice Kennedy advocated a "reasonable expectations" test that would consider factors in addition to common-law nuisance.³⁵ Justice Kennedy believed that common-law nuisance principles should not be "the sole source of state authority to impose severe restrictions"³⁶ because, for example, "[c]oastal property may present such unique concerns for a fragile land system" that regulation beyond the confines of common-law nuisance principles would be necessary to protect it.³⁷ Justice Kennedy seemed to suggest that in such a scenario, a court should consider the reasonable expectations of all parties involved, and if the property owner could have reasonably expected that such land-use restrictions would have been implemented, then she would not be entitled to

31. *Id.*; see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

32. *Lucas*, 112 S. Ct. at 2895. The Court assumed that the lots were rendered valueless because the Coastal Council did not challenge the trial court finding in its Brief in Opposition, and the Court "decline[d] to entertain [that] argument in respondent's brief on the merits." *Id.* at 2896 & n.9.

33. *Id.* at 2899-900. The RESTATEMENT (SECOND) OF TORTS § 821B (1967) defines a public nuisance as "an unreasonable interference with a right common to the general public"; A private nuisance is defined as "a nontresspassory invasion of another's interest in the private use and enjoyment of land." According to the majority, dispositive factors in such an analysis should include consideration of the traditional uses of the property, an inquiry into whether other landowners are permitted to continue the use denied to the claimant, an assessment of the degree of harm posed by the activity, and an examination of whether the harm could easily be avoided by the landowner, or by other public or private actors. *Lucas*, 112 S. Ct. at 2901 (citing RESTATEMENT (SECOND) OF TORTS §§ 826-828, §§ 830-831 (1967)).

34. *Lucas*, 112 S. Ct. at 2902-03 (Kennedy, J., concurring in the judgment). Justice Kennedy agreed with the Court that the case was ripe for a decision, but opined that the facts gave rise to a temporary takings analysis. *Id.* (concurring in the judgment) He recommended that the South Carolina Court inquire into Lucas' intentions concerning the property during the two-year period in question. *Id.* (concurring in the judgment)

35. *Id.* at 2903 (Kennedy, J., concurring) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) and *Penn Central*, 438 U.S. at 124).

36. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring in the judgment).

37. *Id.* (Kennedy, J., concurring in the judgment).

compensation.³⁸

In his dissent, Justice Blackmun³⁹ took issue with the majority's assumption that the property had lost all value.⁴⁰ He explained that if property is a "bundle of rights" then "[p]etitioner still can enjoy other attributes of ownership, such as the right to exclude others."⁴¹ He enumerated several other uses still available to Lucas and asserted that "less value" was not synonymous with "valueless."⁴² Justice Blackmun's overriding criticism was that the majority had completely disregarded precedent that holds that diminution in property value alone is not enough to constitute an automatic taking.⁴³ He believed that the categorical rule adopted by the majority suggests that "an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss."⁴⁴

Justice Stevens also dissented,⁴⁵ expressing his opposition to both the Court's new categorical rule and its exception.⁴⁶ Justice Stevens cited precedent to refute the Court's contention that a regulation depriving a property of all economic use automatically should be considered a tak-

38. Interestingly, under Justice Kennedy's analysis, the Coastal Council's regulation probably should be upheld. Lucas' property is located in an "inlet erosion zone." *Id.* at 2889 n.1 (Kennedy, J., concurring in the judgment). The lots, at various times within the past twenty years, have been completely underwater. Respondent's Brief on the Merits at 3, *Lucas* (No. 91-453). Given these facts, the lots could be described as a "fragile land system" requiring severe restriction. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring in the judgment).

39. In addition to his other disagreements with the majority, Justice Blackmun maintained that the case should not have been heard until Lucas had exhausted all his available administrative remedies. *Lucas*, 112 S. Ct. at 2907 (Blackmun, J., dissenting). Because the plaintiff sought no authorization from the Council as to his property's use, no final agency decision has been rendered. *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that the Court has consistently held that a takings claim "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* (Blackmun, J., dissenting) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985)).

40. *Id.* at 2908 (Blackmun, J., dissenting).

41. *Id.* (Blackmun, J., dissenting).

42. *Id.* (Blackmun, J., dissenting).

43. *See id.* at 2910-11 (Blackmun, J., dissenting). Justice Blackmun cited *Mugler v. Kansas*, 123 U.S. 623, 664, 668-69 (1887), as "[upholding] an ordinance effectively prohibiting operation of a previously lawful brewery, although the 'establishments will become of no value as property,'" and described *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915), as "prohibiting a brickyard, although the owner had made excavations on the land that prevented it from being utilized for any purpose but a brickyard." *Lucas*, 112 S. Ct. at 2910 (Blackmun, J., dissenting).

44. *Lucas*, 112 S. Ct. at 2912 (Blackmun, J., dissenting).

45. *See id.* at 2917-25 (Stevens, J., dissenting). Justice Stevens began his dissent by reiterating Justice Blackmun's opinion that the case should not have been considered. *Id.* at 2917-18 (Stevens, J., dissenting).

46. *See id.* at 2918-25 (Stevens, J., dissenting).

ing.⁴⁷ He prophesied that the majority holding could produce two disparate outcomes: either courts could choose to “define ‘property’ broadly and only rarely find regulation to effect total takings . . . or developers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking.”⁴⁸

While conceding that the issue of regulatory takings was well worth examining, Justice Souter stated that this case was inappropriate for such an examination.⁴⁹ Justice Souter maintained that by focusing its discussion on the common-law nuisance defense to a takings claim, the Court had approached the issue of total deprivation indirectly and unsatisfactorily.⁵⁰ He concluded that the writ of certiorari should never have been granted.⁵¹

The many opinions in *Lucas* illustrate the struggles the Court has endured with the Fifth Amendment Takings Clause.⁵² The seminal case concerning regulatory takings was *Pennsylvania Coal Co. v. Mahon*.⁵³ The state statute at issue, the Kohler Act, prohibited coal companies from mining in a manner that would cause the subsidence of any dwelling regardless of whether the coal company owned the mineral rights underneath that dwelling.⁵⁴ The Pennsylvania Coal Company claimed that this statute constituted a taking of their property.⁵⁵ In an often-quoted analysis, Justice Holmes reasoned:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for

47. *Id.* at 2919 (Stevens, J., dissenting) (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 490 (1987); *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962); *United States v. Caltex*, 344 U.S. 149, 155 (1952); *Miller v. Schoene*, 276 U.S. 272, 279-81 (1928); *Hadacheck v. Sebastian*, 239 U.S. 294, 405 (1915); *Mugler v. Kansas*, 123 U.S. 623, 657 (1887)). Justice Stevens appeared further troubled by the fact that the new rule could be applied in an arbitrary fashion, with a “landowner whose property is diminished in value 95% [recovering] nothing, while an owner whose property is diminished 100% recovers the land’s full value.” *Id.* (Stevens, J., dissenting).

48. *Id.* (Stevens, J., dissenting).

49. *See id.* at 2925-26 (Souter, J., separate statement). Justice Souter disagreed with the Court’s decision to hear the case because in view of the 1990 amendments to the Beachfront Management Act, it is now unclear whether *Lucas* has in reality been deprived of all economic use of this property. *Id.* at 2925 (Souter, J., separate statement) (citing *id.* at 2890-92); *see supra* note 26.

50. *Lucas*, 112 S. Ct. at 2925 (Souter, J., separate statement).

51. *Id.* at 2926 (Souter, J., separate statement).

52. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

53. 260 U.S. 393 (1922).

54. *Id.* at 412-13.

55. *Id.*

every such change in the general law. . . . But obviously the [regulation] must have its limits, or the contract and due process clauses are gone. *One fact for consideration in determining such limits is the extent in diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.*⁵⁶

Holding that the Kohler Act had made it “commercially impracticable” for the company to mine their coal, the Court decided that the regulation had gone “too far” and that the company must be compensated.⁵⁷

Over the next four decades, the question of whether a diminution in value had reached a magnitude requiring compensation continued to perplex the Court.⁵⁸ In the fifteen years preceding the *Lucas* decision, however, the Court has enumerated two different tests to determine whether a non-invasive regulatory taking has occurred.⁵⁹ The Court articulated the first of these tests in 1978 in *Pennsylvania Central Transportation Co. v. New York City (Penn Central)*.⁶⁰ In *Penn Central*, the plaintiff company alleged that the application of New York’s landmark preservation law had taken its property because the company had been denied a permit to construct a multi-story office tower above its railroad terminal.⁶¹ The owners claimed that the historic preservation commission’s denial of their request to build a multi-story tower atop the railroad terminal constituted a taking because they were allegedly prohibited from exercising their right to the airspace above the existing building.⁶² The *Penn Central* Court faced one of the takings clause’s most perplexing questions: how to determine the extent of the property rights at issue, or, as Justice Scalia wrote in *Lucas*, how to determine “the composition of the denomi-

56. *Id.* at 413 (emphasis added).

57. *Id.* at 414-15.

58. *See, e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-96 (1962) (holding that ordinance preventing owners of a gravel quarry from excavating underneath the water table was not a taking); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (holding that destruction of plaintiff’s cedar grove in order to prevent the spreading of disease did not require compensation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (holding that a zoning ordinance which significantly diminished the value of plaintiff’s land did not constitute a taking).

59. The term “non-invasive” is used to denote those regulations that do not involve a direct physical occupation of the property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court declared that any regulation that resulted in a physical occupation by any entity other than the property owner was a per se taking that required compensation. *Id.* at 435-40. This Note, however, is concerned only with non-invasive regulations.

For an excellent analysis of the Supreme Court’s takings tests for both invasive and non-invasive regulations, see Peterson, *supra* note 2, at 1317-34.

60. 438 U.S. 104 (1978).

61. *Id.* at 119.

62. *Id.* at 130.

nator in [the] 'deprivation' fraction."⁶³ The denominator denotes the value of the property before the adverse regulatory action; the numerator indicates its value after the regulation. The larger the denominator in the fraction, the less likely it is that the percentage of value lost to regulation will approximate zero, thus resulting in a taking. Because property is often described as a "bundle of rights,"⁶⁴ the determination of what property should constitute the whole parcel for purposes of calculating the denominator is not always easy. The Court in *Penn Central* enumerated three significant factors that should be considered in a regulatory takings decision: (1) the character of the governmental action,⁶⁵ (2) the regulation's "economic impact,"⁶⁶ and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations."⁶⁷ In its analysis, the Court stated that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."⁶⁸ Focusing "on the nature and extent of the interference with rights in the parcel as a whole,"⁶⁹ the Court decided that because the company could still use the property for a railroad terminal, the ordinance did not prevent it from making "reasonable beneficial use" of the property; hence there was no taking.⁷⁰

The following year, the Court proclaimed its second test for decid-

63. *Lucas*, 112 S. Ct. at 2894 n.7. For an analysis of a takings claim as a fraction, see Michelman, *supra* note 2, at 1192-93. The deprivation fraction is:

$$100 - \left[\frac{\text{Value After Regulation}}{\text{Value Before Regulation}} \times 100 \right] = \% \text{ of value lost to the regulation.}$$

After deciding what extent of the property to consider as the whole, a court must then decide whether there is any remaining value in the parcel.

64. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (noting that the bundle of rights characterized as property includes the right to exclude others).

65. The *Penn Central* Court intimated that if the character of the governmental action could be equated with a physical invasion and thus resembled an act of eminent domain, then a taking was more likely to be found. 438 U.S. at 124.

66. *Id.* In a subsequent footnote, the Court suggested that if a regulation meant that the property had "ceas[ed] to be 'economically viable,'" then relief would be granted. *Id.* at 138 n.36.

67. *Id.* at 124.

68. *Id.*

69. *Id.* at 130-31.

70. *Id.* at 138. The Court's statement begged the question of what constituted a "reasonable, beneficial use." The Court found that the regulation "did not interfere with . . . *Penn Central's* primary expectation concerning the use of the parcel," which was "as a railroad terminal containing office space and concessions." *Id.* at 136. Nor did the denial of this particular permit signify an "intention to prohibit any construction above the Terminal." *Id.* at 137. In addition, the Court found that the availability of transferable development rights "mitigated whatever financial burdens the law [had] imposed on appellants," because the company

ing regulatory takings claims in *Agins v. Tiburon*.⁷¹ In *Agins*, petitioners argued that a zoning ordinance permitting the construction of only five single-family residences on their five-acre tract had destroyed the value of their parcel.⁷² The Court succinctly stated that a regulatory taking may be found if "the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."⁷³ Applying this test, the Court found that the appellants' property was not the only property affected by the ordinance, that the appellants had not been prevented from making use of their land, and that the appellants had not been deprived of any "fundamental rights of ownership."⁷⁴

Subsequent decisions in both the Supreme Court and in lower courts have alternated the use of the *Penn Central* and *Agins* tests.⁷⁵ The Court

could build a taller office building atop one of its other holdings by applying its unused air rights above the terminal to other properties it owned within the city. *Id.*

Also notable is the fact that the statute at issue in *Penn Central* expressly provided that if an owner of a landmark could show that he was not "earning a reasonable return on the property in its present state," then the city government was responsible for developing a plan that would enable the owner "to earn a reasonable return on the landmark site." *Id.* at 112-13 n.13. If the owner rejected the city's plan, then either the city was to acquire the property through eminent domain or else lift the regulation. *Id.* The trial court in *Penn Central* had found that the "cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal." *Id.* at 119 n.20. The appellate court reevaluated the company's proffered accounting figures and rejected the claim that the terminal was operating at a loss. *Id.* at 119. At the Supreme Court level, the transportation owners admitted that the Terminal "must be regarded as capable of earning a reasonable return." *Id.* at 129. This seemed to be the company's fatal error, because the Court emphasized, in its now-famous footnote, that its holding was

based on the present record, which in turn is based on Penn Central's present ability to use the terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the terminal ceases to be "economically viable," appellants may obtain relief.

Id. at 138 n.36.

71. 447 U.S. 255 (1980).

72. *Id.* at 257-58.

73. *Id.* at 260 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928); *Penn Central*, 438 U.S. at 138 n.36).

74. *Id.* at 262. Two years later, when asked to rule on whether the "mere enactment" of a Surface Mining Act had deprived the complaining coal companies of "all economically viable use" of their property, the Supreme Court answered in the negative. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981). The Court, however, was careful to note that its holding did not preclude "other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking." *Id.* at n.40.

75. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492-97 (1987) (combining both the *Agins* and the *Penn Central* tests); *Connolly v. Pension Benefit Guar. Corp.* 475 U.S. 211, 224-25 (1986) (using the *Penn Central* balancing factors to define "economically viable use"); *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, 155 (1991)

applied the *Agins* economic viability test as part of its takings analysis in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.⁷⁶ The Court decided in that case that a facial attack on a statute did not indicate that petitioners had been deprived of all "economically viable use" of their property.⁷⁷ The statute in question required that a certain amount of coal be left under certain structures in order to prevent subsidence. The Court held that the Association's facial attack on the act failed to prove that it had been deprived of all "economically viable use" because it did not claim that it was "impracticable for them to continue mining their bituminous coal interests in western Pennsylvania."⁷⁸

The *Keystone* Court then addressed the question of what property should comprise the denominator of the takings fraction, since the Association claimed that the statute in question had deprived them of a separate support estate that was recognized by state law.⁷⁹ According to petitioners, Pennsylvania recognized three estates: the surface estate, the support estate, and the mineral estate.⁸⁰ Theoretically at least, each of the estates could be owned by a different party. Under this scenario, the owner of the support estate could sell her interests either to the holder of the mineral estate, who could then commence mining operations, or sell to the holder of the surface estate, who could then prohibit the mineral estate holder from mining in a way that would result in damage to the above surface.⁸¹ The majority noted that while the support estate could in theory be owned by a separate party, "invariably" the support estate was owned either by the holder of the surface estate or by the holder of the mineral estate.⁸² The Court upheld the lower court's decision to view the support estate as "'only one "strand" in the plaintiff's "bundle" of property rights, which also include[d] the mineral estate."⁸³ The

(applying only the *Agins* test); see also Peterson, *supra* note 2, at 1316-33 (discussing the Supreme Court's two tests and how they have been applied inconsistently).

76. 480 U.S. 470 (1987).

77. *Id.* at 494-96.

78. *Id.* at 496.

79. *Id.* at 478.

80. *Id.*

81. See *id.*

82. *Id.* at 500.

83. *Id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 771 F.2d 707, 716 (3d Cir. 1986), *aff'd*, 480 U.S. 470 (1987)). The *Keystone* Court also approved of the distinction drawn by the Third Circuit between *Keystone* and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which the court found a regulatory taking. According to the Third Circuit, the language in *Mahon*

seems to suggest that the Court would have found a taking no matter how little of the defendants' coal was rendered unmineable—that because "certain" coal was no longer accessible, there had been a taking of that coal. However, when one reads the

Keystone Court appears to have said that if a property interest is in reality inseparable from one or more other distinct interests that are not impaired by the regulation in question, then such a property interest cannot be the sole subject of a takings claim.⁸⁴

After *Agins*, certain issues continued to puzzle the lower courts. First, because none of the Supreme Court decisions applying the *Agins* test offered a clear definition of the term "economically viable," lower courts wrestled with the term. In 1983, the United States Court of Appeals for the Second Circuit addressed the question of "economically viable use" in *Pompa Construction Corp. v. City of Saratoga Springs*.⁸⁵ The plaintiffs had purchased a sixty-eight acre tract on which they planned to operate a quarry.⁸⁶ A zoning ordinance designating the area as a conservancy district prohibited quarries, and the plaintiffs brought suit alleging that the property had been taken, because it was no longer "economically viable."⁸⁷ The Second Circuit defined economic viability as the plaintiffs' ability to sell the property to someone else for its remaining uses rather than as the profitability of the property's remaining uses for the plaintiffs.⁸⁸ Deciding that the plaintiffs would be able to sell the property, the court concluded that the property was still economically viable.⁸⁹

The United States Court of Appeals for the Ninth Circuit also chose to equate economic viability with marketability. In *MacLeod v. Santa Clara County*,⁹⁰ MacLeod had acquired property as a long term invest-

sentence in context, it becomes clear that the Court's concern was with whether the defendants' "right to mine coal . . . [could] be exercised *with profit*." . . . Thus, the Court's holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable.

Keystone, 771 F.2d at 716 n.6 (quoting *Mahon*, 260 U.S. at 414) (citations omitted).

84. See *Keystone*, 480 U.S. at 500-01.

85. 706 F.2d 418 (2d Cir. 1983).

86. *Id.* at 420.

87. See *id.* at 421-23. The plaintiffs contended that their property was unsuitable for any of the uses permitted within the conservancy district; therefore, its only possible economically beneficial use was as a quarry. *Id.* at 423-25.

88. *Id.* at 423-24.

89. *Id.* at 424-25. One year later, the Second Circuit reiterated its definition of economically viable in *Sandowsky v. City of New York*, 732 F.2d 312 (2d Cir. 1984). The plaintiffs had purchased two vacant, single-room occupancy buildings with the intent of converting them into more profitable residential uses. *Id.* at 312. Alleging that a subsequent three-year moratorium on conversion of these types of buildings had destroyed the economic viability of their property, plaintiffs brought a takings claim against the city. *Id.* at 317. Citing *Pompa Construction*, the court concluded that because plaintiffs had failed to show that their property was unmarketable, "sale of the properties was a possible use." *Id.* 318 n.3. Thus, the court continued, the fact that "appellants might have to sell their property because of financial hardship" and "might be unable to recoup their costs" was not enough to show that the property had no economically viable use. *Id.* at 318.

90. 749 F.2d 541 (9th Cir. 1984).

ment; in the interim he had leased the land for cattle grazing and attempted to run his own cattle operation.⁹¹ Neither activity proved sufficient to cover the costs of maintaining the property.⁹² MacLeod then pursued the possibility of large-scale timber harvesting.⁹³ Although he received the requisite permits from the State of California, the county denied his permit.⁹⁴ The Ninth Circuit found that the permit denial "did not affect MacLeod's ability to continue to hold the property for investment purposes, with interim use as a cattle ranch, and grazing land," although concededly MacLeod was now placed in a difficult short-term financial situation.⁹⁵

The question of the "denominator" of the takings fraction, with which the Supreme Court had wrestled in *Keystone*, troubled lower courts as well. For example, in *Deltona Corp. v. United States*,⁹⁶ a development company subdivided its original purchase into five tracts.⁹⁷ The company obtained the necessary permits to fill and develop the first three tracts of land, but the passage of Section 404 of the Federal Water Pollution Control Act Amendments of 1972 prohibited it from filling in the remaining two tracts.⁹⁸ When the company brought a takings claim based on the permit denial, the court based its decision that there was no taking upon a consideration of the total economic value of all five tracts.⁹⁹

A similar situation was presented by *Jentgen v. United States*.¹⁰⁰ Jentgen had paid \$150,000 for approximately 102 acres.¹⁰¹ Twenty of the acres were uplands and could be developed without the need for permits; the remaining acres were wetlands and necessitated approval by the Army Corps of Engineers before any development could take place.¹⁰² After being denied a permit to develop the entire eighty acres,¹⁰³ Jentgen

91. *Id.* at 542-43.

92. *Id.* at 543.

93. *Id.*

94. *Id.*

95. *Id.* at 547.

96. 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

97. *Id.* at 1188.

98. *Id.* at 1188-89.

99. *Id.* at 1192. The court stated, "Indeed, the residual economic value of the land is enormous, both proportionately and absolutely. . . . In the aggregate, [the two tracts in question] contain only 20% of the total acreage of Deltona's original purchase in 1964 and 33% of the developable lots." *Id.*

100. 657 F.2d 1210 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982).

101. *Id.* at 1211.

102. *Id.* at 1212.

103. The Corps had offered Jentgen a modified permit allowing him to develop 20 of the 80 acres. *Id.*

filed a takings claim and sought approximately \$6,000,000 in compensation.¹⁰⁴ The court refused to limit its consideration to the eighty acres for which the permit was denied¹⁰⁵ and explained that because twenty of the one hundred acres were still developable, no taking would be found.¹⁰⁶

Regulations that require, or have the effect of requiring, that an entire piece of property be left in its natural state have tended to constitute takings that necessitate compensation. In *Q.C. Construction Co. v. Gallo*,¹⁰⁷ for example, a moratorium on sewer tie-ins prevented a landowner from developing his residential lots.¹⁰⁸ The court found that "if the only remaining use for one's land is to provide an empty lot for the benefit of one's neighbors, then the property has become truly worthless and useless to the owner."¹⁰⁹

In *Loveladies Harbor, Inc. v. United States*,¹¹⁰ the Court of Claims addressed the question of what property should comprise the denominator of the takings fraction in the context of a regulation that essentially required land to be left in its natural state. As in *Deltona*, the plaintiffs had purchased a large tract of land and subdivided, filled, and sold all but fifty-one acres.¹¹¹ Subsequent federal and state wetlands regulations required that the landowner obtain permits in order to develop wetland areas.¹¹² In contrast to the court in *Deltona*, the *Loveladies* court declined to consider the full extent of the plaintiffs' original purchase as the

104. *Id.*

105. *Id.* at 1213 (citing *Penn Central*, 438 U.S. at 130-31).

106. *Id.* Even though the regulation had allegedly diminished the value of the entire tract by 98%, the court stated that the value of the 20 acres of developable uplands was close to \$150,000, the original amount Jentgen had paid for the entire parcel. *Id.*

107. 649 F. Supp. 1331 (D.R.I. 1986), *aff'd*, 836 F.2d 1340 (1st Cir. 1987).

108. *Id.* at 1331-32.

109. *Id.* at 1337. The court appeared to be strongly influenced by the fact that Gallo, the town building inspector, had assured the plaintiff that the permits would be forthcoming following the plaintiff's completion of repairs to the sewer system. *Id.* at 1333. The plaintiff construction company expended approximately \$20,000 for repairs, only to be informed that the tie-in moratorium had been implemented. *Id.* at 1334. The plaintiff also had no notice that the moratorium was under consideration. *Id.*; see also *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 895 (Fed. Cir. 1986) (holding that compensation was required when wetlands regulation prohibited Florida Rock from limestone mining, and the property was unsuitable for any other activity), *cert. denied*, 479 U.S. 1053 (1987). *But see Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 16 (1984) (holding that plaintiff's ability to remove timber from the property defeated a takings claim even though the property could not be developed); *Hendricks v. United States*, 14 Cl. Ct. 143, 156-57 (1987) (holding that the fact that recreational uses could still be made of the property helped defeat takings claim).

110. 15 Cl. Ct. 381 (1988).

111. *Id.* at 383.

112. See *id.* at 383-84.

subject of the takings claim.¹¹³ The *Loveladies* court cited two reasons for its decision to limit its takings analysis only to the acreage for which a dredge-and-fill permit had been denied.¹¹⁴ First, it attempted to distinguish *Deltona* by stating that the *Deltona* court's consideration of the developer's original purchase was only the first of "[a] 'few statistics,'"¹¹⁵ and thus could not "be read to require a rigid rule that the parcel as a whole must include all land originally owned by plaintiffs."¹¹⁶ Second, the *Loveladies* court cited *Keystone* as standing for the proposition that the court was not required to consider the entire original purchase.¹¹⁷

When faced with a regulation requiring property to be left essentially in its natural state, the *Loveladies* court reached the same result as the court in *Q.C. Construction Co. v. Gallo*, finding that "the only use remaining for the 12.5 acres [in question] was for the land to remain in its natural state as an empty lot. This court is compelled to view such property as taken."¹¹⁸ The fact that the 12.5 acre parcel under consideration contained one acre of unregulated uplands did not alter the court's

113. *Id.* at 391; see also *Gallo*, 649 F. Supp. at 1332 (considering only 12 of 30 lots originally purchased).

114. The *Loveladies* court also refused to include an additional 6.4 acres of the original purchase that was still owned by the plaintiff at the time of the alleged taking. *Loveladies*, 15 Cl. Ct. at 393. The court excluded the 6.4 acres because they were not contiguous with the tract of land at issue. *Id.* (citing *American Sav. & Loan Assoc. v. County of Marin*, 653 F.2d 364, 369 (9th Cir. 1981)). The *Loveladies* court also distinguished the Supreme Court's treatment of non-adjacent properties in *Penn Central*. In *Penn Central*, "the parcel as a whole designated by the court only included [the tax block] and failed to include these other scattered non-contiguous properties." *Id.*

115. *Id.* at 392. "The other comparisons only included property which was held by the landowner when the claimed taking already occurred." *Id.* (quoting *Deltona*, 657 F.2d 1184, 1188-89 (1981), cert. denied, 455 U.S. 1017 (1982)). The *Loveladies* court seemed to rely heavily on the *Deltona* court's finding that "even within [the areas claimed to be taken], there are located 111 acres of uplands which can be developed without obtaining a Corps permit." *Deltona*, 657 F.2d at 1192.

116. *Loveladies*, 15 Cl. Ct. at 392.

117. *Id.* The court asserted:

[T]he Supreme Court did not include all the property which was held at the time of the original purchase, i.e., all of the coal which was in the ground when the property was originally purchased in the early 1900s. Rather, the Supreme Court defined the value of the parcel as a whole as "the value that remain[ed] in the property when the taking was said to have occurred."

Id. (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

118. *Id.* at 395. The *Loveladies* court rejected the defendant's claim that the land could still be used for recreational purposes, stating that "it is highly doubtful that hunting would have been permitted on the property after the permit denial since the denial was in part motivated to preserve certain endangered species which existed in the wetlands." *Id.*; see also *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 895 (Fed. Cir. 1986) ("The sole purpose [for plaintiff's purchase of the tract] was to obtain its limestone deposits for extraction, and no other use, or sale, has ever been considered.").

conclusion.¹¹⁹ The court rejected the defendant's contention that this one acre could be utilized as a residential site, stating that "[a] taking of such property is found where the government's regulations imposed on the surrounding wetlands have cut off all the routes of access . . . which remain."¹²⁰

The case law preceding *Lucas* leads to two observations: (1) the phrase "economically viable use" has generally been equated with "fair market value,"¹²¹ and (2) the question of what should comprise the denominator in the takings analysis has led to inconsistent answers.¹²² When analyzing the majority opinion in *Lucas*, it is essential to remember the factual finding on which the Court based its holding. The trial court found that the regulation at issue had rendered the property "valueless."¹²³ The South Carolina Supreme Court did not disturb this finding, nor did the United States Supreme Court.¹²⁴ Accepting this finding of "valueless," the Court adopted a categorical rule that any regulation which "denies all economically beneficial or productive use of land" is a per se taking, unless the state can show that the regulation prevents a common-law nuisance.¹²⁵ The Court's "nuisance exception" halts a state's ability to define summarily a regulation as an exercise of the police-power in instances of total deprivation,¹²⁶ is the most immediately striking aspect of *Lucas*, and raises a multitude of issues.¹²⁷ Before a

119. *Loveladies*, 15 Cl. Ct. at 396.

120. *Id.* (citing *Laney v. United States*, 228 Cl. Ct. 519, 523 (1981)); see also *Formanek v. United States*, 26 Cl. Ct. 332, 339 (1992) (finding that unregulated upland portion of claimant's tract had also been taken since the government had failed to show that a market existed for it).

121. See *supra* notes 85-95 and accompanying text.

122. See *supra* notes 96-106, 110-16 and accompanying text.

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

124. *Id.* at 2896 n.9 ("This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits . . . that the finding was erroneous.")

125. *Id.* at 2893, 2897; see *supra* notes 26-33 and accompanying text. In *Lucas*, the Court at least partially resolved the confusion fostered by its two previous takings "tests." In creating its categorical rule, the Court indicates that the *Penn Central* multi-factor balancing approach is inappropriate in situations where the landowner has demonstrated total deprivation. See *Lucas*, 112 S. Ct. at 2893. For a discussion of the *Penn Central* test, see *supra* notes 65-70 and accompanying text.

126. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (upholding ordinance prohibiting a formally lawful brickyard even though the property could not be utilized for any other purpose); *Mugler v. Kansas*, 123 U.S. 623, 664 (1887) (upholding ordinance prohibiting previously lawful brewery even though "the establishments will become of no value as property"). In these cases, the Court held that the local governments had the right to declare what constituted a nuisance. See *Hadacheck*, 239 U.S. at 411; *Mugler*, 123 U.S. at 658.

127. For example, although *Lucas* clearly held that state nuisance law would apply to a state statute preventing an owner from all beneficial or productive use of her property, the

property owner need consider any aspects of the "nuisance exception," however, he must first show that he meets the criteria of the Court's categorical rule. Does *Lucas* offer any guidance as to how property owners may reach the "promised land" of its categorical rule? A subtle revision of the language of prior rulings and commentary on the proper "denominator" of takings analysis offer two possibilities.

Writing for the majority, Justice Scalia stated that this categorical rule was not a new rule, but rather a reaffirmation of the Court's statement in *Agins v. Tiburon*: "[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"¹²⁸ Although superficially correct, Justice Scalia's statement that the majority was merely reaffirming the *Agins* test is not entirely accurate. The *Agins* Court had simply stated that a loss of all "economically viable use" would be considered a taking.¹²⁹ By rephrasing the test as requiring a showing that a regulation has denied a property owner all "economically beneficial or productive" use, Justice Scalia altered the language used by the Court in *Agins*.¹³⁰ Although courts do at times rephrase the language of their "tests," the Court had, until *Lucas*, consistently retained the specific wording of the *Agins* economic viability test.¹³¹ The *Lucas* Court's recharacterization of the *Agins* test thus raises a number of troubling questions.

opinion was unclear as to what type of nuisance law would apply to a taking under a federal statute. See *Lucas*, 112 S. Ct. at 2901. Would a court apply the nuisance principles embodied in the state's common law, or would some type of federal nuisance principles be applied? In addition, if common-law nuisance principles indicated that the prohibited activity was one that had traditionally been allowed to continue so long as the owner paid damages, then would this activity fall under the scope of the Court's nuisance exception? See, e.g., RESTATEMENT (SECOND) OF TORTS § 822 cmt. d (1967). These questions are well worth exploring, but are beyond the scope of this Note.

128. *Lucas*, 112 S. Ct. at 2894 (emphasis added) (alteration in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Two dissenting Justices took issue with the Court's assertion that it was merely reaffirming *Agins*. *Id.* at 2911 n.11 (Blackmun, J., dissenting); *id.* at 2918-19 (Stevens, J., dissenting); see *supra* notes 39-48 and accompanying text. While conceding that the *Agins* language had been repeated in later cases, Justice Blackmun maintained that neither *Agins* nor the later decisions "suggest[ed] that the public interest is irrelevant if total value has been taken." *Lucas*, 112 S. Ct. at 2911 n.11 (Blackmun, J., dissenting). Justice Stevens reiterated this point and stated that while the *Agins* dicta had contained the either/or sentence, the Court's "rulings [had] rejected such an absolute position." *Id.* at 2918-19 (Stevens, J., dissenting).

129. *Agins*, 447 U.S. at 260.

130. *Lucas*, 112 S. Ct. at 2894 (emphasis added).

131. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14 (1984).

Must courts that have consistently equated "economically viable" with fair market value¹³² now implement a new test of "beneficial and productive use?" If the phrase "economically beneficial and productive" is different from "economically viable," does this mean that a property owner is no longer required to show that his property has absolutely no fair market value in order to take advantage of the Court's categorical rule?¹³³ If "all economically beneficial and productive use" is not synonymous with fair market value, then what does the phrase "beneficial and productive" mean?¹³⁴ Would a "beneficial and productive use" test harken back to the "reasonable return" language found in *Penn Central*,¹³⁵ so that claimants who feel that their property is incapable of a "reasonable return" may claim that they have been deprived of "all beneficial or productive use?"¹³⁶ Because the *Agins* test of economic viability was clearly satisfied by the trial court's finding that the property had been rendered "valueless," the *Lucas* court did not have to explain the meaning of "economically beneficial or productive." Subsequent courts now face the question of whether this phrase differs in meaning from *Agins*, and if so, how.

Assuming that the Court's revision of language was an innocuous change, i.e., property must still be completely *valueless* in order to qualify

132. See *supra* notes 85-95 and accompanying text.

133. Of course, after making this showing, the property owner will still have to defend against a governmental entity's assertion that the regulation is preventing a common-law nuisance. See *Lucas*, 112 S. Ct. at 2896-2902; *supra* notes 125-27 and accompanying text.

134. Justices Blackmun and Stevens strongly criticized the majority for assuming "that the only uses of property cognizable under the Constitution are *developmental* uses." *Lucas*, 112 S. Ct. at 2919 n.3 (Stevens, J., dissenting); *id.* at 2908 (Blackmun, J., dissenting); see *supra* notes 41-42 and accompanying text. Justice Scalia denied that the Court was making such an assumption. *Lucas*, 112 S. Ct. at 2895 n.8.

135. *Penn Central*, 438 U.S. at 129; see *supra* note 70 and accompanying text. The *Penn Central* Court's language troubled commentators, who questioned courts' ability to define "reasonable" rates of return for individual parcels. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 230-31 (1978). Before *Penn Central* was handed down, one commentator proposed a "reasonable beneficial use" standard by which courts could determine whether compensation was due. See John J. Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021, 1050-51 (1975). The numerous difficulties in implementing such a standard were then described by Curtis J. Berger in *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 817-21 (1976).

136. For example, suppose the South Carolina Coastal Council had implemented a regulation that restricted the size of habitable structures on Lucas' lots. Could he have shown that since he would have to sell the lots at a loss (since his purchase price had been based on the assumption that the lots were to be used for luxury homes), he would be entitled to compensation because he had been denied "beneficial" use of his land? The fact that the Court quoted the following from Sir Edward Coke suggests its acceptance of this view: "[F]or what is the land but the profits thereof[?]" *Lucas*, 112 S. Ct. at 2894 (quoting 1 E. COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812)).

for the Court's categorical rule, did the Court offer any other suggestions as to how a property owner might qualify? The answer may lie in the Court's commentary on the denominator of the takings fraction—the extent of the land to be considered in takings analysis.¹³⁷ Justice Scalia offered an artfully ambiguous explanation as to the “‘property interest’” to be considered:¹³⁸

When . . . a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.¹³⁹

Under this reasoning, could a property owner subject to a setback regulation prohibiting any type of development on the front twenty-five feet of her lot now fall under the Court's categorical rule by claiming that she has been deprived of “all economically beneficial use” of the “burdened” twenty-five feet of property? Previous cases have rejected attempts to segment property in this manner;¹⁴⁰ has the Court now resurrected this possibility? Perhaps the Court's chosen example indicates that *all* portions of a tract must be left with some sort of economic use. For example, in *Jentgen v. United States*,¹⁴¹ the landowner was allowed to develop twenty of his hundred acres but was denied a permit to dredge-and-fill sixty of the remaining eighty acres. Because the permit denial meant that sixty acres had to be left in “essentially a natural state,” could Jentgen now claim the benefit of the Court's categorical rule by arguing that only the “burdened” sixty acres should be considered?¹⁴²

In addition, as Justice Stevens indicated, the Court's language implies that a total deprivation of “*any* real property interest,” such as any

137. See *supra* notes 63-64 and accompanying text.

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

139. *Id.*

140. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (citing *Gorieb v. Fox*, 274 U.S. 603, 604, 608-10 (1927)); *supra* notes 75-84 and accompanying text; see also *Peterson*, *supra* note 2, at 1346-47 (describing “cases in which no taking occurs even though the claimant *has* effectively been deprived of a discrete portion of a parcel of land or other tangible thing”).

141. 657 F.2d 1210, 1213 (Ct. Cl. 1981); see discussion *supra* notes 100-06 and accompanying text.

142. This portion of the majority opinion deeply troubled Justice Stevens, who stated:

In response to the rule, courts may define “property” broadly and only rarely find regulations to effect total takings On the other hand, developers and investors may market specialized estates to take advantage of the court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking.

Lucas, 112 S. Ct. at 2919 (Stevens, J., dissenting).

one "stick" in the bundle of property rights, might constitute a taking.¹⁴³ The Court suggested that

[t]he answer to this difficult question [of deciding what property interests should comprise the whole] may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.¹⁴⁴

Under this reasoning, the plaintiffs in *Keystone* might have prevailed on their claim, since they were able to show that a separate "support" estate was recognizable under Pennsylvania state law.¹⁴⁵ It should be noted, however, that *Lucas* does not automatically guarantee that a state-protected property interest may serve as the denominator for a takings claim; rather, *Lucas* merely suggests a possible willingness to entertain such claims.

In his dissent, Justice Stevens painted a bleak picture of a plethora of takings claims based on the "market[ing] [of] specialized estates [designed to] take advantage of the Court's new rule."¹⁴⁶ The Court's language indicates that its willingness to consider claims based on less than a fee simple interest will be predicated on such an interest being recognized by the state's common law;¹⁴⁷ thus, Justice Stevens' fear of the creation of a number of new estates may be unfounded. The empha-

143. *Id.* at 2920 n.4 (Stevens, J., dissenting). Justice Stevens accused the majority of engaging in "subtle revision of the 'total regulatory takings' dicta." *Id.* (Stevens, J., dissenting). He pointed out that in *Agins* the Court had stated that a regulation which "denies an owner economically viable use of his *land*" might be a taking. *Id.* (Stevens, J., dissenting) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). But, Justice Stevens maintained, the majority's language seemed to indicate that other estates could also serve as the bases for takings claims. *Id.* (Stevens, J., dissenting).

The issue of conceptual severance, that is, whether the taking of one "stick" in the bundle can be considered a taking, has been problematic from the inception of regulatory takings. *See, e.g.*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 419-20 (Brandeis, J., dissenting). Conceptual severance has also been addressed by many commentators. At the extreme end of the spectrum, Richard Epstein maintains that any government restriction of property rights whatsoever requires compensation. *See* EPSTEIN, *supra* note 2, at 95. For a discussion of the philosophical underpinnings of the conceptual severance idea, see Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 583-92 (1984).

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

145. *See supra* notes 79-83 and accompanying text.

146. *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting).

147. *Id.* at 2894 n.7 (discussing as a basis for the claim "whether and to what degree the State's law [of property] has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value").

sis on "the owner's reasonable expectations"¹⁴⁸ will also serve to discourage such chicanery.

The ultimate effect of *Lucas* on future takings jurisprudence is ambiguous. It appears that *Lucas* is yet another attempt by the Court to fashion a set of categorical rules for takings analysis.¹⁴⁹ Yet because *Lucas* was based on a finding that the property had been "render[ed] valueless,"¹⁵⁰ the Court's categorical rule may prove to be an exceedingly narrow one, one that is limited only to the facts of *Lucas*.¹⁵¹

Will other property owners be able to reach the "promised land" of *Lucas*? The Court's subtle and inexplicable shift in language, from "economically viable use" to "economically beneficial and productive use,"¹⁵² at least raises the question of whether some new and more achievable standard has been set. Future cases will indicate whether a property owner will have to prove that the value of her land is absolutely nil in order to take advantage of the Court's rule.

The Court also left open the question of what types of "property interest" may serve as the denominator in a takings analysis.¹⁵³ If, as *Lucas* suggests, courts may choose to look only at the regulated portion of the property, then land-use planners and public officials must carefully draft regulations ensuring that even the most severely regulated portions of a piece of property are left with some sort of economic use. If broadly interpreted, the Court's suggestions could be grossly inequitable; a preferable method of analysis would weight the economic benefits derived from the entire purchase against the remaining regulated portion. The Court could also clarify matters considerably by clearly enumerating which "sticks" in the bundle of rights will fall under the scope of its new rule.

Perhaps, as Justice Scalia asserts, the *Lucas* rule will be applied only in "extraordinary circumstance[s]."¹⁵⁴ It is more likely, however, that

148. *Id.*

149. See Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1622 (1988) (arguing that the following cases are evidence of a trend towards a more formalistic approach: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) (holding that a building permit condition requiring the landowners to grant beach access did not advance a legitimate state interest); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (holding that damages were available for temporary takings); *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987) (holding that regulation abrogating the right to devise property was compensable taking)).

150. *Lucas*, 112 S. Ct. at 2896.

151. See Dwight Merriam, *Lucas: Has Takings Law Been Set Adrift Once More?*, CONN. L. TRIB., July 13, 1992, at 20.

152. See *supra* notes 128-36 and accompanying text.

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

154. *Id.* at 2894 (Souter, J., separate statement).

the decision has opened the floodgates for an enormous amount of ingeniously crafted takings claims. In his separate statement, Justice Souter clearly focused on the major weakness of the Court's decision: "Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests."¹⁵⁵

By refusing to address the issue of what constitutes a deprivation of "all economically beneficial and productive use," the Court performed a disservice to takings jurisprudence by leaving this important question unanswered.

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155. *Id.* at 2925 (Souter, J., separate statement).