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## Lucas v. South Carolina Coastal Council: Drawing a Line in the Sand

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## LUCAS v. SOUTH CAROLINA COASTAL COUNCIL: DRAWING A LINE IN THE SAND

The Fifth Amendment to the United States Constitution prohibits the federal and state governments<sup>1</sup> from taking private property “for public use without just compensation.”<sup>2</sup> The United States Supreme Court has interpreted this proscription to encompass not only physical appropriations of property,<sup>3</sup> but also land use regulations that cause diminution in property value.<sup>4</sup> Fifth Amendment scrutiny of land use regulations has evolved dramatically and controversially<sup>5</sup> since Justice Holmes’s landmark declaration that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>6</sup>

Formulating a systematic and uniform method for determining whether and when a land use regulation goes “too far” has proven a difficult, if not impossible,<sup>7</sup> task for the Supreme Court.<sup>8</sup> The Court’s approach to regula-

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1. The Takings Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

2. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: “[N]or shall private property be taken for public use without just compensation.” See generally William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) (discussing the historical development of the Just Compensation Clause).

3. See discussion *infra* part I.D.2.

4. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

5. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984) (suggesting that *Pennsylvania Coal* “seems to have generated most of the current confusion about takings”).

6. *Pennsylvania Coal*, 260 U.S. at 415. When a landowner believes a regulation affecting his property has gone “too far,” he may sue the government through inverse condemnation, challenging the regulation as a Fifth Amendment violation, and demand just compensation. *Id.* See generally 7A PATRICK J. ROHAN & MELVIN A. RESKIN, *NICHOLS’ THE LAW OF EMINENT DOMAIN* § 14.03 (3d ed. 1992).

7. The search for a clear understanding of the distinction between “regulation” and “taking,” remarks one commentator, is “the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer’s equivalent of the physicist’s hunt for the quark.” CHARLES M. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976), *quoted in* *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 649 n.15 (1981) (Brennan, J., dissenting).

8. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978). For an excellent overview of the various approaches employed by the Supreme Court and the “chaos” it has created in current takings law, see Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles, Part IV—A Critique of Current Takings Clause Doctrine*, 77

tory takings challenges is best described as an *ad hoc* balancing of private and public interests, focusing on the factual circumstances of each case.<sup>9</sup> Nonetheless, from the Court's takings decisions an identifiable tendency has emerged toward attaching greater weight to a regulation's negative impact on the affected property's value.<sup>10</sup>

Predating this trend, however, exists a conflicting doctrine known as the nuisance exception, which holds economic impact irrelevant, no matter how severe, where the government purpose behind the use restriction is sufficiently important.<sup>11</sup> *Lucas v. South Carolina Coastal Council*<sup>12</sup> drastically reconstructed the role of nuisance principles in regulatory takings analysis, severely diminished its vitality as an exception to the compensation requirement, and realized the tendency toward treating economic impact as a crucial factor in the Court's takings decisions.<sup>13</sup>

The Supreme Court has held that a taking occurs if a regulation is irrational or if it denies a landowner all economically viable use of his property.<sup>14</sup> Before *Lucas*, however, the Court had never had an opportunity to review a regulatory takings claim that involved total destruction of economically beneficial use; prior cases involved only partial destruction.<sup>15</sup> Therefore, there existed little guidance on how the Court would analyze such a situation. In *Lucas*, the Court had the opportunity to squarely face this issue.<sup>16</sup>

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CAL. L. REV. 1299 (1989); see also Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (finding the Court's approaches "incompatible" and "confusing").

9. See, e.g., *Penn Central*, 438 U.S. at 124. Among the factors considered are the regulation's economic impact, interference with investment-backed expectations, the importance of the government interest, and the character of the government action. *Id.*; see also *Pennsylvania Coal*, 260 U.S. at 415-16 (emphasizing that takings decisions do not lend themselves to "general propositions").

10. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

11. See discussion *infra* part I.A.

12. 112 S. Ct. 2886 (1992).

13. See discussion *infra* parts II.A.1, II.B.2.

14. *Agins*, 447 U.S. at 260; see discussion *infra* part I.D.1.

15. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 120-21 (1978).

16. In *Lucas*, the Court *presumed* that the South Carolina regulation at issue denied Lucas all economically beneficial use of his property. 112 S. Ct. at 2896 n.9. However, Justice Souter found this factual premise upon which the case rests sufficiently questionable to have warranted dismissal of the writ of certiorari. *Id.* at 2925 (statement of Souter, J.). The presumption troubled three other Justices as well. *Id.* at 2903 (Kennedy, J., concurring); *id.* at 2908 (Blackmun, J., dissenting); *id.* at 2919, n.3 (Stevens, J., dissenting).

In 1986, David Lucas purchased two beachfront lots for \$975,000 on a barrier island off the South Carolina coast.<sup>17</sup> Lucas intended to erect single family homes on his lots, as the owners of adjacent lots had already done.<sup>18</sup> In 1977, the South Carolina legislature enacted the Coastal Zone Management Act,<sup>19</sup> which requires owners of designated "critical area"<sup>20</sup> to obtain a permit from the South Carolina Coastal Council (the Council) before beginning development.<sup>21</sup> Lucas's lots were not considered "critical area" under the legislation when he acquired them in 1986.<sup>22</sup>

In an effort to preserve the beach/dune system along its coast,<sup>23</sup> in 1988 South Carolina enacted the Beachfront Management Act (the Act).<sup>24</sup> The Act prohibited, without exception, the construction of any permanent, habitable structures on any beach area that the Council designated as critically eroding.<sup>25</sup> Lucas's lots were so designated.<sup>26</sup>

Lucas then filed suit in the South Carolina Court of Common Pleas, claiming that the Act effected a taking of his property without just compensation in violation of the Fifth Amendment to the United States Constitution.<sup>27</sup> That court agreed, finding that the Act rendered the lots valueless, and ordered the Council to compensate Lucas.<sup>28</sup> The South Carolina Supreme Court reversed.<sup>29</sup> Drawing from the 1887 United States Supreme Court decision in *Mugler v. Kansas*,<sup>30</sup> the court reasoned that the Act prevented a serious public harm (erosion of barrier coastline) and as such did not trigger the compensation requirement of the Fifth Amendment's Takings Clause, regardless of its effect on the property's value, because the State

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17. 112 S. Ct. at 2889.

18. *Id.*

19. S.C. CODE ANN. § 48-39-10 to -220 (Law. Co-op. 1987).

20. "Critical area[s]" are those deemed highly vulnerable to erosion and as such are defined as any coastal waters, tidelands, beaches, and certain beach/dune systems. *Id.* § 48-39-10(J).

21. *Id.* § 48-39-130(A); see *Lucas*, 112 S. Ct. at 2889.

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

23. Specifically, the legislature found it necessary to protect the beach/dune system because it serves as a storm barrier, a basis for the tourism industry, a habitat for numerous species, and an environment for leisure time. S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1992).

24. *Id.* § 48-39-250 to -360 (Law. Co-op. Supp. 1992).

25. *Id.* § 48-39-280(A)(2).

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

27. *Id.*

28. *Id.*

29. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992).

30. 123 U.S. 623 (1887).

has the authority to prohibit noxious uses of property.<sup>31</sup> The Supreme Court granted certiorari.<sup>32</sup>

Justice Scalia, writing for the majority, first dismissed the Council's assertion that Lucas's claim was unripe for review.<sup>33</sup> The Court then stated the supposedly preexisting categorical rule that a regulation effects a taking when it denies a landowner all economically beneficial use of his property<sup>34</sup>—a questionable assertion in light of prior cases.<sup>35</sup> Operating under the presumption that the Act in question rendered Lucas's property valueless,<sup>36</sup> the Court held that compensation was owing unless the Council could prove on remand that background principles of South Carolina's property and nuisance law address the use Lucas intends.<sup>37</sup> In so holding, the *Lucas* Court made huge strides toward safeguarding the rights of property owners and placed formidable hurdles before government entities aiming to restrict land uses without triggering the Fifth Amendment's compensation requirement.

This Note begins with a survey of the Supreme Court's treatment of takings claims prior to *Lucas*. The survey includes a discussion of the early development of the nuisance exception, the subsequent introduction of economic impact as an important consideration in takings inquiries, the progression of takings jurisprudence into formal rules and balancing tests, and an assessment of the state of regulatory takings law just prior to *Lucas*. Next, this Note summarizes the Court's rationale underlying its new cate-

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31. *Lucas*, 112 S. Ct. at 2905.

32. 112 S. Ct. 436 (1991).

33. *Lucas*, 112 S. Ct. at 2890-92. The Court's treatment of the ripeness issue is not the subject of this Note, but is worthy of comment, and perhaps criticism. *See id.* at 2906-08 (Blackmun, J., dissenting); *id.* at 2917-18 (Stevens, J., dissenting).

Prior to the issuance of the South Carolina Supreme Court's opinion, the legislature amended the Act to authorize the Council to issue "special permits" providing exceptions to the construction prohibitions. S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. 1991). Lucas had not attempted to obtain a permit prior to the Supreme Court's decision. *Lucas*, 112 S. Ct. at 2890. Therefore, since Lucas had not obtained a final decision regarding the disposition of his property, the Council argued that definitive adjudication of his takings claim would be inappropriate. *Id.* The Court rejected this argument because the South Carolina Supreme Court had disposed of Lucas's takings claim on the merits and Lucas had properly alleged injury-in-fact with respect to the period before the 1990 amendment. *Id.* at 2891. *But see* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986) (requiring exhaustion of right to apply for a special permit before proper adjudication of takings claim); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-91 (1985) (holding that an agency must arrive at final definitive position regarding land in question before a court can evaluate factors in takings claim); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 633 (1981).

34. *Lucas*, 112 S. Ct. at 2893.

35. *See infra* part III.A.1.

36. *Lucas*, 112 S. Ct. at 2896 n.9.

37. *Id.* at 2901.

gorical economically beneficial use rule and then outlines *Lucas*'s drastic reconstruction of the nuisance exception. The analysis examines Justice Scalia's method in arriving at the categorical rule and creating a new role for the nuisance exception. This Note then evaluates the dissenting Justices' complaints, explaining why most of their concerns are misplaced, and concludes that the end result of *Lucas* is consistent with the Fifth Amendment.

## I. THE SUPREME COURT'S MANY APPROACHES TO TAKINGS CASES

### A. *The Nuisance Exception*

Rooted in Supreme Court precedent dating back to the turn of the century is a takings analysis doctrine known as the nuisance exception.<sup>38</sup> During this time, the Court grappled with the issue of how broadly to interpret the states' "police power"—the power to protect the health, safety, and welfare of its citizens.<sup>39</sup> Cases that brought this issue before the Court often involved a private property owner's assertion that a government restriction on the use of his property severely damaged its value, and thus violated the Fifth Amendment's Takings Clause or constituted deprivation of property without due process under the Fourteenth Amendment.<sup>40</sup> The series of cases that addressed this apparent conflict between the states' police power and the constitutional safeguards for private property gave rise to the nuisance exception to the compensation requirement.<sup>41</sup>

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38. See generally Sax, *supra* note 8, at 48-50 (providing summary and critique of noxious use theory); Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" From Mugler to Keystone Bituminous Coal*, 14 B.C. ENVTL. AFF. L. REV. 653, 658-93 (1987) (discussing the noxious use theory and its relationship to police power). The nuisance exception doctrine is sometimes referred to as "noxious use" doctrine, the latter simply referring to the label attached to the proscribed activity.

39. While without any precise definition, courts use the term "police power" to refer to those valid state restrictions that aim to promote the health, safety and welfare of its citizens and do not necessitate compensation or violate due process. See generally Sax, *supra* note 8, at 36 n.6; see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 373 (1926).

40. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (addressing a law that effectively shut down operation of a quarry in a residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (requiring the destruction of cedar trees to prevent infection of nearby apple trees); *Euclid*, 272 U.S. at 365 (dealing with a zoning ordinance that placed housing density restrictions on private property); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (addressing a law that prohibited operation of a brick mill in a residential area); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (addressing an ordinance that prohibited operation of a livery stable in a densely populated city); *Mugler v. Kansas*, 123 U.S. 623 (1887) (dealing with a law that prohibited the manufacture of alcoholic beverages).

41. For an excellent discussion of the cases giving rise to the nuisance exception, see Hippler, *supra* note 38, at 658-93.

The nuisance exception doctrine originated in the 1887 *Mugler* cases.<sup>42</sup> The appellants in these cases were engaged in the manufacture of beer prior to the enactment of a Kansas statute prohibiting such manufacture.<sup>43</sup> Because the prohibition severely reduced the value of their property,<sup>44</sup> which was specifically designed for the manufacture of beer, the appellants claimed the law deprived them of their property without due process, in violation of the Fifth and Fourteenth Amendments.<sup>45</sup> The Supreme Court upheld the statute and denied compensation, finding the law a valid exercise of the state's police power.<sup>46</sup>

After deferring to the legislature's finding that the manufacture of intoxicating liquors is harmful to the general welfare,<sup>47</sup> and as such constituted a public nuisance, the Court affirmed that the state's police power is unrestrained in its authority to abate a nuisance, even to the extent that it may consequently destroy the value of private property.<sup>48</sup> It would be improper, the Court argued, to burden the police power by requiring compensation for every resulting pecuniary loss.<sup>49</sup> The Court reasoned further that no one has the right in the first instance to do that which the government finds injurious to the public.<sup>50</sup> In effect, all property is held under an "implied obligation" to restrain from such uses.<sup>51</sup>

In cases following *Mugler* the Supreme Court applied this logic to uphold state use restrictions against challenges that they severely diminished property values. As such, these cases formed a substantial exception to the Fifth Amendment's compensation requirement in cases where it might otherwise be due.<sup>52</sup> Under this "nuisance exception," the prohibited use need not be

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42. *Mugler*, 123 U.S. at 623. The *Mugler* cases addressed the claims of three people—Mugler, Ziebold, and Hagelin—who were each separately engaged in the beer manufacturing business before the enactment of the Kansas statute prohibiting it. *Id.*

43. KAN. STAT. ANN. §§ 5, 8, ch. 128 (1881) (repealed).

44. *Mugler*, 123 U.S. at 664.

45. *Id.*

46. *Id.* at 675.

47. Specifically, the Court accepted the legislature's finding that "idleness, disorder, pauperism, and crime" are related to the manufacture of alcohol. *Id.* at 662.

48. *Id.* at 658. The *Mugler* Court was very unwilling to burden the state with the possibility of a compensation requirement because the Court regarded the state's police power as an important aspect of the sovereignty of the states and in preserving federalism. *Id.*

49. *Id.* at 669.

50. *Id.* at 663.

51. *Id.* at 665. This "implied obligation"—that an owner may not use his property in a way that is detrimental to the public—was, to the Court, "essential to the peace and safety of society." *Id.* Moreover, the court found the "implied obligation" to be consistent with, and as fundamental as, the Fourteenth Amendment's mandate that no person shall be deprived "of life, liberty, or property, without due process of law." *Mugler*, 123 U.S. at 665 (citing U.S. CONST. amend. XIV, § 1).

52. See Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 345 (1988) (commenting that "[i]t appears settled

inherently harmful regardless of surroundings—a “nuisance *per se*”—nor an activity constituting a nuisance under the state’s common law;<sup>53</sup> any activity that a legislature finds detrimental to the public welfare, even if innocent in itself, triggers the nuisance exception.<sup>54</sup> Destruction of long-established businesses sometimes went uncompensated for the sake of preventing rather vague harms, such as “the evils of over-crowding.”<sup>55</sup> The only limitation on regulatory power contained in the nuisance exception doctrine, oft-repeated but rarely fatal, was that exercise of the police power must not be arbitrary or unreasonable.<sup>56</sup>

In sum, the Court’s standard for analyzing regulatory takings during this time was largely based on the amorphous common law maxim that one should use his property in such a manner as not to injure that of another,<sup>57</sup> with minimal scrutiny of legislative findings and acceptance of significant consequential private losses suffered.<sup>58</sup> Beginning in 1922, however, the

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that a government may destroy all economic use of property if necessary to avoid a public nuisance and promote public safety”).

53. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962) (holding that a prohibited use need not be a common-law nuisance in order to fall within the noxious use doctrine); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (stating that “[a] nuisance may be merely a right thing in the wrong place”); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (rejecting the argument that a use that is not a nuisance *per se* cannot legislatively be declared a nuisance in fact); see also *Sax*, *supra* note 8, at 49 (commenting on the innocence of prohibited uses in noxious use cases).

54. Cases considering legislative determinations that an activity innocent by itself nonetheless constituted a nuisance include: *Miller v. Schoene*, 276 U.S. 272, (1928) (growing red cedar trees was declared a nuisance when the trees were a source of a disease that infected nearby apple orchards); *Euclid*, 272 U.S. at 388 (developing land for residential use considered a nuisance because it would cause an undesired increase in traffic, noise, and other “evils of over-crowding”); and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (operating a brick mill deemed a nuisance where the smoke and soot it spewed caused discomfort to residents nearby).

55. *Euclid*, 272 U.S. at 388; see also *Reinman v. City of Little Rock*, 237 U.S. 171, 174 (law prohibiting operation of livery stable prevented “offensive odor”).

56. See, e.g., *Euclid*, 272 U.S. at 395 (applying arbitrary or unreasonable test); *Reinman*, 237 U.S. at 171 (affirming a state’s power to declare an activity a nuisance in fact if not done arbitrarily).

For a sound assessment of this aspect of the nuisance exception doctrine, see William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1062, 1070 (1980) (concluding that the noxious-use test is a “tautologous restatement of the rule that no valid exercise of the police power is a taking. . . . [It] is simply . . . the test for substantive due process and is not a test for taking at all.”).

57. The Court has referred to this maxim, often in the Latin *sic utere tuo ut alienum non laedas*, for determining when an activity is a nuisance and whether a state has appropriately used its police power to abate the activity. See *Euclid*, 272 U.S. at 387.

58. See, e.g., *id.* at 384 (75% loss); *Hadacheck*, 239 U.S. at 405 (87 1/2% loss). But see *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (invalidating prohibition on cattle-grazing on claimant’s land, stating that the police power cannot “be exercised to destroy essential uses of private property”).



Court began to accept that otherwise valid exercises of the police power could trigger the Fifth Amendment's compensation requirement.

*B. Pennsylvania Coal Co. v. Mahon: Recognition of a "Regulatory Taking" and Introduction of the Diminution in Value Theory*

Early Supreme Court analysis of regulatory takings claims precluded balancing public benefit with private losses suffered when the Court adhered to the nuisance exception; once the Court found the requisite harm and determined that the challenged regulation was rationally based, private loss was of no consequence.<sup>59</sup> In time, however, the Court recognized that unlimited deference to the police power would make the Fifth Amendment's prohibition meaningless.<sup>60</sup> Accordingly, the Court began to include diminution in property value as a factor in determining whether particular regulations constituted a taking.<sup>61</sup> This qualified the police power with a more rigorous test than the mere "unreasonable and arbitrary" test previously employed.<sup>62</sup> Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*,<sup>63</sup> that a regulation can go "too far,"<sup>64</sup> is best known for initiating this approach.<sup>65</sup>

In *Pennsylvania Coal*, the plaintiffs sued to enjoin the Pennsylvania Coal Company from mining underneath their property, which was causing subsidence of the surface and their home.<sup>66</sup> Though the deed conveying this land had expressly reserved the coal company's mining rights below the surface,<sup>67</sup> the plaintiffs pointed to a Pennsylvania statute<sup>68</sup> that prohibited the mining of anthracite coal in such a way as to cause subsidence of a surface dwell-

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59. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 658 (1887) (stating that police power to stop a nuisance can extend to the destruction of property).

60. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

61. Regulatory takings cases in which the Court has considered economic impact include: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

62. See, e.g., *Euclid*, 272 U.S. at 365, 387 (upholding a zoning ordinance as within the police power, and hence not a taking, because it was neither arbitrary nor unreasonable). The *Pennsylvania Coal* Court seemed to apply a less deferential standard of review. See Seth E. Zuckerman, Note, *Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 CATH. U.L. REV. 753, 764-65 (1991).

63. 260 U.S. 393 (1922).

64. *Id.* at 415.

65. For an in-depth discussion of *Pennsylvania Coal*, see Rose, *supra* note 5, at 566-69. The author criticizes *Pennsylvania Coal* for the ambiguity inherent in its "too far" doctrine, pondering, for example, "how much diminution in value is too much" and "How much of what?" *Id.* at 566.

66. *Pennsylvania Coal*, 260 U.S. at 412.

67. *Id.*

68. The Kohler Act, 1921 Pa. Laws 1198.

ing.<sup>69</sup> The statute concededly destroyed previously existing property rights.<sup>70</sup> The Court needed to decide whether the statute was a valid exercise of the police power or a taking of property requiring compensation under the Fifth Amendment.<sup>71</sup>

Justice Holmes began his opinion by reciting an understanding previously recognized by the Court: that private property rights have an implied obligation to yield to the police power of the state.<sup>72</sup> He then, however, decided whether the law was a valid exercise of the police power by balancing the public benefit and private losses the Act entailed, resting on the premise that reduction in value of property is a relevant factor in determining whether a regulation effects a taking.<sup>73</sup> The Court found that the public benefit fell short of justifying the private loss<sup>74</sup> and, therefore, the state had exceeded its police powers.<sup>75</sup>

Over a vigorous dissent,<sup>76</sup> the Supreme Court thus modified the nuisance exception doctrine in a substantial respect: the issue became a question of degree rather than a bright-line, deferential test of validity hinging merely on a legislature's decree that a use is detrimental to the public.<sup>77</sup> After *Pennsylvania Coal* the Supreme Court, with increasing frequency,<sup>78</sup> began to factor diminution in value into its takings analysis,<sup>79</sup> attaching to it varying

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69. *Pennsylvania Coal*, 260 U.S. at 412.

70. *Id.* at 413.

71. In the words of Justice Holmes: "The question is whether the police power can be stretched so far." *Id.*

72. *Id.* at 413; see *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

73. *Pennsylvania Coal*, 260 U.S. at 412-13.

74. Justice Holmes reasoned that the private loss outweighed the public benefit in this case because the latter only consisted of preventing subsidence of a single home and could not justify the destruction of *Pennsylvania Coal*'s support estate nor causing its business to become commercially impracticable. *Id.* at 413-14.

75. *Id.* at 414.

76. *Id.* at 417 (Brandeis, J., dissenting) (insisting on adherence to rigid nuisance exception rule, stating that a regulation "imposed to protect the public . . . is not a taking").

77. *Id.* at 416. Note that Justice Holmes actually advanced this idea nearly 15 years before *Pennsylvania Coal* in dictum that suggested the boundary between the police power and private property interests is not a bright line, but a question of degree. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (upholding a law prohibiting the transport of state water into other states is not a taking despite a claim that the law took riparian rights of property). Justice Holmes analogized using the example of a government restriction on the height of a building: when the limit approaches a height that makes a building lot entirely useless there would be a taking. *Id.*

78. The Court did not immediately adopt *Pennsylvania Coal*'s emphasis on considering economic impact and instead continued to embrace the nuisance exception doctrine for some time. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

79. See generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1190-93 (1967) (discussing and criticizing the diminution in value theory as employed by the Supreme Court); Sax, *supra* note 8, at 50-60 (same).

degrees of importance depending upon the particular test formulated or followed,<sup>80</sup> but always considering it nonetheless.

### C. A Balancing Test

After the Supreme Court recognized diminution in value as relevant to its regulatory takings analysis, this factor remained merely that, a factor, for a long time. While acknowledging the impact a regulation worked on the value of private property, the Court often stated that diminution in value was not determinative of the takings issue, even where the use restriction denied the most profitable use of the property.<sup>81</sup> In fact, the Court shrank from making any single factor dispositive of the takings question or proposing any general formulae, preferring instead to employ ad hoc, factual inquiries in each case.<sup>82</sup> General and elusive principles of justice and fairness, tempered by the underlying intent of the Fifth Amendment, guided the Court in its decisions.<sup>83</sup> Hence, a multifactor balancing approach was thought most appropriate for takings analysis.<sup>84</sup>

*United States v. Central Eureka Mining Co.*<sup>85</sup> exemplifies the Court's balancing approach to solving takings questions after the recognition in *Pennsylvania Coal* that diminution of value is relevant.<sup>86</sup> *Central Eureka* involved a wartime order issued for purposes of conserving labor and equipment<sup>87</sup> that required Central Eureka Mining Co. to close its gold mines temporarily.<sup>88</sup> Central Eureka alleged that the order effected a Fifth

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80. See, e.g., *infra* notes 96-128 and accompanying text (discussing the *Penn Central* balancing test); *infra* part I.D.1. (discussing the *Agins* two-pronged test).

81. See *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (stating that a denial of the most profitable use of land is insufficient to establish a taking); see also *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (applying the same rule in cases of personal property).

82. See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

83. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (observing that "the question at bottom is upon whom the loss of the changes desired should fall").

84. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 451 (1982) (Blackmun, J., dissenting) (observing "history teaches that takings claims are properly evaluated under a multifactor balancing test").

85. 357 U.S. 155 (1958).

86. See *supra* part I.B. (discussing diminution in value theory).

87. War Production Board Limitation Order L-208, 7 Fed. Reg. 7992-93 (October 8, 1942).

88. *Central Eureka*, 357 U.S. at 156-58.

Amendment taking of its right to mine gold during the life of the order and, hence, required compensation.<sup>89</sup>

The Supreme Court took several factors into account before concluding that the order did not work a taking. First, the Court considered the fact that the order damaged the mine owners in depriving them of the most profitable use of their property. Without explanation, however, the Court dismissed this factor as insufficient by itself to establish a taking.<sup>90</sup> The absence of government occupation or possession of the gold mines was also a relevant factor.<sup>91</sup> A third observation in the Court's analysis was that the order was issued in the context of war.<sup>92</sup> This outweighed the former two factors because the mine owners' economic losses were trifling when compared to the demands of war.<sup>93</sup>

Despite a dissent that found deprivation of economically beneficial use controlling,<sup>94</sup> the Court held that that factor was not dispositive in the instant case, largely because wartime demands outweighed it.<sup>95</sup> By implication, a situation could arise where the diminution in economic value might outweigh the government purpose underlying it, leading the Court to find a taking.

*Penn Central Transportation Co. v. New York City*<sup>96</sup> is renowned for formulating a three-prong test for the Supreme Court's balancing approach to takings analyses.<sup>97</sup> While *Penn Central* made clear that consideration of economic impact is indeed important in takings inquiries,<sup>98</sup> as *Pennsylvania Coal* first advanced,<sup>99</sup> the Court refrained from elevating this factor beyond

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89. *Id.* at 161.

90. *Id.* at 168.

91. *Id.* at 165-66.

92. That the order was issued in the context of war made the government interest extremely important. *Id.* at 168-69. Additionally, the Court felt that the economic impact of wartime restrictions was minuscule in comparison to other impacts of the war that are also uncompensated, such as the loss of life and freedom. *Id.*

93. *Id.* at 168.

94. *Id.* at 184 (Harlan, J., dissenting) (arguing that the government's requiring an industry to close at severe economic cost is the "equivalent of outright physical seizure" and therefore a taking).

95. *Id.* at 169.

96. 438 U.S. 104 (1978).

97. *Penn Central* has been criticized for further confusing the Court's already complicated approach to takings cases. The three factors introduced by the case—the character of the government action, the economic impact, and interference with investment-backed expectations—may each be defined differently and afforded varying degrees of importance. For an insightful discussion and comment, see Peterson, *supra* note 8, at 1317-27.

98. *Penn Central*, 438 U.S. at 124.

99. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922).

the status of a "relevant consideration"<sup>100</sup> and identified two other factors that the Court must consider.<sup>101</sup>

*Penn Central* involved New York City's Landmark Preservation Law,<sup>102</sup> administered by the Landmarks Preservation Commission and designed to preserve the historical and aesthetic integrity of certain buildings that the Commission designated as landmarks.<sup>103</sup> Grand Central Terminal was so designated.<sup>104</sup> The owner of the terminal, Penn Central Transportation Co., planned to construct a multi-story office building above the terminal and applied for the necessary permit from the Commission.<sup>105</sup> The Commission denied the application.<sup>106</sup> Stripped of its right to pursue the most profitable use of its property,<sup>107</sup> Penn Central challenged the application of the law as violating the Fifth and Fourteenth Amendments.<sup>108</sup>

The Court began by stating that it eschews any fixed rules for takings decisions and instead engages in ad hoc, factual inquiries.<sup>109</sup> Then the Court identified three factors of "particular significance"<sup>110</sup> to the takings issue: economic impact, interference with distinct investment-backed expectations, and lastly, the character of the government action,<sup>111</sup> such as requiring physical invasion<sup>112</sup> or exploiting private property for government purposes.<sup>113</sup>

Balancing these factors, the Court concluded that the Landmarks Law did not effect a compensable taking.<sup>114</sup> Specifically, the Court found that the

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100. *Penn Central*, 438 U.S. at 124.

101. The Court found that considering economic impact a determinative factor was inappropriate in a takings inquiry in light of prior case law that took into account other factors of particular significance as well, thus necessitating the need to "balance" all of these factors together. *Id.*; see *infra* notes 110-13 and accompanying text.

102. The law imposed certain restrictions and duties on owners of landmark properties in order to preserve their historic integrity, such as keeping the building in good repair and obtaining permission prior to altering or improving the building. *Penn Central*, 438 U.S. at 111-12.

103. *Id.* at 110.

104. *Id.* at 115-16.

105. *Id.* at 116.

106. *Id.* at 117. The Commission concluded that the proposed construction—a 55-story office tower balanced atop a "flamboyant Beaux-Arts facade"—would be "an aesthetic joke." *Id.* at 117-18.

107. *Id.* at 120.

108. *Id.* at 119.

109. *Id.* at 124; accord *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (observing that the Court has failed to announce a clear test for determining regulatory takings cases); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979) (noting the absence of a more precise test).

110. *Penn Central*, 438 U.S. at 124.

111. *Id.*

112. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (creating a per se physical invasion test for determining when a taking occurs).

113. *United States v. Causby*, 328 U.S. 256, 262-63 n.7 (1946).

114. *Penn Central*, 438 U.S. at 138.

interference with the property's economic value<sup>115</sup> was of insufficient magnitude to require compensation, reasoning that the law neither interrupted present uses nor prevented a reasonable return on investment, and noting that Penn Central had transferable rights allowing development elsewhere.<sup>116</sup> These factors mitigated any losses the Landmarks Law caused.<sup>117</sup> The Court also believed the action was reasonably related to promoting the general welfare of the city,<sup>118</sup> did not exploit the property for city purposes,<sup>119</sup> and involved no physical invasion or occupation.<sup>120</sup> Accordingly, the Court held that the character of the action lacked indicia of a taking.<sup>121</sup>

*Penn Central* reinforced the approach of including economic impact as one consideration in the Court's regulatory takings analyses. Nonetheless, the Court refused to regard it as determinative of the takings issue and instead balanced it against other factors.<sup>122</sup> Denial of the most beneficial use or full exploitation of a property interest was clearly not dispositive in *Penn Central*,<sup>123</sup> nor was it in takings cases that followed.<sup>124</sup> Yet neither of the other two factors which *Penn Central* proffered were dispositive either.<sup>125</sup> The Court offered little guidance on the weight that a court should attach to each of the three prongs in the *Penn Central* test, and thus, the case is sub-

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115. The Court defined the relevant unit of property as the city tax block designated as a landmark ("the parcel as a whole"), refusing to examine the economic impact with respect to a discrete segment of the property, i.e., the air rights above the terminal. *Id.* at 130-31. The proposed office building had a guaranteed yearly rental value of \$3 million. *Id.* at 141 (Rehnquist, J., dissenting).

116. *Id.* at 137.

117. *Id.* at 136-37.

118. *Id.* at 134.

119. For further discussion of this consideration in takings decisions—whether a government action involves appropriation of the benefits of private property to benefit the government in its operations as opposed to balancing, as arbiter, the competing interests in uses of private property among individuals—see Sax, *supra* note 8, at 62-67 (advancing a "[g]overnment-as-enterpriser" versus "government-as-mediator" distinction as the most sensible and comprehensive test for regulatory takings decisions); see also *United States v. Causby*, 328 U.S. 256, 262-63 n.7 (1946) (holding that frequent government flights over the claimant's property that caused a disturbance on the surface was a taking because, *inter alia*, government was "using a part of it for the flight of its planes").

120. *Penn Central*, 438 U.S. at 135.

121. *Id.*

122. *Id.* at 131.

123. *Id.* at 130.

124. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (finding no taking where law required disclosure of health and safety data and thereby admittedly completely deprived claimant of his property—trade secrets in the data); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (upholding an act prohibiting the sale of protected bird parts despite a claim that it denied the most profitable use).

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

ject to much judicial discretion and manipulation.<sup>126</sup> The case in effect makes available a "grab bag" of sorts from which a judge can choose any factor upon which to expound in his takings analysis, achieving a result tailored to his own preferences.<sup>127</sup>

However, the Court in *Penn Central* did discuss economic impact at length in an effort to show that economic viability remained, presumably underscoring its importance. This approach is markedly different from that of earlier cases that employed the nuisance exception, which held severity of economic impact irrelevant.<sup>128</sup>

#### D. Formalization of Takings Law and the Increasing Importance of Economic Impact

##### 1. A Two-Pronged Test

*Agins v. City of Tiburon*<sup>129</sup> represents an example of the Supreme Court's shift away from multi-factor balancing and toward more definite principles of what constitutes a taking.<sup>130</sup> After *Agins* had acquired a five-acre tract of unimproved land, the City rezoned the property with a density restriction under which *Agins* could build no more than five single-family homes on the entire tract.<sup>131</sup> *Agins* challenged the law as facially invalid<sup>132</sup> and effecting a taking, claiming that the rezoning prevented their plans to develop the property for residential use and thereby completely destroyed its value.<sup>133</sup>

The Court resolved the takings issue by applying a two-pronged test, summarily announced<sup>134</sup> as follows: A law effects a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner

126. See, e.g., Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389, 391 (1988) (remarking that the aftermath of *Penn Central* "has been a shapeless body of law"); Stoebuck, *supra* note 56, at 1069 (concluding that the alternative theories embodied in the case "create a situation of near anarchy").

127. See Peterson, *supra* note 8, at 1317. The author argues that "[*Penn Central*]'s three factors have provided little structure to the Court's takings analysis. First, the Court has defined each factor in a variety of ways, without acknowledging the shifts in definition. Second, it is difficult to predict what weight the Court will give to each factor." *Id.*

128. See *supra* notes 47-49 and accompanying text.

129. 447 U.S. 255 (1980).

130. See Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1621-22 (1988) (describing the Supreme Court's increasing tendency to adopt more formal, categorical rules of decision).

131. *Agins*, 447 U.S. at 257.

132. The Court did not decide the issue of whether application of the law constituted a taking, finding no concrete controversy for that issue. *Id.* at 260-61.

133. *Id.* at 258.

134. Notably, after the Court announced this rule it then recited that there are no precise rules in takings cases and that there should be a weighing of public and private interests. *Id.* at 260-61.

economically viable use of his land.”<sup>135</sup> Using this test, the Court held that the law did not constitute a taking.<sup>136</sup>

The zoning ordinance passed the first prong of the test because its purpose was “to protect the residents . . . from the ill effects of urbanization,” and a density restriction designed to preserve open space substantially advanced this government interest.<sup>137</sup> Addressing the second prong, the Court found that since the law neither prevented the best use of the property nor stopped Agins from pursuing reasonable investment expectations, economically viable use remained.<sup>138</sup>

An example of the Supreme Court’s application of this two-pronged test came seven years after *Agins* in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>139</sup> the facts of which are remarkably similar to *Pennsylvania Coal Co. v. Mahon*.<sup>140</sup> In *Keystone*, Pennsylvania law prohibited the removal of fifty percent of the coal beneath certain structures.<sup>141</sup> Keystone Bituminous Coal Association alleged that the law was facially invalid and constituted a taking since it required leaving twenty-seven million tons of coal in place and destroyed its support estate—a contractually acquired right to cause damage to the surface.<sup>142</sup> The Court found no taking after applying the two prongs of the *Agins* test.<sup>143</sup>

Since the regulation was designed to minimize subsidence in certain areas, a result that the legislature found harmful, the fifty percent requirement served an important public interest,<sup>144</sup> and therefore could not qualify as a taking under the first prong of the test.<sup>145</sup> Next, the Court found that the

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135. *Id.* at 260 (citations omitted).

136. *Id.* at 263.

137. *Id.* at 261.

138. The Court reached this conclusion by flatly rejecting Agins’s claim that all value was destroyed and necessarily implying that *some* use is the equivalent of economically viable use. *Id.* at 262.

139. 480 U.S. 470 (1987).

140. 260 U.S. 393 (1922).

141. *Keystone*, 480 U.S. at 476-77.

142. *Id.* at 478-79.

143. However, with subtle manipulation of dicta from *Agins*, the Court lessened the dispositive nature of each prong by saying that when either of the prongs are met, the regulation *can* effect a taking, *id.* at 485, whereas *Agins* stated that that *does* effect a taking. *Agins v. City of Tiburon*, 447 U.S. 265, 260 (1980).

144. The Court distinguished the law in this case from the Kohler Act in *Pennsylvania Coal* by noting that the latter’s purpose was merely to prevent damage to some private landowners’ homes. *Keystone*, 480 U.S. at 487-88.

145. As the dissent noted, the Court applied the *Mugler* notion that regulation of uses deemed socially harmful are not takings, hence endorsing the nuisance exception to an extent. *Id.* at 512 (Rehnquist, C.J., dissenting); see Michelman, *supra* note 130, at 1601-04 (analyzing *Keystone* and its endorsement of the nuisance exception). However, the majority’s extensive discussion that followed, arguing that *Keystone* had failed to show destruction of economic viability, undermines the dispositive nature of the nuisance exception carried in prior cases. *E.g.*,



law passed the second prong because the fifty percent requirement did not make Keystone's mining commercially impracticable or unprofitable.<sup>146</sup>

## 2. *A Per Se, Physical Invasion Rule*

*Agins* and *Keystone* represent a formalization in takings analysis, injecting key factors and lessening opportunities to balance competing interests. One of the key factors is economic impact on private property.<sup>147</sup> Many cases have found no taking but only after concluding that economically viable use remained.<sup>148</sup> The only approach in regulatory takings analysis in which courts need not consider economic impact is one invoked where a regulation involves a physical invasion of private property.<sup>149</sup> In such cases, there is a taking per se;<sup>150</sup> economic impact is irrelevant.<sup>151</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>152</sup> announced this per se, physical invasion rule and furthered the Supreme Court's trend toward formalizing its approach in takings analysis.

In *Loretto*, the Court considered a New York law which required landlords to permit installation of a cable on their property to be a taking.<sup>153</sup> As the dissent noted, "[a]t issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes" amounting to one eighth of cubic foot of space on a roof.<sup>154</sup> The majority argued that the Court has long considered physical intrusions very serious, so serious in fact that the "character of the governmental action" factor<sup>155</sup> is not a mere factor in these

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*Mugler v. Kansas*, 123 U.S. 623 (1887). The dissent found that destruction of all economically viable use had occurred and would have required compensation based on this fact alone. *Keystone*, 480 U.S. at 520 (Rehnquist, C.J., dissenting).

146. *Keystone*, 480 U.S. at 495-98. In determining this, the Court defined the relevant unit of property rather broadly—the entire mining operation, not just extractible coal—such that only two percent of value was destroyed. The Court further enlarged the unit of property by regarding the support estate as just one strand in the bundle of rights of Keystone's mineral estate and not a discrete segment of property in itself. *Id.* at 501.

147. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981) (holding that the test to be applied, at least in facial challenges, is that a regulation effects a taking if it denies an owner economically viable use).

148. E.g., *Keystone*, 480 U.S. 470; *Hodel*, 452 U.S. 264; *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

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

150. *Id.* at 426.

151. Economic impact is irrelevant where there is physical invasion because the existence of physical invasion is "determinative." *Id.*

152. 458 U.S. 419 (1982).

153. *Id.* at 421.

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

155. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

cases; it is determinative.<sup>156</sup> The case thus announced what it deemed the "traditional rule" that permanent physical occupation is a taking per se.<sup>157</sup>

### E. Assessment of the Current State of Regulatory Takings Law

One can attempt to generalize the state of takings jurisprudence prior to *Lucas v. South Carolina Coastal Council*,<sup>158</sup> but to do so is misleading. Takings jurisprudence is a very amorphous body of law with various approaches and consequent inconsistencies.<sup>159</sup> In conjunction with the issue of whether any of these tests are satisfactory, it is difficult to predict the outcome of a takings case because of uncertainty over which test a Court will choose to employ from the several that are available, as well as the inherent subjectivity in each.<sup>160</sup> The Supreme Court further complicates the issue by invariably announcing that it makes decisions on an ad hoc basis<sup>161</sup>—casting doubt as to how much precedential value rules advanced in prior cases warrant.<sup>162</sup>

Some generalizations about the Court's approach to regulatory takings decisions may safely be made, however. The nuisance exception doctrine, firmly rooted in a host of cases dating back to the turn of the century, while never flatly rejected,<sup>163</sup> has become largely irrelevant in light of recent takings law.<sup>164</sup> At best, the nuisance exception has degenerated into an equivalent of the "character of the government action" factor of *Penn Central*,<sup>165</sup> and as such, is clearly not determinative. Indeed, recent trends indi-

156. *Loretto*, 458 U.S. at 426.

157. *Id.* at 441; see also *United States v. Causby*, 328 U.S. 256, 261 (1946) (holding that government air flights over the claimant's property causing severe disturbances on the surface constituted a taking because they effectively amounted to a direct physical entry).

158. 112 S. Ct. 2886 (1992).

159. For a survey of the Supreme Court's conflicting and various approaches to takings cases, see John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982). The author poignantly summarizes takings jurisprudence as "a widely acknowledged hodgepodge, its doctrines a farrago of fumbblings which have suffered too long from a surfeit of deficient theories." *Id.* at 244.

160. *But see Hodel v. Irving*, 481 U.S. 704, 713 (1987) (claiming that "[t]he framework for examining [regulatory takings cases] . . . is firmly established and has been regularly and recently reaffirmed").

161. *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

162. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 444 (1982) (Blackmun, J., dissenting) (arguing against categorical rules in takings jurisprudence); Michelman, *supra* note 79, at 1166-72 (arguing that the rules-of-decision approach has failed and is inappropriate for takings law).

163. *Accord Lawrence*, *supra* note 126, at 395.

164. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.12, at 430 (4th ed. 1991) ("Although *Mugler*['s nuisance logic] has never been overruled . . . and is, in fact, still precedent, the Court has judiciously ignored the broad language of *Mugler* in cases where [regulatory] governmental action has been found to be a taking."); see also *Penn Central*, 438 U.S. at 133-34 n.30 (expressing doubt as to merits of noxious use test).

165. 438 U.S. 104, 124 (1978).

cate that the character of the government action prong itself is less formidable to claimants attempting to prove a taking, due to the Court's recently heightened scrutiny of government interests and the means used to achieve them.<sup>166</sup>

Conversely, the role of severity of economic impact has evolved from irrelevant under the nuisance exception,<sup>167</sup> to arguably dispositive.<sup>168</sup> Recent cases from the United States Court of Federal Claims have found takings by substantially basing their decisions on destruction of economic value.<sup>169</sup>

The current state of regulatory takings law is in need of enhanced predictability and less subjectivity. A clarification as to which approach controls or an elaboration of how to apply certain tests is required.<sup>170</sup> Specifically, the time has come to decide the question of whether to dispose of the nuisance doctrine and uphold a categorical rule that destruction of all economically viable use is a taking, or to breathe new life into the dying nuisance exception doctrine and reinforce its role as a major qualification to the Takings Clause of the Fifth Amendment to the United States Constitution.<sup>171</sup> Using a questionable interpretation of prior law and a remarkable amount of judicial creativity, Justice Scalia resolved this issue in *Lucas v. South Carolina Coastal Council*.<sup>172</sup>

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166. See *Nollan v. California Coastal Council*, 483 U.S. 825, 837 (1987) (invalidating regulation for failing to have sufficient "nexus" with government interest, thereby heightening judicial scrutiny). For an excellent overview of the varying standards of review the Court has used in its takings jurisprudence, and *Nollan's* impact on same, see Zuckerman, *supra* note 62, at 761-77.

167. See *supra* part I.A.

168. In legal commentary, at least, this approach has received treatment as a distinct rule in regulatory takings law. See, e.g., Peterson, *supra* note 8, at 1330-33.

169. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (holding that the government's denial of a fill permit constituted a taking because of the severe impact on property's value); *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990) (same); *Formanek v. United States*, 18 Cl. Ct. 785 (1989) (same).

170. Accord Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988). Rose-Ackerman, by way of countering a fellow commentator's theory, argues that increased formalization and predictability are mandatory in the field of takings law, because the *ad hoc* approach and shifting doctrines inject uncertainty into investors' decisions and expectations. *Id.*; see also David A. Arrensen, *Compensation for Regulatory Takings: Finality of Local Decisionmaking and the Measure of Compensation*, 63 IND. L.J. 649 (1988) (describing how uncertainty regarding potential liability interferes with otherwise desirable land-use planning).

171. The outcome of such a decision is indeed critical. See, e.g., William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 363 (1988) (suggesting that "[i]f Supreme Court policy is construed as mandating that deprivation of all economic use, standing alone, constitutes a compensable taking (even if the subject regulation . . . is . . . a reasonable exercise of the police power), the practical ramifications will be enormous").

172. 112 S. Ct. 2886 (1992).

## II. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

In *Lucas v. South Carolina Coastal Council*,<sup>173</sup> the petitioner, Lucas, had purchased two lots on a barrier island off the coast of South Carolina in 1986 for the purpose of erecting single-family homes.<sup>174</sup> In 1988, South Carolina enacted the Beachfront Management Act,<sup>175</sup> which prohibited Lucas from building any permanent, habitable structures on his property.<sup>176</sup> After unsuccessfully arguing in the South Carolina Supreme Court that the Act effected a taking without compensation, Lucas appealed his case to the United States Supreme Court.<sup>177</sup> The Supreme Court reversed and remanded the case, instructing the lower court to apply a novel concept in takings jurisprudence.<sup>178</sup>

### A. *The "Categorical" Rule*

The Supreme Court began by asserting that two concepts in takings jurisprudence have evolved over the years into categorical rules.<sup>179</sup> The first such rule is the physical invasion test.<sup>180</sup> The Court then noted a second "categorical" rule: where a regulation denies all economically beneficial or productive use of land, a taking occurs.<sup>181</sup>

#### 1. *Justifications*

The Supreme Court described the rationale behind this second categorical rule. From the landowner's point of view, a regulation that denies all economically beneficial use is the equivalent of a regulation that permits complete government appropriation of his property.<sup>182</sup> Further, regulations that so severely restrict the use of property are, in effect, sometimes dangerously indistinguishable from an actual exercise of eminent domain.<sup>183</sup> Such a regulation can produce substantially equivalent public purposes.<sup>184</sup> Rather than accomplishing this result through an affirmative act of condemnation,

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173. *Id.*

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

175. S.C. CODE ANN. § 48-39-250 (Supp. 1990).

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

177. *Id.* at 2890.

178. *Id.* at 2901-02.

179. *Id.* at 2893.

180. *Id.*; see *infra* part II.D.2.

181. *Lucas*, 112 S. Ct. at 2893.

182. *Id.* at 2894; see also *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 181-84 (1958) (Harlan, J., dissenting) (arguing same and suggesting that to hold otherwise would "permit technicalities of form to dictate consequences of substance").

183. *Lucas*, 112 S. Ct. at 2894-95.

184. *Id.*

however, governmental use of restrictive regulation indirectly can effect the same public purpose.<sup>185</sup>

## 2. *Application in Lucas*

The Supreme Court decided *Lucas* under the *presumption* that the South Carolina Act destroyed all economically beneficial use of Lucas's property.<sup>186</sup> This presumption enabled the Court to avoid grappling with the difficult questions left unanswered in prior cases, such as the extent of devaluation necessary to qualify as "complete" destruction,<sup>187</sup> and identification of the relevant unit of property against which to measure the loss incurred.<sup>188</sup> As such, *Lucas* clearly upheld and easily applied the categorical "denial of all economically beneficial use" rule but offered no guidance for determining when all such use has been destroyed.<sup>189</sup>

### B. *Adding a Significant Qualification to the Nuisance Exception*

The South Carolina Supreme Court contended that even though the regulation denied all economically beneficial use of Lucas's property, the nuisance exception doctrine advanced in *Mugler*<sup>190</sup> precluded finding a compensable taking.<sup>191</sup> Because the regulation prevented a harmful use—contributing to the erosion of the barrier shore—the South Carolina court reasoned that it was a valid exercise of the police power to prevent a noxious use, and therefore could not require compensation.<sup>192</sup> This assertion

185. *Id.* Prominent examples include use restrictions enacted to preserve open space, see *Annicelli v. South Kingstown*, 463 A.2d 133, 140-41 (R.I. 1983), or to create a wildlife refuge, see *Morris County Land Improvement Col. v. Parsippany-Troy Hills Township*, 193 A.2d 232, 240 (N.J. 1963).

The *Lucas* Court further argued that the existence of laws empowering government to use eminent domain when it wishes to preserve the scenic or ecological integrity of certain lands implies that to otherwise set such regulations would amount to a taking. *Lucas*, 112 S. Ct. at 2895. *E.g.*, 16 U.S.C. §§ 3921-3923 (1988) (authorizing government acquisition of wetlands).

186. The Court availed itself with this presumption simply because the finding was the premise of Lucas's Petition for Certiorari and the South Carolina Coastal Council had failed to challenge it in its Brief in Opposition. *Lucas*, 112 S. Ct. at 2896 n.9.

187. *Id.* at 2895 n.8.

188. *Id.* at 2894 n.7 (acknowledging this uncertainty, but apparently asserting relevant unit in instant case is fee simple interest). For discussion and commentary on the Supreme Court's varying definitions of property in takings cases, see Peterson, *supra* note 8, at 1308-16; see also Michelman, *supra* note 79, at 1190-93 (criticizing diminution in value theory and uncertainty in defining property).

189. The Court acknowledged: "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 112 S. Ct. at 2894 n.7.

190. See *supra* part I.A.

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

192. *Id.* at 2896-97.

squarably brought the issue of the nuisance exception's vitality before the United States Supreme Court.

### 1. *The Problem with the Nuisance Exception*

The Supreme Court first noted that the noxious use principle advanced in *Mugler* was used as part of the Court's initial attempts at articulating the contemporary rule on the breadth of the police power: that use restrictions are valid so long as they "substantially advance legitimate state interests."<sup>193</sup> Justice Scalia, however, shifted the judicial inquiry away from the review of legislative determinations of "noxious" use, explaining that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder,"<sup>194</sup> and is therefore riddled with subjectivity. For example, the South Carolina legislature could label the regulation "prevention of a noxious use"—beach erosion—and there would be no taking under the nuisance exception. Conversely, the legislature could define the regulation as producing a benefit—ecological preservation—and there *would* be a taking.<sup>195</sup> Consequently, the Court reasoned, the question whether or not a taking occurs would turn on "whether the legislature has a stupid staff."<sup>196</sup> The Takings Clause surely requires a more meaningful test.<sup>197</sup>

### 2. *The Solution*

In *Lucas*, the Supreme Court rejected subjective judicial determinations of harms and benefits and embarked on a search for an "objective, value-free basis" with which to decide takings claims.<sup>198</sup> The Court cast aside the traditional understanding of the nuisance exception and proposed the following: When a regulation deprives an owner of all economically beneficial use, the government is excepted from the compensation requirement *if the affected property interest did not inhere in the owner's title from the start*.<sup>199</sup>

The Court recast the focus on nuisance principles as an objective judicial inquiry into the relevant state laws of property and nuisance that serve to define the limits and contours of property rights.<sup>200</sup> This objective inquiry

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193. *Id.* at 2897 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)); see also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

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

195. *Id.*

196. *Id.* at 2898 n.12; accord *Michelman, supra* note 79, at 1196-1201 (arguing that compensability cannot hinge on characterizations of harms and benefits).

197. *Lucas*, 112 S. Ct. at 2898 n.12.

198. *Id.* at 2899.

199. *Id.*

200. *Id.* at 2900, 2902 n.18. Acknowledging that there is "some leeway in a court's interpretation of what existing state law permits," Justice Scalia reasoned, however, that a legisla-

into state property law may reveal that the land use in question is consistent with preexisting investment-backed expectations that derive from the bundle of economic rights incident to the ownership of land.<sup>201</sup> Alternatively, the inquiry may reveal that the landowner took title subject to a preexisting implied limitation on use grounded in state law, which precludes any legitimate expectation of a right to engage in that use.<sup>202</sup> Accordingly, where a land use denies all economically beneficial use, the regulation can escape the compensation requirement only if its effect does no more than duplicate the result that could have been achieved in the courts—by adjacent landowners.<sup>203</sup>

As Justice Scalia observed, it is unlikely that constructing a home on one's property is a nuisance under South Carolina's laws of property and nuisance.<sup>204</sup> Importantly, the government may not rely merely on the general common law maxim that one cannot use his property to injure another to prove that a certain activity is a nuisance.<sup>205</sup>

### III. A CASE OF DESIRABLE JUDICIAL CRAFTSMANSHIP

#### A. *The Categorical Rule*

##### 1. *"Mere Application" of a Categorical Rule*

In *Lucas*, Justice Scalia declared that in takings law there is a categorical rule "which we do not invent but merely apply today,"<sup>206</sup> that where a regulation denies all economically beneficial use it violates the Fifth Amendment.<sup>207</sup> As the dissent noted, the Court eluded the fact that diminution in value has not been treated as a categorical rule by the Court.<sup>208</sup>

In support of this categorical rule, Justice Scalia cites to *Agins v. City of Tiburon*,<sup>209</sup> *Nollan v. California Coastal Commission*,<sup>210</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>211</sup> and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*.<sup>212</sup> These cases did examine economic impact and recited

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ture's creating a rationale to support a confiscatory regulation is subject to far more manipulation. *Id.* at 2902 n.18.

201. *Id.* at 2899.

202. *Id.*

203. *Id.* at 2900.

204. *Id.* at 2901. The practical import of the case to *Lucas* is that it is extremely likely that South Carolina owes him just compensation, or, if the State elects to rescind its regulation, *Lucas* will be entitled to execute his plans to construct residences on his lots. *Id.* at 2901 n.17.

205. *Id.*

206. *Id.* at 2893 n.6.

207. *Id.*

208. *Id.* at 2911 n.11 (Blackmun, J., dissenting).

209. 447 U.S. 255 (1980); see *supra* part I.D.1.

210. 483 U.S. 825 (1987); see *supra* note 166.

211. 480 U.S. 470 (1987).

212. 452 U.S. 264 (1981).

the *Agins* two-prong test.<sup>213</sup> However, not one of the cases found a taking based on economic impact,<sup>214</sup> nor do any suggest that government interests become irrelevant once a regulation completely destroys economic value. The holdings of *Agins*, *Hodel*, and *Keystone* collectively stand for the principle that if a regulation does not deny all economically beneficial use then it does *not* work a taking.<sup>215</sup> The inverse of this rule—that if a regulation denies all beneficial use then it works a taking—is in fact quite another proposition; it is not a necessarily true deduction, but rather an assumption. The Court’s “categorical” rule, therefore, does not spring forth as neatly as Justice Scalia would have it. Further, dicta in the very cases cited by Justice Scalia suggest that the Court was disavowing the creation of any categorical rule;<sup>216</sup> other cases also have language contradictory to the existence of this categorical rule.<sup>217</sup> Accordingly, *Lucas*’s categorical rule rests on tenuous precedential foundation.

Additionally, a per se rule in takings law is contrary to beliefs expressed frequently throughout it that the field is ill-suited for categorical rules and general formulae.<sup>218</sup> Almost all regulatory takings cases<sup>219</sup> include cautionary language suggesting that decisions should be made on an ad hoc basis, balancing certain “factors” such as economic impact and government interest.<sup>220</sup>

The dissent correctly noted that the Court’s fashioning of a per se rule in cases of total destruction of value ignores the usual balancing of considerations.<sup>221</sup> Takings cases, however, are not so easily generalized. In prior cases, the Court has announced a “rule” and in the very same case de-

213. *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 495; *Hodel*, 452 U.S. at 295-96; *Agins*, 447 U.S. at 260.

214. The *Nollan* Court found a taking under the first prong of *Agins*, holding that the means used by the government in that case were irrational. *Nollan*, 483 U.S. at 838-42.

215. *E.g.*, *Hodel*, 452 U.S. at 295-97.

216. *E.g.*, *Agins*, 447 U.S. at 260-61 (stating that “no precise rule determines when property has been taken”).

217. *E.g.*, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978) (noting that diminution in value alone cannot prove a taking); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (“Although a comparison of values before and after is relevant, it is by no means conclusive.”) (citations omitted).

218. *E.g.*, *Agins*, 447 U.S. at 261; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

219. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), represented a sharp break from the balancing approach in the case of physical invasions. *See supra* part I.D.2. Aside from this exception, the Court has always considered government interest relevant and has not excluded it by creating a per se rule.

220. *See Penn Central*, 438 U.S. 104 (balancing economic impact, interference with investment-backed expectations, and character of government action); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (balancing economic impact with government interest).

221. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2918-19 (Stevens, J., dissenting); *id.* at 2910 (Blackmun, J., dissenting).



nounced per se rules.<sup>222</sup> The result is conflicting dicta. Further, with regard to the often-repeated, but never-fatal second prong of *Agins, Lucas* presented a clean slate upon which to write. Arguably, then, the Court “merely applied” this prong. In light of this more inclusive reading of dicta from prior case law, it is clear that meaningful criticism of the *Lucas* decision lies not, as the dissent argued,<sup>223</sup> in its categorical nature.<sup>224</sup> Rather, criticism would more appropriately be based on an analysis of the rule’s merit and suitability for application in future circumstances.<sup>225</sup>

## 2. *The Presumption that the Rule Applies in Lucas*

A pivotal assumption in *Lucas* was that the South Carolina Act rendered Lucas’s two lots valueless.<sup>226</sup> Because the South Carolina Coastal Council did not challenge this premise in its brief, the Supreme Court accepted the premise and declined to review its merits.<sup>227</sup> This presumption troubled four justices.<sup>228</sup> The dissent stated that the finding was simply without merit, arguing that Lucas was still free to “picnic, swim [or] camp”<sup>229</sup> and that Lucas’s land is “far from ‘valueless.’”<sup>230</sup> The concurrence also believed the premise of total destruction was questionable.<sup>231</sup>

Though these opinions as to the factual validity of the finding may have merit,<sup>232</sup> the justices’ concerns are unnecessary. The Court did not *decide*, but rather *presumed*, that the Act destroyed all economically beneficial

222. *Loretto*, 458 U.S. at 426 (observing that the Court must engage in ad hoc inquiries, then announcing that any physical invasion is determinative of the takings issue); see also *supra* notes 122-27 and accompanying text.

223. See *supra* note 221.

224. Indeed, some commentators might find *Lucas*’s categorical nature its most commendable feature. E.g., Rose-Ackerman, *supra* note 170, at 1700-02 (discussing the “perils of case-by-case analysis”).

225. However, evaluating the merit of the Court’s per se rule after *Lucas* proves problematic. See *infra* notes 236-40 and accompanying text.

226. *Lucas*, 112 S. Ct. at 2896 n.9.

227. *Id.* As such, the case offers no guidance in resolving how to determine whether a regulation destroys all economically beneficial use of property.

228. *Id.* at 2903 (Kennedy, J., concurring); *id.* at 2908 (Blackmun, J., dissenting); *id.* at 2919 n.3 (Stevens, J., dissenting); *id.* at 2925 (statement of Souter, J.).

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

230. *Id.* at 2919 n.3 (Stevens, J., dissenting).

231. *Id.* at 2903 (Kennedy, J., concurring).

232. While the issue is moot for purposes of analyzing *Lucas*, see *infra* text accompanying notes 232-35, the factual inquiry as to whether all economically viable use in Lucas’s setting is destroyed is indeed an intriguing and controversial matter, which may explain the Court’s readiness to accept the finding below and thus preclude further analysis. Indulging in the issue briefly, observe that Justice Blackmun would tolerate rather significant private loss without requiring compensation, suggesting that such uses as picnicking and camping that remain for Lucas—arguably meager consolation after having paid \$975,000 for his property—preclude finding a taking. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

use.<sup>233</sup> It simply did not partake in a factual inquiry as to whether Lucas's circumstances involved total destruction. As such, though the case offers a per se rule, it provides no precedential "arsenal" for claimants to use in future cases to trigger the rule, other than an opponent's blunder in failing to challenge a claimant's assertion.<sup>234</sup> Therefore, the dissents' complaints that Lucas has not suffered total destruction of his property's value are irrelevant;<sup>235</sup> the Court simply did not "find" that.

Justice Souter, in a Statement, did address a deficiency in *Lucas* related to this presumption.<sup>236</sup> He was troubled not because the factual finding was questionable, as he happened to believe,<sup>237</sup> but because of the problematic implications of relying on a questionable premise in a case that advances such an important per se rule.<sup>238</sup> Presuming total destruction meant that the Court could not provide, among other things, a much-needed clarification of the concept of "total" destruction.<sup>239</sup> Because that concept remains uncertain after *Lucas*, so does the significance of the per se rule resting upon it.<sup>240</sup>

In sum, the case offers a powerful rule without instructions. If uncertainty as to future application constitutes a flaw in a per se rule, then in this shortcoming lies the sharpest criticism to level against *Lucas* and its categorical rule.<sup>241</sup>

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233. *Lucas*, 112 S. Ct. at 2896 n.9.

234. *Id.*

235. *Id.* at 2925 (statement of Souter, J.) (commenting that "there is little utility in attempting to deal with this case on the merits").

236. *Id.* at 2925-26.

237. *Id.* at 2925 (citing cases that arguably contradict the trial courts' finding that all economically beneficial use of Lucas's property was destroyed); see, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-502 (1987); *Penn Cent. Transp. Corp. v. New York City*, 438 U.S. 104, 130-31 (1978).

238. *Lucas*, 112 S. Ct. at 2925-27 (statement of Souter, J.).

239. *Id.* at 2925.

240. *Id.*

241. Many of the problems in the application of this per se rule needed to be addressed, but were not, including its apparent arbitrariness (*i.e.*, 95% destruction is not a taking, while only 5% more destruction is a taking), see *id.* at 2895 n.8; *id.* at 2919 (Stevens, J., dissenting); what constitutes total destruction sufficient to trigger the per se rule; and what the relevant unit of property should be against which to measure the loss. See also *id.* at 2919-20 (discussing the manipulability of this aspect of the Court's rule).

Justice Souter, in order to avoid this significant defect, would have dismissed the writ of certiorari in order to await an opportunity to squarely address the total deprivation question, so that more certain legal principles could accompany the per se rule. *Id.* at 2925 (statement of Souter, J.).

### B. *The Exception*

In addition to recognizing a categorical rule in regulatory takings analysis, *Lucas* also discussed a type of exception to the compensation requirement of the Fifth Amendment's Takings Clause.<sup>242</sup> The Supreme Court rejected the approach under which the existence of some " 'noxious' " or " 'harmful' " use precluded finding a taking, regardless of any other factors.<sup>243</sup> The Court did, however, uphold a type of nuisance exception to the Takings Clause, defining the parameters of this exception in such a way that its applicability is quite limited.<sup>244</sup>

#### 1. *Wisely Rejecting "Noxious Use" as a Determining Factor*

The *Lucas* Court was correct in abolishing the old approach that hinged on the presence of a so-called "noxious-use."<sup>245</sup> Under this theory, the Court would not find a violation of the Fifth Amendment, regardless of a regulation's economic impact on the property owner, so long as the state legislature enacted the regulation to prevent a serious public harm.<sup>246</sup> There is an obvious danger in this theory, as Justice Scalia rightly noted,<sup>247</sup> because to avoid finding a taking, a court need only look to the legislature's intent in enacting the use restriction.<sup>248</sup> In light of the usual deference the Court affords legislatures,<sup>249</sup> any reasonably related attempt to abate what could arguably cause a public harm would not be a taking.<sup>250</sup> The decision turned on the legislature's characterization of the regulation as preventing a public harm, which ultimately amounts to a meaningless test,<sup>251</sup> for almost any use restriction conceivably prevents a harm.<sup>252</sup> The South Carolina Act in the instant case illustrates how elusive the distinction between harm-preventing and benefit-conferring can be.<sup>253</sup>

If all that is needed to trigger an exception to the compensation requirement is a legislative recital of some harm prevention, then the exception

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242. *Id.* at 2899-900.

243. *Id.* at 2897.

244. *Id.* at 2900.

245. *Id.* at 2899.

246. *See supra* part I.A.

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

248. *Id.* at 2898.

249. *But see* *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (heightening the level of scrutiny that a court must use in takings cases when analyzing the rationality of a state regulation).

250. *Lucas*, 112 S. Ct. at 2899 (stating that "departure would virtually always be allowed").

251. *Id.* at 2898 n.12.

252. *See Michelman, supra* note 79, at 1196-201 (criticizing noxious use doctrine because "the test invites improper application").

253. *See supra* notes 195-97 and accompanying text.

swallows the rule; this surely is unjustified. It relies heavily on the discretion of judges in discerning the harm/benefit distinction and precludes basing regulatory takings analysis “on an objective, value-free basis.”<sup>254</sup> Courts should continue to indulge in the usual deference to states when reviewing the legitimacy of legislative exercises of the police power. However, courts should *not* permit a legislative characterization of “harm” to control the determination of whether that exercise requires compensation as a matter of constitutional law.<sup>255</sup> To do so invites use of the police power as a short-cut to the categorical mandate of the Fifth Amendment, that when private property is taken for public use, compensation is required.<sup>256</sup>

In addition to the consequences noted above, there are reasons not mentioned in *Lucas* that support the Court’s rejection of the noxious use test. First, a plain reading of the Fifth Amendment shows that the Takings Clause is a categorical rule.<sup>257</sup> The compensation requirement has no qualifying language such as “unless the government interest is great.”<sup>258</sup> Its categorical nature casts doubt on the validity of any per se exceptions to it.

Second, because the noxious use exception makes impact on the owner irrelevant and government interest determinative, it seems fundamentally flawed. A plain reading of the Takings Clause shows that it is a limit on government power, and a protection of private property owners.<sup>259</sup> In ignoring the negative impact a law has on a private property owner, the noxious/harmful use exception is incongruous with this basic principle of the Takings Clause.<sup>260</sup>

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

255. For a contrary view, see Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1943 (1992) (arguing that courts *should* accept a legislature’s position as to whether compensation is due because the legislature is more capable of balancing competing interests).

256. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (warning that “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change”).

257. The Takings Clause of the Fifth Amendment reads: “[N]or shall private property be taken for public use without just compensation.” U.S. CONST. amend V.

258. Paraphrasing, e.g., Amicus Brief for the American Mining Congress, et al. at 4, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (No. 91-453).

259. See, e.g., NOWAK & ROTUNDA, *supra* note 164, § 11.11, at 424 (noting that “[t]he just compensation clause of the fifth amendment . . . was built upon this concept of a moral obligation to pay for governmental interference with private property”); Peterson, *supra* note 52, at 339 (noting that “[s]ince . . . *Pennsylvania Coal Co. v. Mahon*, it has been clear that the just compensation clause was designed to promote balanced fairness and justice to property owners and the public”).

260. *Accord* Lawrence, *supra* note 126, at 395 (remarking that “[g]iven the drastic reductions in value that a use restriction can bring about, the constitutionally mandated right to compensation . . . could not plausibly hinge entirely on whether the government characterized a use as harmful”).

## 2. *Soundly Recasting the Nuisance "Exception" in its Proper Role*

*Lucas* aptly restructured the traditional nuisance exception doctrine so that the obvious failings previously attached to it are greatly diminished. The rule now is that a government may avoid compensating total destruction of value only if the use restricted did not inhere in the owner's title from the start according to the state's law of property and nuisance.<sup>261</sup> This principle is quite sound—so much so that the Court's new version of the old doctrine is more accurately described as a long-awaited statement of the obvious.<sup>262</sup> When a state stops a nuisance, it is not "taking" any property at all, for a nuisance can never be a property right.<sup>263</sup>

The Supreme Court thus discarded its historical reliance on nuisance principles as providing an unwritten exception to the Fifth Amendment compensation requirement, and now looks to nuisance law to define the scope of property under the Takings Clause.<sup>264</sup> Such principles are now part of the textual rule rather than the basis for an exception.<sup>265</sup>

What the Court in *Lucas* found unjust was the practice of declaring that a use previously inhering in the owner's title had become nuisance-like or harm-causing, and the state's invoking of the nuisance exception or a similar principle to escape compensation.<sup>266</sup> In such cases, the government is taking away a property right that the owner previously enjoyed. Regardless of the new "nuisance" characterization of the activity, the right to engage in such activity has been taken and the government must pay.

The Court in *Lucas* provided a rule consistent with this notion.<sup>267</sup> The rule in *Lucas* ensures that when the government takes a property right previously enjoyed and thereby causes severe impairment of economically beneficial use, it must compensate.<sup>268</sup> After-the-fact characterizations by a legislature are no longer sufficient to trigger an "exception" in such cases.

As the Court noted,<sup>269</sup> defining property rights with reference to previous entitlements and expectations is not an entirely new concept in constitu-

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261. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992).

262. *Id.* at 2901 (stating that "this recognition . . . is surely unexceptional").

263. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987) (stating that individuals have no property right to create a nuisance, and therefore a state has "taken" nothing when it enjoins a nuisance).

264. *Lucas*, 112 S. Ct. at 2900.

265. *Id.*

266. *Id.* at 2898 n.12 (stating that "the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations").

267. *Id.* at 2900.

268. *Id.*

269. *Id.* at 2901.

tional law,<sup>270</sup> nor in takings jurisprudence in particular.<sup>271</sup> However, defining nuisances in terms of state common law, rather than in terms of the Supreme Court's opinions, is novel.<sup>272</sup> In *Lucas*, the Court apparently was aware of this, making no assertion that it was merely "applying" a rule as it had with the economically-beneficial-use rule.<sup>273</sup> On balance, the benefits of this rule outweigh the "cost" of this display of judicial creativity. By announcing that property is essentially what state law holds it is, the Court made strides toward divorcing legislatures' dubious "harmful use" characterizations as well as judges' own values from the takings analysis.<sup>274</sup>

In this way, the Court has tempered takings jurisprudence with a stroke of federalism. Although the Constitution singles property out for protection,<sup>275</sup> defining property is peculiarly within the province of state law.<sup>276</sup> In order to define a given property interest, both state and federal courts have traditionally deferred to the law of the state where the property is located.<sup>277</sup> Nuisance law, which is one aspect of state law that defines property, already involves a balancing of private and public interests against a background of

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270. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (holding that continued government employment is not "property" protected by the Fourteenth Amendment under "existing rules or understanding that stem from an independent source such as state law").

271. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (holding that state took "property" protected by the Fifth Amendment when it kept interest accruing on an interpleader fund deposited in court registry, defining property as state-created rights under the *Roth* rationale).

272. See *Lucas*, 112 S. Ct. at 2913 n.16 (Blackmun, J., dissenting). There is scant support, if any, from prior regulatory takings cases for the Court's definition of the nuisance exception. Many cases excused compensation despite severe economic impact where common law did not already prohibit the restricted use. See cases cited *supra* note 40.

273. *Lucas*, 112 S. Ct. at 2893 n.6.

274. Note, however, that if Justice Scalia was on a quest to formulate a bright-line rule in an attempt to eliminate all vagueness and subjectivity in regulatory takings jurisprudence, as he has in other areas of constitutional law, see *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (insisting upon precise governing standards as opposed to balancing tests), he has not entirely succeeded. The states' common law of nuisance is not a tidy list of what is a nuisance and what is not. One will not find strict, objective principles in the states' common law and as such, the *Lucas* dissent argued, its interpretation is as manipulatable as the harm/benefit distinction that Justice Scalia found problematic. *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting).

275. See U.S. CONST. amend. IV (protecting "houses, papers, and effects against unreasonable searches and seizures"); U.S. CONST. amend. V (due process and takings); U.S. CONST. amend. XIV (due process).

276. E.g., *United States v. Causby*, 328 U.S. 256, 266 (1946) (stating that "[w]hile the meaning of 'property' as used in the Fifth Amendment [is] a federal question, 'it will normally obtain its content by reference to local law.'" (quoting *United States v. Powelson*, 319 U.S. 266, 279 (1943))).

277. This deference has been a basic premise of both constitutional law, see *Board of Regents v. Roth*, 408 U.S. 564, (1972), and has been one of the few unchanging rules in conflict of laws theory. See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 208-13; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 222.

public policy and local values.<sup>278</sup> However, prior to the *Lucas* decision, precedent dictated that judges must strike a nuisance-type balance of their own to determine the takings issue.<sup>279</sup>

In *Lucas*, Justice Scalia imported state nuisance law into the regulatory takings analysis wholesale, suggesting that judges, rather than subjectively striking the balance anew as a matter of *constitutional* law, should objectively look to the balances already struck by state courts and legislatures.<sup>280</sup> State courts arguably balance interests with an equal amount of subjectivity.<sup>281</sup> Nonetheless, the *Lucas* Court's rule suggests that, with regard to property, this subjectivity is legitimate and appropriate only in state forums. By recognizing that the *states* are responsible for defining property, Justice Scalia crafts a careful equilibrium between state and federal law and begins to answer criticism of the Supreme Court's balancing approach.<sup>282</sup>

The dissenting and concurring justices criticized the majority's redefinition of the nuisance exception as completely inappropriate.<sup>283</sup> Justices Kennedy and Stevens both argued that limiting nuisance exceptions to state common law of property and nuisance will make it difficult for states to react to changing conditions, enslaving them to the common law.<sup>284</sup> Specifically, Justice Kennedy stated that the common law is "too narrow a confine for the exercise of regulatory power."<sup>285</sup> Now, the dissent argued, every movement away from the common law will require compensation.<sup>286</sup>

These sweeping charges are false. Not all legislative movements away from states' common law of property and nuisance will require compensation under the Supreme Court's nuisance exception rule—only those that destroy all economically beneficial use.<sup>287</sup> A state government is still able to prohibit harmful uses of property and to respond to changing conditions as needed. Property remains subject to an implied limitation and must still

278. See *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 705-07 (Ariz. 1972); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871-72 (N.Y. 1970); see also RESTATEMENT (SECOND) OF TORTS § 812B cmt. e; *id.* at §§ 822-31.

279. E.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1986).

280. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, at 2900-02 (1992).

281. See *supra* note 274.

282. "When the judge weighs the elements to be balanced, the weights will be assigned in accordance with the judge's view of what is important. Whether one interest or set of interests 'outweighs' another . . . depends on which of them the judge values more highly." Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 643 (1988), quoted in Zuckerman, *supra* note 62, at 768 n.106.

283. See *infra* notes 284-86 and accompanying text.

284. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring); *id.* at 2921 (Stevens, J., dissenting).

285. *Id.* at 2903 (Kennedy, J., concurring).

286. *Id.* at 2922 (Stevens, J., dissenting).

287. *Id.* at 2899.

yield to the police power from time to time.<sup>288</sup> It is entirely conceivable that not all attempts to prevent harmful use will cause total destruction of economically beneficial use and will therefore not necessitate compensation even if they do go beyond the common law. The dissent failed to recognize this. For those limitations on property use that are so severe as to destroy all economically beneficial use, and take away a property right not previously forbidden in common law, the state must pay.<sup>289</sup> Although the public need for certain use restrictions on property may be great, and although compensation may be cumbersome, there can be no shortcut to effecting these changes by avoiding the compensation requirement of the Fifth Amendment.<sup>290</sup>

The dissent also questioned the majority's insistence on using common law, the product of judges long dead, in defining property.<sup>291</sup> There is "nothing magical" about their opinions, and in fact they engaged in the very sort of subjective balancing that the Court found so offensive when performed by a legislature or even itself, the dissent argued.<sup>292</sup>

This view forgets the purpose underlying the majority's rule. The majority did not resort to common law because it found superiority of old state judges' reasoning over that of the legislatures. That is irrelevant. The majority insisted on using the common law of property and nuisance because they determine what inhered in an owner's title when he acquired it.<sup>293</sup> The whole point of the rule involves turning to *preexisting state* law to determine what is a nuisance, and therefore not a property right, and to rid the Court of the business of defining these things.<sup>294</sup> In doing so, the rule ends retroactive removal of property rights from bundles acquired earlier, and ensures that the Fifth Amendment will not be forgotten.

#### IV. CONCLUSION

*Lucas* served an important role in sensibly recasting doctrines that were in risk of straying from the Fifth Amendment's categorical mandate, and prevented that mandate from becoming further muddled into the depths of the amorphous and complicated body of regulatory takings law. The case made clear that denial of all economically viable use is a taking and ensured that legislative recital of harm prevention will no longer be a convenient way of

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288. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

289. *Lucas*, 112 S. Ct. at 2900.

290. See *Pennsylvania Coal*, 260 U.S. at 416.

291. *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting).

292. *Id.*

293. *Id.* at 2899.

294. See *id.* at 2898-99 (explaining how the prior approach made it "difficult, if not impossible, to discern [the takings issue] on an objective, value-free basis").



sidestepping the need to compensate such severe denials. As such, *Lucas* represents a victory for property rights advocates by drawing a formidable “line in the sand” that crafters of draconian land-use regulations must not overstep.

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