Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council

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LAND USE CONTROL, THE INDIVIDUAL, AND SOCIETY:  
*LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*  

ROBERT M. WASHBURN*  

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INTRODUCTION  

After seventy years of near indifference following the landmark regulatory takings decision of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court has spoken. The context it selected, after declining numerous other opportunities, was the case of *Lucas v. South Carolina Coastal Council*, in which David H. Lucas, an owner of beachfront property in South Carolina, challenged the constitutionality of a state land use regulation that prohibited him from building two houses on his two lots. Lucas’s dilemma has become an increasingly common one as a result of the recent enactment of numerous federal and state statutes intended to benefit the general

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1. 260 U.S. 393 (1922).  
welfare through protecting and preserving important environmental resources.

Lucas purchased two beachfront lots in 1986 with the expectation of improving them by building single-family homes suitable for ordinary recreational enjoyment of the location. He paid $975,000 for the two lots. At the time of his purchase, the property was zoned single-family residential, and similarly situated lots on the same beachfront had already been developed with homes. His plans were interrupted, however, by the passage of the South Carolina Beachfront Management Act, which imposed a moratorium on new beachfront development in the area that included Lucas’s lots. As a result of the Act, which was admittedly within the state’s police power and consistent with the public interest, Lucas found himself left with property of no value. Accordingly, he sought “just compensation” under the Fifth Amendment to the United States Constitution for South Carolina’s “regulatory taking” of his property. The South Carolina Court of Common Pleas found in favor of Lucas, awarding him $1,232,387.50 as compensation for the lost use of the two building lots. On appeal by the South Carolina Coastal Council, the agency established to implement the Beachfront Management Act, the South Carolina Supreme Court held that Lucas’s intended use of his land amounted to “great public harm”—indeed, a nuisance—and was therefore not a taking requiring compensation. The United States Supreme Court, rejecting the South Carolina Supreme Court’s “great public harm” formulation, essentially decided that Lucas was entitled to constitutional “just

3. Id. at 2889.
4. Id. at 2889-90.
6. The statute empowered the South Carolina Coastal Council to establish setback lines. The Council drew the line behind Lucas’s property, precluding him from constructing homes or other permanent structures on his lots. See Lucas, 112 S. Ct. at 2889-90.
8. Permanent, occupiable improvements were prohibited. The Act permitted a wooden walkway no more than six feet wide and a wooden deck no larger than 144 square feet. See Lucas, 112 S. Ct. at 2889 & n.2.
9. See id. at 2890.
compensation."\textsuperscript{11}

The \textit{Lucas} decision goes far beyond solving Lucas's dilemma. In the short time since it was issued, it has become a landmark addition to land use regulatory takings jurisprudence, providing much-needed and long-awaited guidance for land developers, regulators, and lower courts. And the decision is, in fact, much broader, because it is not merely about property rights or about balancing property rights with public interests; it is also about the civil rights of individuals to use, enjoy, devise and otherwise exercise control over their interests in property free from unlawful governmental interference. Like the right to speak or the right to travel, the right to be secure in the use of one's own property is a constitutional right, the breadth of which is fundamental to the existence of our constitutional democracy.

I. \textsc{The Fifth Amendment Takings Clause}

Because of its multi-faceted jurisprudential impact, an analysis of the Court's decision in \textit{Lucas} must begin with consideration of the Fifth Amendment to the United States Constitution. A part of the original Bill of Rights,\textsuperscript{12} the Fifth Amendment Takings Clause states: "... nor shall private property be taken for public use, without just compensation."\textsuperscript{13} While the scope of the protected right derives from the Supreme Court's ever-evolving interpretations of "the three key words in the Takings Clause—'property,' 'taken,' and 'just compensation,'"\textsuperscript{14} those interpretations are made and refined in light of the original and evolving purpose of that particular provision. Based on its specific wording, the Fifth Amendment clearly does not prohibit the taking of property. What is prohibited is a taking by the federal, state, or local government without just compensation.\textsuperscript{15} The intent of the drafters was not to prohibit the

\textsuperscript{11} \textit{Lucas}, 112 S. Ct. at 2891, 2895.

\textsuperscript{12} The concept of just compensation for a taking of property can be traced to Chapter 39 of the Magna Carta and was an established principle of English jurisprudence at the time of its inclusion in the Northwest Ordinance in 1787 and in the Bill of Rights. See Catherine R. Connors, \textit{Back to the Future: The "Nuisance Exception" to the Just Compensation Clause}, 19 CAP. U. L. REV. 139, 148-50 (1990) (providing a detailed history of the right to just compensation).

\textsuperscript{13} U.S. CONST. amend. V.


\textsuperscript{15} The Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. See Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 239 (1897) (explaining that compensation for private property taken for public use constitutes an essential element of due process).
taking of property, "whether through formal condemnation proceedings, occupancy, physical invasion, or regulation," but rather "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." The Supreme Court's narrow holding in *Lucas* was that the South Carolina Beachfront Management Act effected a "taking" of Lucas's property requiring that he be compensated from public funds for the public benefit of open beach areas. The extent of *Lucas*'s impact on land use regulatory takings jurisprudence begins with an examination of the relevant earlier law.

II. THE REGULATORY TAKINGS DOCTRINE

Although other, arguably earlier, origins for the regulatory takings doctrine can be found in legal literature, the concept was first accepted by the Supreme Court in 1871 in the case of *Pumpelly v. Green Bay Co.*, which involved the flooding of the plaintiff's land as a result of a state regulation permitting the level of a lake to be raised. In its opinion, the Court recognized that

> [i]t would be a very curious and unsatisfactory result, if in construing [the Takings Clause] ... it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public[,] it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

This taking-by-regulation formulation laid dormant at the

18. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992). The Court's decision left open the remote possibility that, on remand, the state courts might conclude that the proposed building of houses on Lucas's beachfront lots would constitute a prohibited use under common-law nuisance principles and that the Beachfront Management Act therefore took no property right requiring compensation. *Id.* at 2901-02; see also infra discussion in text accompanying notes 192-195.
20. 80 U.S. (13 Wall.) 166 (1871).
21. *Id.* at 177-78.
22. Prior to *Pennsylvania Coal*, the Supreme Court had considered the notion that a land use regulation could be an unlawful taking under the *Due Process* Clauses of the Fifth and Fourteenth Amendments. *See, e.g.,* Curtin v. Benson, 222 U.S. 78 (1911) (striking down a rule prohibiting the grazing of cattle on private land within the limits of Yosemite National Park). The Court had also considered a number of zoning restric-
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Supreme Court level for over fifty years until the Court decided Pennsylvania Coal Co. v. Mahon in 1922.

A. Pennsylvania Coal Co. v. Mahon

Justice Holmes, author of the majority opinion in Pennsylvania Coal, is generally regarded as the source of the modern doctrine of regulatory takings. Though not the first time the Court directly considered whether a regulation could go too far in diminishing the value of private property, Pennsylvania Coal was the first of the very few cases in which the Court invalidated a land use regulation on

tions, generally sustaining such regulation as not violative of the Due Process Clause provided that it was not "so unreasonable that it deprive[d] the owner of the property of its profitable use without justification." Welch v. Swasey, 214 U.S. 91, 107 (1909).

23. 260 U.S. 393 (1922). It should be noted, however, that a number of state courts did apply just compensation clauses to regulatory limitations on the use of property. See Connors, supra note 12, at 150-52.

24. In the intervening years, the Supreme Court did uphold a number of federal and state regulations as not violative of the Due Process Clauses of the Fifth Amendment and Fourteenth Amendment respectively. See infra text accompanying notes 112-126; supra note 22. The standard used was that traditionally applied in substantive due process cases. Specifically, the regulation would be upheld under the police power as long as it was "not exerted arbitrarily, or with unjust discrimination," Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915), or was rationally related to the "protection of the health, morals, and safety of the people," Mugler v. Kansas, 123 U.S. 623, 668 (1887).

25. Only one year before its decision in Pennsylvania Coal, the Supreme Court held that a rent-control regulation did not diminish the value of the property involved enough to violate the Takings Clause. See Block v. Hirsh, 256 U.S. 135, 154-56 (1921).

26. From Pennsylvania Coal through Lucas (inclusive), the Supreme Court has decided only seven times that a regulation was an unconstitutional taking of private property. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that a land use regulation prohibiting a landowner from building on his beachfront property denied him all economically viable use of his land, thus requiring compensation); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (requiring compensation for the exaction of public access as a condition to the landowner's obtaining a rebuilding permit, where the condition was unrelated to the purposes of the permitting system); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding that a statute requiring landlords to permit a cable television company to install wires and other necessary hardware on their property effects a taking that requires compensation); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding that the government's attempt to create a public right of access to developed private property amounts to a taking requiring compensation); Armstrong v. United States, 364 U.S. 40 (1960) (holding that the government must pay compensation for the value of materialmen's liens rendered unenforceable when it seized partially completed boats upon a shipbuilder's default); United States v. Causby, 328 U.S. 256 (1946) (holding that the government's use of an airport rendered adjacent property uninhabitable, resulting in a taking requiring compensation); Pennsylvania Coal, 260 U.S. 393 (1922) (holding that an act prohibiting the mining of anthracite coal, which rendered a landowner's property virtually worthless, effects a taking requiring compensation). Each of these cases, with the exception of Lucas and Pennsylvania Coal, involved a taking by some form of physical invasion. See infra
the ground that the regulation violated the Takings Clause of the Fifth Amendment.

The regulation that precipitated the revolutionary change in this area of the law was Pennsylvania's Kohler Act, which prohibited, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . . subsidence of . . . any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." The case came to the Court as a result of the Mahons' seeking to enjoin the mining operations of the Pennsylvania Coal Company under their residential property, claiming that those operations were in violation of the Kohler Act. Pennsylvania law recognized three estates in mining property: (1) the right to use the surface, (2) the ownership of the underlying minerals, and (3) the right to have the surface supported by the subjacent strata. The Mahons owned only the surface estate because, at the time of purchase of that estate from the coal company, the company reserved the rights to both the mineral estate and the support estate and obtained a waiver of any damages that might result to the surface estate from the anticipated mining of the coal. Accordingly, the coal company argued that, if upheld, the Kohler Act would result in a taking of its right to use its property interest in the coal in a commercially profitable manner; because the only value of the mineral estate was through mining, the regulation was the functional equivalent of a taking by eminent domain and thus unconstitutional if enforced without compensation under the Takings Clause of the Fifth Amendment.

The Supreme Court invalidated the Kohler Act. Justice Holmes expressly agreed with the coal company that "[f]or practical purposes, the right to coal consists in the right to mine it." . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it

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28. Id. § 661.
29. See Pennsylvania Coal, 260 U.S. at 412.
31. See id. at 492.
32. See Pennsylvania Coal, 260 U.S. at 401-04 (Argument for Plaintiff in Error).
33. Id. at 414.
commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.\textsuperscript{34}

Yet Justice Holmes did more than agree with the coal company's position; he went on to create the modern regulatory takings doctrine just recently revisited and endorsed in \textit{Lucas}.

Justice Holmes acknowledged that under their police power states may and must regulate the use of private property to protect the rights of the public, for "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."\textsuperscript{35} But then he clarified this expansive notion, noting that "[t]he rights of the public... are those that it has \textit{paid} for... The protection of private property in the Fifth Amendment presupposes that it is \textit{wanted} for public use, but provides that it shall not be \textit{taken} for such use without compensation."\textsuperscript{36} In articulating the need for a case-by-case judicial balancing of the police-power qualification to the "seemingly absolute protection" accorded by the Fifth Amendment with the actual scope of that Amendment's protection of the rights of individual property holders, Justice Holmes announced that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{37} A line was drawn. Land use regulation, at least that free from any obligation to pay just compensation, was limited by \textit{Pennsylvania Coal} to only those instances which fall short of "going too far."

\textbf{B. Penn Central Transportation Co. v. New York City}

Despite its eloquent coming, the regulatory takings doctrine languished for more than half of a century. The next significant Supreme Court analysis of whether a land use regulation effected a taking requiring the payment of just compensation was its 1978 decision in the case of \textit{Penn Central Transportation Co. v. New York City}.\textsuperscript{38} The regulation under scrutiny was New York City's Landmarks Preservation Law.\textsuperscript{39} The Landmarks Preservation Commission, the

\textsuperscript{34} \textit{Id.} at 414-15 (citation omitted).
\textsuperscript{35} \textit{Id.} at 413.
\textsuperscript{36} \textit{Id.} at 415 (emphasis added).
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} 438 U.S. 104 (1978).
\textsuperscript{39} N.Y.C. ADMIN. CODE, ch. 8-A, §§ 205-1.0 \textit{et seq.} (1976).
agency with primary responsibility for administering the law, designated Grand Central Terminal a historic landmark, the exterior of which was then required by law to be kept "in good repair" at the owner's cost and maintained without alteration except with Commission approval. The Landmarks Law was challenged when the Commission refused to approve either of two proposed plans for the construction of a multistory office building addition over the Terminal, finding that such a structure would be destructive of the Terminal's historic and aesthetic features. Presumably because it expected the proposed upward expansion of the Terminal to result in a substantial increase in the Terminal's investment value given the high-rent, commercial nature of the surrounding neighborhood, Penn Central Transportation Company sought judicial relief. It argued that the expansion prohibition was a regulatory taking of its property rights without just compensation, in violation of the Fifth and Fourteenth Amendments.

Consistent with the tradition of the Supreme Court at that time, the New York Court of Appeals only considered whether the Landmarks Law was in violation of the Due Process Clause of the Fourteenth Amendment. Applying the usual rational-basis substantive-due-process standard, the Court of Appeals found no denial of due process because the restrictions did not deprive Penn Central of a "reasonable return" on its investment in the Terminal; the restrictions still permitted continuation of the present, though not the more profitable, use. Declining the Court of Appeals' invitation to develop other bases for further judicial analysis, Penn Central turned to the United States Supreme Court.

42. Penn Central Transportation Company had entered into a renewable 50-year lease with UGP Properties, Inc., and an agreement under which UGP would construct the office building. Revenues to Penn Central under the lease totalled $1 million annually during construction and at least $3 million annually thereafter. See id. at 116.
43. Id. at 119.
44. See supra note 22; infra text accompanying notes 112-134.
45. See Penn Cent. Transp. Co. v. New York City, 366 N.E.2d 1271, 1274 (N.Y. 1977), aff'd, 438 U.S. 104 (1978). The court rejected the claim that the Landmarks Law had taken property without just compensation, indicating that such claims are "[o]f course, . . . more accurately described as a deprivation of property without due process of law." Id.
46. See supra notes 22, 24.
47. See Penn Cent. Transp., 366 N.E.2d at 1273-78.
48. See id. at 1279.
The Supreme Court interrupted its pattern of indifference to the regulatory takings doctrine created in *Pennsylvania Coal* by defining the issue presented on appeal as "whether the restrictions imposed by New York City's law upon appellants' exploitation of the Terminal site effect a 'taking' of appellants' property for a public use within the meaning of the Fifth Amendment." The Court then provided some guidance "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Acknowledging that no "set formula" had been developed, the Court discussed several previously identified factors of particular significance for consideration in similar takings cases. The three components of this quantitative approach included: "[1] [t]he economic impact of the regulation on the claimant, . . . [2] the extent to which the regulation has interfered with distinct investment-backed expectations, . . . [and 3] the character of the governmental action." Although the Court did emphasize that a taking can more readily be found where the character of the governmental interference amounts to a physical invasion, it declined to suggest any relative weights for the enumerated factors. Significantly, however, the Court's elaboration of the *Pennsylvania Coal* takings standard introduced the concepts of economically viable use and "distinct, investment-backed expectations," concepts that have since been determinative in the bulk of land use regulatory takings cases.

Justice Brennan began the majority's analysis of the impact of the Landmarks Law on *Penn Central* by recognizing that "in a wide variety of contexts, . . . government may execute laws or programs that adversely affect recognized economic values." As apparent background and justification incident to sustaining the Landmarks

50. *Id.* at 124.
51. *Id.*
52. *Id.*
53. See *id.* at 138 n.36 (noting that the city had conceded that if "the Terminal ceases to be 'economically viable,' appellants may obtain relief").
54. *Id.* at 124.
55. See Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 758-59 (1988) ("In its recent 'takeings' cases, the Supreme Court has indicated that a taking occurs if a regulation deprives a property owner of 'economically viable use' of his land, and that a property owner's 'reasonable, investment-backed, profit expectations,' are protected against confiscation by state and local government land-use regulations." (citations omitted)).
Law, Justice Brennan then discussed “obvious examples” of previously upheld regulations such as taxing acts, zoning ordinances, and laws prohibiting dangerous or harmful uses of property. All of the cases cited, however, involved the Due Process rather than the Takings Clause, and lend little support to the majority’s conclusion that the Landmarks Law, largely because it did not interfere with the present use of the Terminal, did not go far enough to constitute an unconstitutional taking under the Fifth Amendment.

The period between the *Penn Central* decision and the much-analyzed trilogy of Supreme Court opinions delivered in 1987 involved little activity in land use regulatory takings jurisprudence. Essentially, the few interim decisions that were issued refined the three *Penn Central* factors for determining when a regulation goes too far, thereby amounting to an unconstitutional taking under the *Pennsylvania Coal* quantitative-balancing test. As expected from the *Penn Central* Court’s suggestion that a taking can more readily be found when the interference amounts to a physical invasion, the Supreme Court continued to regard cases of permanent physical occupation, even as minuscule as that caused by the installation of cable television wiring, virtually always requiring just compensation, irrespective of any economic impact. In *Kaiser Aetna v. United States*, the Supreme Court held that “the right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.

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57. See id. at 124-27. For discussion of the harmful use or “nuisance doctrine” cases, see infra text accompanying notes 112-134.

58. See infra text accompanying notes 139-146 (discussing *Penn Central* dissent).

59. See infra text accompanying notes 75-110.

60. See *Penn Cent. Transp.*, 438 U.S. at 124.


62. See id. at 432 ("[P]hysical invasion cases are special and have not repudiated the rule that any permanent physical occupation is a taking."); see also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requiring compensation for the physical invasion of an easement). Earlier cases in accord include *Armstrong v. United States*, 364 U.S. 40 (1960), and *United States v. Causby*, 328 U.S. 256 (1946). Note that these physical invasion cases are four of the seven instances in which the Supreme Court held that a regulation effected a taking. See supra note 26.

63. See Loretto, 458 U.S. at 432 ("[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.").

64. 444 U.S. 164 (1979).

65. Id. at 179-80 (footnote omitted) (adding “even if the Government physically invades only an easement in property, it must nonetheless pay just compensation”). But compare *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that shopping center owners failed to demonstrate that the “right to exclude others” is essential to the
In the remainder of the significant Supreme Court pre-trilogy takings decisions, the Court attempted to refine two of the critical economic impact factors introduced in *Penn Central*, but the refinements were clouded by the fact that the Court never reached the actual takings question. In *Agins v. City of Tiburon*, for example, the Court held that a property owner's challenge to a zoning ordinance restricting the number and size of buildings that could be erected on unimproved land was not yet ripe for decision because the property owner had not yet applied for approval of a specific development plan. Yet this brief opinion, holding that "the zoning ordinances on their face do not take the appellants' property without just compensation," implied at least a judicial concern with the murkiness of takings jurisprudence, if not a promise of change.

Writing for a unanimous Court, Justice Powell stated that a regulation "effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." By stating in the disjunctive the test for a taking requiring compensation, the Court clearly envisioned the possibility of finding a taking for the sole reason that the regulation failed to advance legitimate interests, as indeed it did seven years later in *Nollan v. California Coastal Commission*. Also clearly envisioned was the possibility that a taking might be found for the sole reason that the regulation denied the owner economically viable use, though not necessarily all use, of his land. By inviting the appellants in *Agins* to pursue their reasonable investment expectations by submitting a development plan, the Court hinted that it would

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use or economic value of their property and, therefore, denial of the right to exclude does not amount to a "taking").

It is also unclear why the Court, in the same year it decided *Kaiser Aetna*, held that the right to sell personal property—Indian artifacts containing the feathers of protected birds—was just one strand in the bundle of property rights rather than a fundamental property interest deserving Fifth Amendment protection and requiring compensation when "taken." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). See also infra notes 277-278 and accompanying text.

68. See *Agins*, 447 U.S. at 262-63. *Agins* involved the first of the many "ripeness" requirements in land use regulatory takings cases. For a discussion of others, see Berger, *supra* note 55, at 786-95. See also infra note 350 (citing cases decided on ripeness grounds).
70. *Id.* (emphasis added).
71. 483 U.S. 825, 837 (1987) ("Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, this is not one of them.").
find a taking based solely on denial of economically viable use, and finally did so in *Lucas*.\(^{73}\) In sum, the *Agins* opinion can most clearly be read as stating that in the case of the typical land use regulation enacted in furtherance of a socially desirable goal, the takings decision will turn on whether the economic impact on the property owner amounts to a denial of "the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."\(^{74}\)

C. The 1987 Trilogy: Nollan, First English, and Keystone

In 1987, the jurisprudential flurries following the Supreme Court's designation in *Penn Central* of its three significant takings factors became a dramatically well-published tempest.\(^{75}\) Arguably, the 1987 trilogy was still a tempest in a teapot because of the narrow aspects of the land use regulatory takings doctrine that the Court directly addressed. Yet, like the *Agins* opinion, they foreshadowed more.

In *Nollan v. California Coastal Commission*,\(^{76}\) the Court found its sixth regulatory taking. Like David Lucas, the Nollans owned a beachfront lot and planned to build a three-bedroom house, much like others in the vicinity, to replace their small bungalow which was no longer fit for use. When they applied for a building permit, the California Coastal Commission, under authority of the California Coastal Act of 1976,\(^{77}\) conditioned the issuance of the permit on an agreement by the Nollans to grant a public easement across their property. The purpose of this easement was to increase the public's visual and psychological access to the public beaches located on both sides of the Nollans' property. The Nollans viewed the access-easement requirement as an unconstitutional taking of their property and sought judicial relief. In a five-to-four decision, the Supreme Court found that the permit condition could not survive scrutiny under *Agins* because it did not "substantially advance legitimate state interests."\(^{78}\) The Court noted that "there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."\(^{79}\) Focusing particularly on the lack of nexus between the permit condition and the gov-

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74. *Agins*, 447 U.S. at 263.
75. See, e.g., Berger, supra note 55, at 735-36 ("The scope and intensity of the media coverage of these opinions is apt and fitting testimony to their importance.").
77. CAL. PUB. RES. CODE §§ 30000-30900 (West 1986).
78. See *Nollan*, 483 U.S. at 834 (reaffirming the *Agins* framework for takings analysis).
79. Id. at 841.
ernmental purpose of the ban on development, the Court characterized this type of building restriction as "not a valid regulation of land use but 'an out-and-out plan of extortion.'" 80

The narrow result was not surprising. The exaction of public access was no different from any other imposition of an easement, a physical invasion of property that had virtually always warranted just compensation under the Fifth Amendment. 81 As the Court emphasized yet again, "the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."" 82 More surprising was the Court's gratuitous notation that "the right to build on one's own property," a similarly inherent property right, "cannot remotely be described as a 'governmental benefit.'" 83 Most surprising, and indicative of the Court's changing attitude toward land use regulation vis-a-vis individuals' rights in their property, was that the Court chose to reach its decision by scrutinizing the application of the regulation not under the due-process rational-relationship basis, but under the standard of whether it would "substantially advance' the 'legitimate state interest' sought to be achieved." 84 As the Court unequivocally stated, after Nollan, "there is no reason to believe . . . that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." 85

Similarly, the narrow holding in First English Evangelical Lutheran Church v. County of Los Angeles 86 did not dramatically alter the existing regulatory takings doctrine; again, however, the Court's opinion boded change. First English involved a temporary prohibition of any rebuilding on property in a flood-hazard area, which included twenty-one acres that had been used as a summer camp by the church and had been seriously damaged by a flood. 87 Three years later, the regulation made the building prohibition permanent. 88

81. See supra note 55 and accompanying text. Justice Scalia repeatedly referred to the condition as an easement. E.g., Nollan, 483 U.S. at 827, 828, 831.
83. Id. at 834 n.2.
84. Id. at 834 n.3 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
85. Id. at 835 n.3.
87. See id. at 307.
88. Id. at 313 n.7.
First English brought an inverse condemnation action, arguing that the three-year prohibition effected a taking of its property and entitled it to just compensation. The Supreme Court held that even a temporary taking required just compensation, rejecting the California Supreme Court's rule based on its earlier *Agins* decision. It is noteworthy that the Supreme Court, after declining to consider similar claims "[f]our times this decade" because of "concerns with finality," chose to view the posture of *First English* as "quite different." It did so by interpreting the California Court of Appeals to have held that "regardless of the correctness of the appellant's claim," no damages are recoverable for the period prior to the court's declaration that the ordinance was unconstitutional. Under that interpretation, the constitutional question was divorced from the merits of the takings issue and, thus, was "squarely presented."

Further evidence of the Court's renewed interest in regulatory takings questions was Chief Justice Rehnquist's analysis of the language and purposes of the Takings Clause of the Fifth Amendment and his reaffirmance of *Pennsylvania Coal* as "established doctrine."

In the third of the 1987 trilogy of regulatory takings cases, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Supreme Court faced a constitutional challenge reminiscent of that in *Pennsylvania Coal*, this time involving Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act. Like the earlier Kohler Act, the Subsidence Act prohibited coal mining that would cause subsidence dam-

89. *Id.* at 321 ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").


92. See *First English*, 482 U.S. at 312.

93. *Id.* As expected, however, on remand the California courts found that no taking had occurred. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 894 (Cal. Ct. App. 1989) (answering the reserved question—whether the specific regulation affecting First English led to an unconstitutional taking—in the negative), cert. denied, 493 U.S. 1056 (1990).

94. See *First English*, 482 U.S. at 314-16.


96. PA. STAT. ANN. tit. 52, §§ 1406.1 to 1406.21 (1986).
age to dwellings and other surface buildings. Pursuant to the Subsidence Act's grant of regulatory and enforcement authority, the state Department of Environmental Resources (DER) required that fifty percent of the coal under protected structures be kept in place to support the surface estate. The Coal Association—whose members owned extensive coal reserves under surface property protected by the Subsidence Act and who also typically owned, as did the coal company in Pennsylvania Coal, the support estate, including waivers of damages caused to the surface estate by mining operations—sought to enjoin the DER from enforcing the Subsidence Act on the grounds that such enforcement would constitute a taking of their coal without just compensation, in violation of the Fifth Amendment.

The Coal Association relied on Pennsylvania Coal in apparent confidence. Despite the striking similarity between the Kohler Act and the Subsidence Act, the Supreme Court agreed with the courts below that the Subsidence Act did not effect an unconstitutional taking.

The narrow holding of Keystone was neither surprising nor significant in the stalled development of the regulatory takings doctrine. Like Agins, the Keystone controversy presented another opportunity for the Supreme Court to decide whether a specific land use regulation, as applied to a specific category of property owners, denied those owners "economically viable use" of their property, thereby amounting to a governmental taking and entitling them to compensation. As it did in Agins, the Court treated the challenge as a facial one, necessitating a decision in favor of the government.

While land use regulators might have chosen to view the Keystone decision as judicial reluctance to expand or even reaffirm the rule in Pennsylvania Coal, thereby somehow tipping in their favor the balance between the right of government to regulate and the rights of persons owning the regulated property, the opinion contained no objective support for such an interpretation. Indeed, the better

97. Id. § 1406.4.
99. See id. at 504. See also supra text accompanying notes 30-32 (discussing the three separate estates in mining property recognized under Pennsylvania law).
101. See id. at 506 (Rehnquist, C.J., dissenting).
102. See id. at 479-81.
103. See id. at 493-95 ("The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.").
view was that the Supreme Court came close to finding a regulatory taking, reflecting an increasing concern for the rights of individuals over their property and an indication of its readiness to broaden its construction of the Takings Clause protections for individual owners of property.

First, the Court expressly affirmed the regulatory takings doctrine set forth in Pennsylvania Coal, as well as the Penn Central and Agins refinements. It then engaged in the two-pronged Agins analysis, but found each component satisfied. The Keystone majority determined that the regulation addressed a legitimate state interest, preventing "a significant threat to the common welfare," and that "there is no record in this case to support a finding, similar to the one the Court made in Pennsylvania Coal, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations." Finally, while the Agins Court had unanimously declined to consider whether a facially valid regulation effected a taking as applied to the plaintiffs, the Keystone majority went on to reach this issue, even though the plaintiffs had only mounted a facial challenge.

This 1987 trilogy of land use regulatory takings decisions completed the limited pre-Lucas development of the Supreme Court's regulatory takings doctrine that was first articulated in Pennsylvania Coal. Despite this limited development of the doctrine, there was and is no question that a land use regulation will constitute an unconstitutional taking of private property entitling the affected property owner to just compensation unless it is enacted for a legitimate public purpose, and it substantially advances that legitimate purpose, and it does not involve any physical invasion of the regulated property. However, in addressing the question of whether a land use regulation which meets the above three conditions but still diminishes the use or value of the land can effect an unconstitutional taking, either on its face or as applied, there had been no precedent and little guidance from the Supreme Court until its decision in Lucas.

104. Id. at 484-85.
105. Id. at 485.
106. Id.
108. See Keystone, 480 U.S. at 493-96 (supporting the finding of no taking by noting that "petitioners have not even pointed to a single mine that can no longer be mined for profit").
Even more significant to the development of the regulatory takings doctrine was that both the majority and dissenting opinions in *Keystone* incorporated into their analysis the concept of a nuisance exception to the long "established doctrine . . . [that] 'if regulation goes too far it will be recognized as a taking.'"\(^{109}\) However, the nature and scope of the exception envisioned by the two opinions were sharply different.\(^{110}\) Relying on those confusing positions, the Supreme Court of South Carolina found that Lucas's intended use for his beachfront lots amounted to a nuisance and therefore held that the government's prohibition of that use was not a taking which required just compensation under the Fifth Amendment.\(^{111}\) Analysis of the Supreme Court's decision in *Lucas* depends, accordingly, on an examination of the long-existing nuisance doctrine that was grafted onto the historically unrelated regulatory takings doctrine.

### III. Development of the Nuisance Exception

#### A. Mugler v. Kansas and Its Progeny

In making its determinative nuisance exception analysis in *Lucas*, the South Carolina Supreme Court relied on a short line of cases, which it cited as authority for the view that no taking of property occurs when a regulation "exists to prevent serious public harm."\(^{112}\) Normally viewed as the first significant opinion adopting this qualitative approach to upholding land use regulations,\(^{113}\) *Mugler v. Kansas*\(^ {114}\) involved a brewer's challenge to state regulations that prohibited the use of his brewery for the manufacture and sale of malt liquor. Writing for the majority, Justice Harlan found the regulations to be a valid exercise of the police power—legitimate prohibitions "upon the use of property for purposes that are

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\(^{109}\) First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987). See *Keystone*, 480 U.S. at 491 (approving of "[t]he Court's hesitance to find a taking when a state merely restrains uses of property that are tantamount to public nuisances"); *id.* at 513 (Rehnquist, C.J., dissenting) (arguing against "allow[ing] a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation").


\(^{111}\) *Id.* at 901.

\(^{112}\) *Id.* at 899 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 246 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887)).


\(^{114}\) 123 U.S. 623 (1887).
declared, by valid legislation, to be injurious to the health, morals, or safety of the community."  At the time, any exercise of the police power would have withstood scrutiny under the Due Process Clause provided it was rationally related to the "protection of the health, morals, and safety of the people." However, Justice Harlan further supported his position by characterizing liquor as a common nuisance, always subject to abatement by legislatures and courts. Of note is that Justice Harlan declined to consider whether the prohibition amounted to a taking of the brewery, dismissing *Pumpelly v. Green Bay Co.*—the only authority for the then-unrecognized regulatory takings doctrine—as an eminent domain case and therefore inapplicable.

The short line of nuisance-doctrine cases relied on by the South Carolina Supreme Court in its *Lucas* opinion included two other cases decided by the United States Supreme Court prior to its promulgation of the regulatory takings doctrine in *Pennsylvania Coal.* In 1915, in *Reinman v. City of Little Rock* the Court upheld an ordinance prohibiting the operation of an existing livery stable, stating that the city could, under its police power, "declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." Also in 1915, in *Hadacheck v. Sebastian,* the Court, citing its unanimous opinion in *Reinman,* upheld an ordinance prohibiting the manufacture of bricks near residents of Los Angeles. Again, the Court found that it was within the city's police power to classify an existing business as a nuisance under changed circumstances.

In neither of these cases did the Court consider the possibility of a regulatory taking, but this is not surprising because that concept had not yet been formally or clearly recognized. These were "garden variety" due-process cases, in which the regulation was subject to no more than the "garden variety" rational-basis standard for determining constitutionality. During the *Mugler* era, land use regula-

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115. *Id.* at 668.
116. *Id.*
117. See *id.* at 669-70.
118. 80 U.S. (13 Wall.) 166 (1871); see supra text accompanying notes 19-21.
119. See *Mugler,* 123 U.S. at 668.
120. 237 U.S. 171 (1915).
121. *Id.* at 176.
122. 239 U.S. 394 (1915).
123. *Id.* at 410-12.
124. See *id.* at 409-10 ("There must be progress, and if in its march private interests are in the way they must yield to the good of the community.").
ations could be challenged successfully only by proving that they did not further a legitimate state purpose and were therefore not a proper exercise of the police power. Because during that era, as today, the notion of governmental power was expansive, it is not surprising that such a successful challenge occurred only once.\(^{125}\) There was then no need for any "exception" for regulations promulgated to abate nuisances.\(^{126}\)

B. The Nuisance Doctrine after Pennsylvania Coal

After the regulatory takings doctrine was introduced in Pennsylvania Coal in 1922, the Court theoretically could have treated nuisance cases as exceptions to the newly created doctrine. Yet, an analysis of the cases cited in Lucas confirms the irrelevance of the one doctrine to the other.\(^{127}\)

In Miller v. Schoene,\(^ {128}\) the Supreme Court upheld Virginia's Cedar Rust Act, which required the owner of infected cedar trees to cut them down to save neighboring apple orchards from infection, finding it not violative of the Due Process Clause.\(^ {129}\) Notably, the owner never sought relief under the Just Compensation Clause for a taking of his property. The parallel line of nuisance cases, much like the parallel line of zoning regulation cases,\(^ {130}\) was simply not viewed as implicating the Takings Clause.

Similarly, the last of the nuisance doctrine cases relied on by the South Carolina Supreme Court in Lucas did not consider the regulatory takings doctrine applicable. In Goldblatt v. Town of Hempstead,\(^ {131}\) the Supreme Court, after citing Hadacheck, Reinman, and Mugler, concluded that a city ordinance prohibiting sand and gravel mining below the water table was a valid exercise of the city's police power and therefore withstood a challenge under the Due Process Clause of the Fourteenth Amendment. The Court did mention that "the fact that [the ordinance] deprives the property of its most beneficial use does not render it unconstitutional."\(^ {132}\) The Court went on to

\(^{125}\) See Curtin v. Benson, 222 U.S. 78, 86 (1911) (invalidating regulations prohibiting the grazing of cattle on private land within Yosemite Park).

\(^{126}\) Connors, supra note 12, at 148 (adding that until 1922, "all regulations which constituted legitimate exercises of police power were upheld against takings challenges, except regulations which physically appropriated property").


\(^{128}\) 276 U.S. 272 (1928).

\(^{129}\) Id. at 280.

\(^{130}\) Id. at 279-80.

\(^{131}\) 369 U.S. 590 (1962).

\(^{132}\) Id. at 592.
note that “there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.”\textsuperscript{133} The opinion also noted that if the property owner met the burden of establishing the unreasonableness of the ordinance’s effect on him, he would have been entitled to just compensation under \textit{Pennsylvania Coal}.\textsuperscript{134}

The so-called “nuisance exception” line of cases consisted of unrelated police power cases that had some limited effect on the use of land. Factually, they fell short of “going too far” and, accordingly, were not considered an exception to the regulatory takings doctrine until the startling merger of these parallel doctrines in \textit{Keystone}.

\textbf{C. Merger of the Nuisance Doctrine into the Regulatory Takings Doctrine}

When Justice Holmes created the regulatory takings doctrine in \textit{Pennsylvania Coal}, \textit{Mugler} and its progeny were well-established cases, standing for an expansive interpretation of the police power and a correspondingly limited construction of the Due Process Clauses of the Fifth and Fourteenth Amendments. Yet Justice Holmes’s landmark opinion contained no mention of them, presumably because of their irrelevance to the issue of whether the Kohler Act caused an unconstitutional taking of the coal without just compensation. Any argument that he intended any sort of nuisance exception to his quantitative-balancing test, therefore, cannot be supported.

The opinion of Justice Brandeis, however, the sole dissenter in \textit{Pennsylvania Coal}, contains traces of a proposed nuisance exception to the new regulatory takings doctrine. By way of introduction to his opinion, Justice Brandeis restated the prohibitions of the Kohler Act at issue and generalized that “[c]oal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance.”\textsuperscript{135} He further stated that the “restriction here in question is merely the prohibition of a noxious use” and that “the legislature has power to prohibit such uses without paying compensation.”\textsuperscript{136} It is not at all clear, however, that Justice Brandeis’s dissent was based solely, if at all, on these nuisance observations. In fact, the bulk of his opinion focused on whether the limits of the police power had been exceeded by the resulting dimi-

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 594.
\item \textsuperscript{134} \textit{See id.}
\item \textsuperscript{135} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).
\item \textsuperscript{136} \textit{Id.} (Brandeis, J., dissenting).
\end{itemize}
ution in value, an analysis consistent with Justice Holmes's doctrine and capable of leading to a conclusion that the Kohler Act, on balance, simply did not diminish the value of the coal enough to amount to a taking requiring just compensation. Under that, more credible, reading of the dissenting opinion, the nuisance discussion added nothing.

The actual introduction of a nuisance exception to regulatory takings jurisprudence derives from the dissent of then-Justice Rehnquist in *Penn Central*. In upholding the Landmarks Law, the majority essentially dismissed the *Mugler* line of cases, albeit with a footnote reference to its role in implementing policies beneficial to the public. Applying the *Pennsylvania Coal* quantitative-balancing test, the majority concluded that the provisions of the Landmarks Law did not interfere with all use or even the existing uses of the Terminal, and therefore did not diminish its value enough to constitute an unlawful taking.

Justice Rehnquist, with whom Chief Justice Burger and Justice Stevens agreed, applied the same test but found sufficient diminution in value to effect an unconstitutional taking. His analysis began with the literal words of the Fifth Amendment that require just compensation if "private property be taken for public use." Because it was not disputed that certain valuable property rights of Penn Central were destroyed by the Landmarks Law, an unconstitutional taking occurred unless the government's action fell within the "nuisance exception to the taking guarantee." Citing *Mugler* and its progeny, Justice Rehnquist explained that where legislation prohibits only noxious or injurious uses of private property, it is excepted from scrutiny under the normal regulatory takings analysis—thereby articulating, for the first time, a clear nuisance exception to

137. See id. at 419 (Brandeis, J., dissenting).
138. See id. at 419-20 (Brandeis, J., dissenting).
140. See Penn Cent. Transp., 438 U.S. at 136-38; see Connors, supra note 12, at 142-43.
142. Id. at 142 (Rehnquist, J., dissenting).
143. Id. at 145 (Rehnquist, J., dissenting).
the Pennsylvania Coal quantitative-balancing test. Neither side argued that the Landmarks Law was intended to or did abate any nuisance. Nor was the introduction or explanation of a nuisance exception necessary or even relevant to the analysis of either the majority or the dissent. Indeed, the nuisance doctrine developed independently as a factor in scrutinizing governmental regulations under the Due Process Clause of the Fifth and Fourteenth Amendments. The reason it appeared as established doctrine in the Penn Central dissent remains a mystery, but it became an aspect of regulatory takings jurisprudence much in need of the clarification eventually provided by the Lucas decision.

Nine years later, in Keystone, every member of the Supreme Court acknowledged the existence, though not the nature and scope, of a nuisance exception to the land use regulatory takings doctrine. The Keystone majority concluded that the Subsidence Act was not unconstitutional, at least facially, because it met neither of the two bases for finding a taking under the Agins test. In considering whether the Act failed to substantially advance legitimate state interests, the majority interjected a lengthy discussion of Mugler, Reinman, Hadacheck, Miller, and Goldblatt, emphasizing that these nuisance cases were not overruled by Pennsylvania Coal and suggesting, without particularity, that nuisance-abatement regulations are less likely than other regulations to constitute a taking. Given the textual location of the majority’s conclusion that the Subsidence Act was intended to prevent “a significant threat to the common welfare,” it appears that the majority believed that the Mugler line of authority was relevant only to the first prong of the Agins test—assessment of the legitimacy of the state interests underlying the regulation. Because the determinative issue is typically whether a regulation denies the property owner “economically viable use of

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144. See id. at 144-46 (Rehnquist, J., dissenting). The dissent further explained that the nuisance exception “is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health or welfare of others.” Id. at 145 (Rehnquist, J., dissenting).
145. See, e.g., id. at 145 (Rehnquist, J., dissenting) (“Appellees are not prohibiting a nuisance.”).
146. See supra text accompanying notes 112-134.
147. See supra notes 101-108 and accompanying text.
149. Id. at 485.
his land” under the second Agins prong, the majority's slant on the role of the nuisance exception in the development of takings jurisprudence was not significant. The majority opinion in Keystone rested on the coal owners' failure to establish a “diminution of value sufficient to satisfy the test set forth in Pennsylvania Coal and our other regulatory takings cases.” Therefore, the South Carolina Supreme Court's reliance on the Keystone majority for its decision—that a governmental regulation of property use, enacted to prevent serious public harm, cannot amount to a taking requiring just compensation—was misplaced.

The Keystone dissent's position was based on the economic impact of the Subsidence Act, which effected a taking warranting just compensation because “[s]pecifically, the Act works to extinguish petitioners' interest in at least 27 million tons of coal.” Of more current importance, Chief Justice Rehnquist, having introduced the nuisance exception to the law of regulatory takings in his Penn Central dissent, sought to better define its proper role in the application of the well-established Pennsylvania Coal balancing test to challenged land use regulations.

Chief Justice Rehnquist emphasized that the Pennsylvania Coal holding “today discounted by the Court has for 65 years been the foundation of our 'regulatory takings' jurisprudence” and that “our repeated reliance on that opinion establishes it as a cornerstone of the jurisprudence of the Fifth Amendment’s Just Compensation Clause.” The Chief Justice clarified that the existence of a legitimate public purpose for a regulation “is merely a necessary prerequisite to the government's exercise of its taking power.” In his view, the nuisance exception to the ordinary quantitative-balancing test must of necessity be extremely narrow, applied only “where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others.”

150. But see Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (focusing on whether the regulation in question furthered a legitimate governmental purpose related to the regulatory scheme).
152. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992) (“The South Carolina Supreme Court’s approach would essentially nullify [Pennsylvania Coal]'s affirmation of limits to the noncompensable exercise of the police power.” (citing the Keystone dissent)).
154. Id. at 508 (Rehnquist, C.J., dissenting).
155. Id. at 511 (Rehnquist, C.J., dissenting).
156. Id. (Rehnquist, C.J., dissenting).
was available only to a nuisance statute that rested on discrete and narrow purposes, such as those in *Goldblatt, Hadacheck,* and *Mugler,* not to one such as the Subsidence Act that was much more than a nuisance statute. The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth's tax base. We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.\(^{157}\)

The Chief Justice also noted that the determination of the type of regulation that qualifies for the nuisance exception is a "question of federal, rather than state, law, subject to independent scrutiny by this Court."\(^{158}\)

More significantly, the dissent argued that the nuisance exception, as every case in the *Mugler* line bears out,\(^ {159}\) has never been available "to allow the complete extinction of the value of a parcel of property."\(^ {160}\) Under this view of the nuisance exception, the definition of a parcel of property—already, as in *Keystone,* an area without a consensus\(^ {161}\)—would become critical to takings determinations involving regulations that did not affect an owner's entire interest in the land, such as a regulation that burdened only seventy-five percent of a lot, leaving twenty-five percent available for development.\(^ {162}\)

**IV. *Lucas v. South Carolina Coastal Council***

The South Carolina Supreme Court decided that Lucas's proposed construction of single-family homes similar to those of his neighbors amounted to "great public harm"—a nuisance—and, therefore, that the prohibition of such use by the Beachfront Management Act was not a taking requiring compensation under the

\(^{157}\) *Id.* at 513 (Rehnquist, C.J., dissenting).

\(^{158}\) *Id.* at 512 (Rehnquist, C.J., dissenting).

\(^{159}\) *See id.* at 513-14 (Rehnquist, C.J., dissenting).

\(^{160}\) *Id.* at 513 (Rehnquist, C.J., dissenting).

\(^{161}\) *See Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2894 n.7 (1992) (acknowledging the continuing lack of a precise means of determining the property interest against which economic loss is to be measured).

\(^{162}\) *See id.* (suggesting that "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property").
Fifth Amendment. The South Carolina Supreme Court considered as only one of several factors the trial court's finding that the Act's prohibition against any building rendered the Lucas properties totally "valueless," a determination that the United States Supreme Court noted and accepted for purposes of its decision. The narrow issue addressed by the United States Supreme Court was "whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.'" As suggested by the analysis of the Court's development of its land use regulatory takings jurisprudence, and particularly by the substance of the 1987 trilogy, the Court both decided the narrow issue in favor of Lucas and delivered a landmark addition to the regulatory takings doctrine. Given the broad potential impact of this decision on the doctrine—and on the viability of a nuisance exception to the doctrine, the scope of the Takings Clause, and the sanctity of individual rights under the United States Constitution—a thorough examination of each of the five opinions is essential to an analysis of Lucas's effect on the regulatory takings doctrine.

The majority opinion, written by Justice Scalia and joined by Chief Justice Rehnquist and Justices White, O'Connor and Thomas, began in accordance with the Court's post-Pennsylvania Coal pattern by addressing the issue of ripeness. In conformance with the First English opinion and the four-justice dissent in Keystone, the majority chose to forego an obvious opportunity to avoid deciding the merits, a route that would have been available by a holding that Lucas had failed to exhaust his remedies or achieve a final decision because of the 1990 Amendment to the Act permitting the Coun-

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163. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898-99 (S.C. 1991) ("Finding that the regulation under attack prevented a use seriously harming the public, we have concluded that no regulatory taking has occurred."); rev'd, 112 S. Ct. 2886 (1992). It is noteworthy that the two dissenting justices of the South Carolina Supreme Court, while acknowledging that the Mugler line of cases allowed governmental prohibition of "noxious" uses of property, did not characterize the Act's "primary purpose [as] the prevention of a nuisance." Lucas, 404 S.E.2d at 906 (Harwell, J., dissenting).

164. See Lucas, 404 S.E.2d at 900 (claiming that "economically viable use" test "is not the dispositive test in all cases").

165. See Lucas, 112 S. Ct. at 2890.

166. Id. at 2889.

167. See, e.g., supra note 91 and accompanying text.

168. See Lucas, 112 S. Ct. at 2890.

cil to grant special permits for certain construction.\textsuperscript{170}

The majority's opinion on the merits of the takings question is largely the application, with clarification, of the Chief Justice's analysis in his \textit{Keystone} dissent to the \textit{Lucas} factual context. The Court once again expressly reaffirmed the well-established regulatory takings doctrine, first articulated in \textit{Pennsylvania Coal}, by quoting emphatically the maxim that "'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"\textsuperscript{171} The Court further reaffirmed that doctrine by actually finding for the first time since \textit{Pennsylvania Coal} that a regulation not involving any physical invasion amounted to an unconstitutional taking of private property requiring compensation.\textsuperscript{172} The majority acknowledged that past decisions had "offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment"\textsuperscript{173} and then proceeded to clarify the factors relevant to the inquiry and their proper application under the \textit{Pennsylvania Coal} balancing test.\textsuperscript{174}

While the majority reaffirmed its "'70-odd years' of preference "for determining how far is too far" by engaging in "essentially ad hoc, factual inquiries" rather than by applying any "set formula,"\textsuperscript{175} it emphatically pointed out that the Court has long recognized two categories of land use regulatory action that generally require awarding just compensation "without case-specific inquiry into the public interest advanced in support of the restraint."\textsuperscript{176} The first category consisted of regulations that involve some physical invasion of the property.\textsuperscript{177} As discussed earlier, the Court's decisions had for some time left no doubt that such invasive regulations virtually always constitute an unconstitutional taking warranting compensation.\textsuperscript{178} The second category of regulations whose burden was almost automatically compensable—regardless of the validity of the state interest—were those situations "where regulation denies

\textsuperscript{170. See \textit{Lucas}, 112 S. Ct. at 289'.}
\textsuperscript{171. \textit{Id.} at 2893 (quoting \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922)).}
\textsuperscript{172. See supra note 26 (listing cases in which the Supreme Court has struck down land use regulations).}
\textsuperscript{173. \textit{Lucas}, 112 S. Ct. at 2893.}
\textsuperscript{174. See \textit{id.} at 2893-95.}
\textsuperscript{175. \textit{Id.} at 2893 (quoting \textit{Penn Central}).}
\textsuperscript{176. \textit{Id.}}
\textsuperscript{177. \textit{Id.}}
\textsuperscript{178. \textit{Id.} ('[N]o matter how minute the intrusion, . . . we have required compensation.'). See supra notes 62-65 and accompanying text.
all economically beneficial or productive use of land."\textsuperscript{179} Again, as evidenced by the applicable language of \textit{Agins},\textsuperscript{180} \textit{Keystone},\textsuperscript{181} and the other cited authorities,\textsuperscript{182} the majority apparently created no new scheme or rule.\textsuperscript{183} Rather, Justice Scalia confirmed and—given the confusion resulting from the contrary implications of the Court's facial decisions in \textit{Agins} and \textit{Keystone}—also provided useful clarification of the rule clearly stated in \textit{Agins} that the Fifth Amendment is violated when land use regulation "does not substantially advance legitimate state interests \textit{or denies an owner economically viable use of his land}."\textsuperscript{184}

In clarification of the rule that deprivation of all beneficial use of land generally constitutes a taking requiring just compensation, irrespective of the legitimacy of the state's interests in effecting that deprivation, the majority explained simply that, from the landowner's point of view, total deprivation is the equivalent of physical appropriation.\textsuperscript{185} In addition, the majority expressed its belief that the reaffirmed rule reduced the risk of the state pressing private property into public service under the guise of mitigating serious public harm.\textsuperscript{186} As has been often judicially recognized, the issue involved in takings controversies is not whether property may be taken for public use, but rather whether the cost, as a matter of "fairness and justice," should be borne by the individual property owners or by the benefiting taxpayers.\textsuperscript{187} Justice Scalia concluded that the "sacrifice \textit{of all} economically beneficial uses in the name of the common good" is for good reason generally an unconstitutional taking.\textsuperscript{188}

\textsuperscript{179} \textit{Lucas}, 112 S. Ct. at 2893.
\textsuperscript{180} See \textit{Agins} v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that a taking has occurred if a zoning regulation "denies an owner economically viable use of his land").
\textsuperscript{183} But see \textit{id.} at 2909-14 (Blackmun, J., dissenting) (arguing that the majority had in fact created a new "takings" scheme with its decision).
\textsuperscript{184} \textit{Id.} at 2894 (quoting, with emphasis, \textit{Agins}, 447 U.S. at 260).
\textsuperscript{185} See \textit{id.} at 2894.
\textsuperscript{186} \textit{Id.} at 2894-95.
\textsuperscript{187} See, e.g., \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960).
\textsuperscript{188} \textit{Lucas}, 112 S. Ct. at 2895. Subsidiary but related questions involve the determination of when an owner has been deprived of all use and value and the appropriate property interest to be used to measure the loss in value. On the first issue, the South Carolina trial court found a complete deprivation of all use and value—a determination that the United States Supreme Court accepted—even though the statute permitted the construction of certain nonhabitable improvements, such as a wooden walkway or deck.
The majority also addressed the South Carolina Supreme Court's conclusion that a regulation whose purpose is to prevent "great public harm" does not require compensation to be paid under the "harmful or noxious uses" principle in the *Mugler* line of cases. Justice Scalia explained at some length that while certain of the Court's earlier opinions suggested that "harmful or noxious uses" of property could be proscribed without the requirement of compensation, such a purpose in itself could not be conclusive. The conclusion that such a purpose in itself could be determinative was based on an incomplete understanding of the history and narrow applicability of the noxious-use principle to land use regulatory takings cases.

The noxious-use principle developed in the *Mugler* line of authority was in fact "merely [the Court's] early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value" and was neither intended nor allowed by the Court to except from payment of just compensation the regulatory deprivation of all beneficial use of the land. Interpreting the language of the Fifth Amendment, the majority explained that complete deprivation is possible without compensation only where there is no actual taking of property because "the proscribed use interests were not part of his title to begin with." In other words, because the common-law "bundle of rights" in land has never included the right to use the land in a noxious manner, a regulation that does nothing more than prevent or abate such a noxious use takes nothing and warrants no compensation. Accordingly, the majority acknowledged that in the extremely

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*Id.* at 2889-90 & n.2. In their dissents, Justices Blackmun and Stevens argued that the trial court's finding was clearly erroneous. *Id.* at 2908 (Blackmun, J., dissenting); *Id.* at 2925 (Stevens, J., dissenting). The Supreme Court skirted the second issue because Lucas's asserted interest was a full fee-simple title. The Court recognized that the determination of deprivation of all economically feasible use must take into account the property interest against which the loss in value is to be measured, but acknowledged that uncertainty exists as to the method by which this should be determined. *See id.* at 2894 n.7.

189. *See id.* at 2897-99 ("'Harmful or noxious use' analysis was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests.'" (citations and internal quotations omitted)).

190. *See id.* at 2897; *supra* text accompanying notes 112-134.

191. *See supra* text accompanying notes 153-162 (discussing Chief Justice Rehnquist's dissenting opinion in *Keystone*).


193. *Id.* at 2899.

194. *Id.*
unlikely event that the building of homes on Lucas's beachfront lots could be found to constitute a common-law nuisance under established South Carolina principles of nuisance and property law, Lucas could be denied just compensation.\footnote{Id. at 2901-02. The Court warned, however, that common-law principles "rarely support prohibition of the 'essential use' of land." Id. at 2901 (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).}

In his concurring opinion, Justice Kennedy agreed with the majority that the \textit{Lucas} matter was ripe for decision and that in general an owner of land that is rendered valueless by a state regulation is entitled to just compensation under the Takings Clause of the Fifth Amendment.\footnote{See id. at 2902-04 (Kennedy, J., concurring).} Justice Kennedy also agreed that the constitutional right to compensation, even for deprivation of all use of land, is subject to some limitation. Like the majority, he would allow states to prevent or abate uses that constitute common-law nuisances without paying compensation to affected landowners. However, Justice Kennedy would also deny compensation to landowners whose property was rendered valueless by land use regulations that are within the reasonable expectations of those landowners.\footnote{See id. at 2903 (Kennedy, J., concurring) ("[C]ourts must consider all reasonable expectations whatever their source.").} He argued that "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society."\footnote{Id. (Kennedy, J., concurring).} Justice Kennedy's somewhat broader limitation on the payment of compensation would permit more governmental flexibility to respond to changing circumstances.

The dissenting opinion of Justice Blackmun is a scathing criticism of virtually every aspect of the majority opinion, which in his view "launches a missile to kill a mouse."\footnote{Id. at 2904 (Blackmun, J., dissenting).} Justice Blackmun began by arguing that because Lucas's claim was neither ripe nor justiciable, it should not have been reviewed.\footnote{See id. at 2906-08 (Blackmun, J., dissenting).} He then asserted that the Court's decision to hear the case based on the record below was inappropriate because "the trial court's finding that the property had lost all economic value . . . is almost certainly erroneous."\footnote{Id. at 2908 (Blackmun, J., dissenting) (noting that courts "have recognized that land has economic value where the only residual economic uses are recreation or camping").} Justice Blackmun characterized as "a new scheme" the majority's assertion that application of the long-recognized two-pronged \textit{Agins} takings test dictates that "where regulation denies all economically
beneficial or productive use of land,” compensation is generally required without inquiry into the underlying legitimate state interest.\textsuperscript{202} The remainder of Justice Blackmun’s dissent was directed to pointing out certain shortcomings of the majority’s categorical rule over a less certain, but more flexible, ad hoc approach, and to highlighting inconsistencies between the majority’s perspective on the role of the \textit{Mugler} line of cases and the actual language of those cases, which suggests that a state may constitutionally prohibit even all use of property to prevent public harm.\textsuperscript{203}

As precise and persuasive as Justice Blackmun’s dissent appears, its logic is not convincing. The \textit{Mugler} line of authority developed in the context of defining the scope of police power under the Due Process Clauses of the Fifth and Fourteenth Amendments.\textsuperscript{204} Furthermore, it was inappropriately grafted onto the unrelated regulatory takings doctrine with which it has never been consistent.\textsuperscript{205} Justice Blackmun suggested no alternative approach to alleviate the long-existing confusion in the law of regulatory takings, although he implied that a balancing of the sufficiency of the public interest with the significance of the private cost would be involved.\textsuperscript{206} Justice Blackmun did not, however, actually take a position on whether the Act effected a taking as to Lucas under the Fifth Amendment.

Although Justice Stevens did conclude that “the Act did not effect a taking of petitioner’s property,”\textsuperscript{207} his dissent was otherwise much in accord with that of Justice Blackmun. Arguing that Lucas had not yet suffered a permanent taking and had not demonstrated any injury-in-fact to justify a temporary takings claim, Justice Stevens would also have declined review.\textsuperscript{208} Like Justice Blackmun, he asserted that the Court had adopted a new categorical rule rather than affirmed an existing rule. In Justice Stevens’s judgment, the Court’s new rule was “an unsound and unwise addition to the law” and the Court’s formulation of the exception to the rule was “too rigid and too narrow.”\textsuperscript{209} After arguing that the majority’s arbitrary

\textsuperscript{202} Id. at 2909 (Blackmun, J., dissenting). Justice Blackmun further suggested that the majority rule shifts “the burden of showing the regulation is not a taking” to the legislature itself. \textit{Id.}

\textsuperscript{203} See, \textit{id.} at 2910-12 (Blackmun, J., dissenting).

\textsuperscript{204} See \textit{supra} text accompanying notes 112-134.

\textsuperscript{205} See \textit{supra} text accompanying notes 135-162.

\textsuperscript{206} See \textit{Lucas}, 112 S. Ct. at 2912 (Blackmun, J., dissenting).

\textsuperscript{207} Id. at 2925 (Stevens, J., dissenting).

\textsuperscript{208} Id. at 2917-18 (Stevens, J., dissenting).

\textsuperscript{209} Id. at 2918 (Stevens, J., dissenting).
approach will prove unworkable, 210 Justice Stevens suggested that his approach would be to consider "the risk[s] inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature." 211 Based on such considerations, even "assuming that [Lucas's] property was rendered valueless" by the Act, Justice Stevens was not persuaded that a taking of Lucas's land had been effected. 212

In the last of the five individual opinions, Justice Souter stated merely that he would vote to dismiss the writ of certiorari because in his view it was improvidently granted, given the questionable determination of the trial court that Lucas was actually deprived of the entire economic interest in his land. 213 Because the procedural posture of the case did not allow the Court to review that determination or attempt to clarify the concept of a "total" taking, Justice Souter argued that the indirect approach to the issue taken by the majority would merely engender more confusion in an already-confused area of takings jurisprudence. 214

V. THE NUISANCE EXCEPTION AFTER LUCAS

The nuisance exception to the regulatory takings doctrine was the result of a grafting in Keystone of the parallel, but older and unrelated, nuisance doctrine onto the evolving land use regulatory takings doctrine first articulated by Justice Holmes in Pennsylvania Coal in 1922. 215 The merger of these inherently incompatible doctrines was particularly startling because just three months after deciding Keystone, the Court in Nollan stated unequivocally that where the regulation of property is involved, the standards applicable to takings challenges are not identical to those sufficient to sustain a due-process challenge. 216

Although the majority's treatment of the so-called nuisance exception in Lucas involved only the category of takings cases where the economic impact is a total deprivation of use, the articulated basis for its severe limitation of the "noxious use" principle is appli-

210. See id. at 2918-25 (Stevens, J., dissenting) (claiming that the holding "effectively freezes the State's common law" and "arrest[s] the development of the common law," preventing legislatures from implementing "new learning").
211. Id. at 2925 (Stevens, J., dissenting).
212. Id.
213. See id. at 2925-26 (Statement of Souter, J.).
214. Id.
215. See supra text accompanying notes 135-162.
cable to all land use regulatory takings cases. The majority began in the manner of Chief Justice Rehnquist’s *Penn Central* dissent\(^2\) by focusing on two of the key words in the Takings Clause, “property” and “taken.” It reasoned that under common-law nuisance principles no owner of land had any right to use his land in a manner harmful to others. Accordingly, a regulation that had the effect of preventing or abating such an unlawful use took nothing at all.\(^2\) In other words, the Court corrected its inadvertent and irrational creation of a nuisance exception in *Keystone* by excising the exception *qua* exception from the well-established, and once again reaffirmed, regulatory takings doctrine. This excision of traditional nuisance abatement regulations from compensable takings does not lessen, however, the importance of the governmental purposes in support of a regulation challenged by an affected property owner, except where the regulation falls into one of the two categories—physical invasion or deprivation of all use—that virtually always involve a compensable taking.\(^2\)

Then-Justice Rehnquist’s dissenting opinion in *Penn Central* attempted to carve nuisance control out of the general exercise of the police power by arguing that “[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.”\(^2\) Fairly read, Justice Rehnquist seemed to be saying that not all police power enactments can automatically be read as nuisance-preventing.\(^2\) Rehnquist’s *Penn Central* opinion would narrow the exception to only those uses of land that are dangerous to others’ health, safety, and welfare.\(^2\)

The majority opinion in *Keystone* also pointed out that nuisance prevention does not take anything from the property owner because no individual has a right to use his property in a manner that harms


\(^2\) See *Lucas*, 112 S. Ct. at 2899.

\(^2\) See id. at 2893.


\(^2\) There is some disagreement over the correct interpretation of the quoted sentence. See Connors, *supra* note 12, at 145; Epstein, *supra* note 95, at 20-21; Kmiec, *supra* note 139, at 1634 n.27 (noting the different readings of the quoted language by Justices Rehnquist and Stevens).

\(^2\) *Penn Cent. Transp.*, 438 U.S. at 145 (Rehnquist, J., dissenting); see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) (discussing the narrowing principles applied to the nuisance exception); Kmiec, *supra* note 139, at 1634 (discussing the treatment in those two cases of the nuisance principle).
However, the *Keystone* opinion went to great lengths to establish that the mine owners were not deprived of all use of their property, and that the coal required to remain in place was only a small part of all of the coal left to be mined. Thus, it is unnecessary to find an inherent conflict between *Keystone* and *Agins*. Because the *Keystone* majority found that the mine owners had not been deprived of all use of their property, the *Agins* holding remains good law when all use or value has been lost. This seems clear from a close reading of *Keystone*. Citing *Mugler* and the subsequent “nuisance” cases, the *Keystone* Court held that a “‘prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking . . . .’” The emphasized language can fairly be read to indicate that harm-producing uses may be prohibited as long as other uses are allowed.

The *Lucas* decision remedies the vague manner in which the *Keystone* majority applied the nuisance test. In assessing the “character of the governmental action,” the Court in *Keystone* found that the state sought to stop “a significant threat to the common welfare,” which implicated “important public interests.” The Court referred to the object of the regulation as being “akin to a public nuisance,” “tantamount to public nuisances,” and “similar to public nuisances.” However, the line between nuisance and abuse of the police power becomes increasingly hard to draw; soon,

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224. See *id.* at 493-99. In *Lucas*, the South Carolina Supreme Court attempted to demonstrate that the *Keystone* deprivation analysis was not dispositive but was used only to show that the plaintiff had failed to meet that test as well. See *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 901 n.4 (S.C. 1991), rev’d, 112 S. Ct. 2886 (1992). In his *Keystone* dissent, Chief Justice Rehnquist emphasized that the Court had never held, even in the so-called nuisance cases, that a regulation can completely extinguish all use or value without compensation. See *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). Contrary to the assertion of the South Carolina *Lucas* opinion, *Keystone* did follow the two-prong test recognized in *Penn Central* and *Agins*, and explicitly applied both tests. See *id.* at 485 (“The two factors . . . have become integral parts of our takings analysis.”).
228. *Id.* at 488.
229. *Id.* at 491.
230. *Id.* at 492; see generally *Michelman*, *supra* note 220, at 1602 (recognizing the traditional notion that “regulations of uses classed as socially harmful or nuisance-like ordinarily cannot be considered takings”).
it is feared, every exercise of police power controlling a "nuisance-like" use would be exempt from Takings Clause scrutiny. Broadening the application of *Mugler* in this manner would eviscerate the Takings Clause.231 Justice Stevens’s majority opinion in *Keystone* equated nuisance prevention with broad regulation in the public interest, greatly expanding the scope of the exception.232

It is curious that the *Keystone* majority concluded that subsidence mining was analogous to nuisance avoidance.233 Clearly the regulation was substantially related to a valid public purpose, whether or not the coal company’s activity constituted a nuisance. After finding the first prong of the *Agins* test satisfied, the opinion went on to find that the coal companies could still make economically viable use of their property,234 that the coal required to remain in place did not constitute a separate property interest,235 and that the loss of the support estate did not constitute a total deprivation of an interest in property.236 Because both prongs of the *Agins* test had been met, the majority could have rejected the challenge to the Subsidence Act without the nuisance analogy.237

Analyzing precedent in light of the categorical rule presented in *Lucas*, the Court made it clear that consideration of the noxiousness of the proposed use is relevant to assessing the state’s legitimate interest in regulating that use, that is, to the first prong of the *Agins*

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231. See Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 905 (S.C. 1991) (Harwell, J., dissenting), rev’d, 112 S. Ct. 2886 (1992). Justice Harwell warned that *Keystone* “does not hold that every exercise of police power can escape the Constitution by calling that which it seeks to prevent a nuisance” because this would “become an exception which would swallow the rule.” *Id.*

232. See *Keystone*, 480 U.S. at 488, 492. The most important court to accept Justice Stevens’s invitation to broaden the scope of the nuisance exception was, of course, the South Carolina Supreme Court in *Lucas*, which deprived Lucas of compensation because of the nuisance exception, without regard to destruction of his property values. The South Carolina Supreme Court appears to have read even more into Justice Stevens’s invitation than he intended. See *Lucas*, 404 S.E.2d at 901 n.4; see also *supra* notes 109-111, 223 and accompanying text (discussing the nuisance exception as applied in *Keystone*).

233. See *supra* notes 148-152, 155-157 and accompanying text.


235. *Id.* at 498-99.

236. *Id.* at 500-02.

237. See, e.g., Miller v. Schoene, 276 U.S. 272, 280 (1928) (finding a valid exercise of police power to prevent a public harm, without making extensive nuisance findings); see also Connors, *supra* note 12, at 144-46 (noting that “the actual holding is unrelated to the nuisance exception” and adding that “the very fact that the majority had to fall back on the quantitative test as its holding suggests reluctance on the part of some members of the majority to accept the exception as applied by Justice Stevens”); Michelman, *supra* note 220, at 1603.
The second prong of the *Agins* test, whether all use or value of the property has been denied, is part of the new categorical test decreed in the *Lucas* opinion. At the same time that the Court created this categorical test, it recognized a "nuisance exception" to the test, distinct and separate from the examination of the use under the first *Agins* prong. However, the Court greatly narrowed the scope of the nuisance exception, finding that compensation can be denied only when the use would constitute a nuisance under "background principles of the state's law of property and nuisance already place[d] upon land ownership." Because the Supreme Court drew the exception so narrowly, compensation will be denied only when background principles of nuisance and real property law dictate, and not when the state legislature declares that the particular use is contrary to the public interest.

By limiting the extent of the discretion and authority of the state legislature to regulate without paying compensation, the Supreme Court rejected the holding of the South Carolina Supreme Court that a legislative declaration of serious public harm was sufficient to deny a property owner compensation. The Supreme Court recognized that if the legislature has the power to declare which regulations entitle an owner to compensation and which do not, the protection intended by the Fifth Amendment would be lost. In reaching this conclusion, the Court reaffirmed the language in *Pennsylvania Coal* that warned of "the natural tendency of human nature ... to extend the qualification more and more until at last private property disappears." The *Lucas* Court recognized that a contrary holding would result in all governmental police-power regulations being self-justifying because a legislature could always clothe its enactments in the appropriate supportive

239. *Id.* at 2893-94.
240. *Id.* at 2900; see Connors, supra note 12, at 179-80; Lawrence, supra note 113, at 414 &n.158 (stating that "where a traditional harm preventative function seemed unequivocally paramount, even Chief Justice Rehnquist proved willing to imagine an uncompensated denial of all use" (citing *First English*)).
242. See *id.* at 2890.
243. *Id.* at 2899.
244. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), quoted in *Lucas*, 112 S. Ct. at 2893. In *Pennsylvania Coal*, Justice Holmes warned of the "danger of forgetting 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." 260 U.S. at 416.
wording. Of necessity, there must be a distinction for purposes of the Takings Clause between the exercise of the police power generally and its exercise to abate a nuisance. If every regulation designed to avoid a public harm were to be characterized as nuisance prevention, then under the majority opinion in Keystone, compensation would never be due and Fifth Amendment protection would be a nullity. But the Fifth Amendment was intended to be a limitation on governmental authority. To allow a governmental entity to define the uses for which it is not obligated to compensate, that is, to set the parameters of its own liability, would deprive the Takings Clause of its protective purpose. To the extent that courts balance private rights against the public interest, a broad view of nuisance prevention based on legislative findings would destroy the position of private property interests in the balancing process. The Lucas Court very clearly refused to allow regulations that destroy all economically beneficial use to be "newly legislated or decreed."

There is obvious danger in equating a legislative declaration of public purpose with "nuisance prevention." Most statutes contain broad public policy statements in sections dealing with legislative intent, findings, or purpose. If the courts fail to look beyond these statements, it would be all too easy for skillful drafting to ob-

245. See Lucas, 112 S. Ct. at 2898 n.12, 2899 (quipping that this would "amount[ ] to a test of whether the legislature has a stupid staff"). Nor should courts label a proposed use a nuisance and deny just compensation solely because the legislature chose to regulate the use. See Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 168 (1990) ("[T]he assertion that a proposed activity would be a nuisance merely because Congress chose to restrict, regulate, or prohibit it for the public benefit indicates circular reasoning that would yield the destruction of the fifth amendment."); Kmiec, supra note 139, at 1632 (citing both the majority and dissenting opinions in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)).


248. Lucas, 112 S. Ct. at 2900.

249. The South Carolina Beachfront Management Act itself contains a long list of the reasons for prohibiting construction in the beach and dune area, including: protecting life and property by serving as a storm barrier; promoting tourism; preserving plant and animal habitat; maintaining a natural healthy environment for recreation and the overall well-being of South Carolina citizens; preserving unique vegetation; avoiding the danger from bulkheads and other man-made beach erosion protection devices; halting the interference of uncontrolled development with the natural erosion process; and increasing public access to the beach. See S.C. CODE ANN. § 48-39-250; Lucas, 112 S. Ct. at 2896 n.10.
literate constitutional protection. For example, although all the objectives of the South Carolina Beachfront Management Act were important and substantially served valid public purposes, none, with the possible exception of the protection of life and property by maintaining the beach dune storm barrier, could be considered prevention of a traditionally recognized nuisance.\textsuperscript{250} Lucas, of course, conceded that the regulation was necessary to prevent great public harm,\textsuperscript{251} but he never conceded that it was necessary to prevent a public nuisance.

Under a broad interpretation of the nuisance exception, any legislative declaration of great public harm could constitute nuisance prevention and allow the government to prevent all use of property. A combination of the nuisance exception, broadly read as in \textit{Keystone} and the South Carolina Supreme Court’s opinion in \textit{Lucas}, and the application of the \textit{Mugler} rule, would allow regulation to render a person’s property valueless without the right to compensation. The nuisance exception would soon swallow the just compensation rule.\textsuperscript{252} The \textit{Lucas} majority rightly chose to follow the very narrow construction given the nuisance exception in Chief Justice Rehnquist’s \textit{Keystone} dissent,\textsuperscript{253} finding it applicable only when a regulation prevents a landowner from inflicting a traditional public nuisance on his neighbors.\textsuperscript{254}

The broad view of the nuisance exception has also been rejected in several recent decisions of the Federal Court of Claims.\textsuperscript{255}

\begin{itemize}
\item \textsuperscript{250} The dissent in the South Carolina Supreme Court \textit{Lucas} opinion concluded that none of the activities prohibited by the Act constitute “noxious uses.” \textit{Lucas} v. South Carolina Coastal Council, 404 S.E.2d 895, 906 (S.C. 1991) (Harwell, J., dissenting), \textit{rev’d}, 112 S. Ct. 2886 (1992).
\item \textsuperscript{251} \textit{Id.} at 898. \textit{See also id.} at 906 (Harwell, J., dissenting) (“Lucas has conceded the ‘laudable’ goals of the Act and does not challenge the legitimacy of its public purpose.”).
\item \textsuperscript{252} \textit{Keystone} Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 512-13 (1987) (Rehnquist, C.J., dissenting); \textit{see also} Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 168 (1990) (arguing that it would be circular logic to find that a proposed activity is a nuisance simply because Congress regulates it); \textit{Epstein, supra} note 220, at 109, 114-23; \textit{Connors, supra} note 12, at 143, 145, 183-84 (using an “anti-harm” definition would embrace almost all valid exercises of the police power); \textit{Lawrence, supra} note 113, at 395. Professor Michelman pointed out that all of the justices in \textit{Keystone} agreed that the nuisance exception should not be read so broadly as to nullify the constitutional provision. \textit{Michelman, supra} note 220, at 1603.
\item \textsuperscript{253} \textit{Keystone}, 480 U.S. at 512-13 (Rehnquist, C.J., dissenting).
\item \textsuperscript{254} \textit{Connors, supra} note 12, at 184 (commenting that to do otherwise would “lead to inconsistent results, dependent on the personal traits of the judge making the takings decision, [and] would also politicize the takings decision”).
\item \textsuperscript{255} \textit{See Florida Rock}, 21 Cl. Ct. at 167 (holding that the nuisance exception was clearly inappropriate); \textit{Loveladies Harbor, Inc. v. United States}, 21 Cl. Ct. 153, 154 (1990) (indicating that the proposed use of the property did not bring the case within the nuisance exception).
\end{itemize}
Although these cases involved wetlands regulation—thus encompassing a highly esteemed public goal—and implicated serious public policy concerns, the Court of Claims held that owners of property rendered useless by federal wetlands regulation were entitled to compensation. Rejecting claims by the Army Corps of Engineers that the landowners were not entitled to compensation because they were engaging in nuisance-like activities, the Court of Claims restricted the doctrine to only those uses constituting common-law nuisances. If the Court of Claims had instead applied the majority opinion in Keystone, it probably would have been compelled to find that dredging or filling a wetland was a "nuisance-like" activity, which therefore, could be prohibited without producing a regulatory taking.

The Lucas Court concluded that it could not base the distinction between when and when not to compensate on a prevention-of-harmful-use motive or on a distinction between statutes that prevent harm and statutes that confer benefits, and then sought a new test to resolve the question. Apparently seeking a bright-line standard, the Court attempted to fashion a clear test: A use can be prohibited without the requirement to pay compensation—even if it is the only use to which the property can be put—if that use constitutes a traditional nuisance under state law. Viewed in this context, it is evident that the Takings Clause was not intended to apply to long-standing common-law nuisances. Traditionally, courts could not


256. See generally Hwang, supra note 7, at 2-3, 36-38.

257. Florida Rock, 21 Cl. Ct. at 167; Loveladies Harbor, 21 Cl. Ct. at 161. The Supreme Court has recognized that the rightful denial of a dredge or fill permit can lead to a takings claim if it leaves the owner no economically viable use of property. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) ("Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.").


259. Florida Rock, 21 Cl. Ct. at 167 (holding that rock mining was not a public nuisance); Loveladies Harbor, 15 Cl. Ct. at 396 (ruling that filling in wetlands was not a public nuisance); see also Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), cert. denied 479 U.S. 1053 (1987).


261. Id. at 2900.

262. See Kmiec, supra note 139, at 1639-40 ("[A] nuisance-based definition of private property is in harmony with a constitutional structure designed to counteract the majoritarian tendency to isolate individual citizens for disproportionate burdens.").
fashion a remedy more broadly than was necessary to cure the nuisance; therefore, nuisance prevention was a limited exception with a limited remedy.\textsuperscript{263}

This test was chosen because it embodied a self-evident proposition. If the regulated use could be enjoined in a public or private action, then the property owner would have no property interest in his ability to continue that use. When the challenged regulation deprived him of that already-actionable use, the property owner was entitled to no compensation because he had no redressable property right in the first place.\textsuperscript{264}

The critical question raised by the nuisance exception is whether compensation is due for a regulation that prohibits a traditional nuisance, yet deprives the owner of all use of his property. If an absolute nuisance exception exists, the answer should be that compensation is not available to the property owner, as the \textit{Lucas} Court concluded.\textsuperscript{265} This answer is a strong argument for a very narrow interpretation of the nuisance exception. The exception should apply only in exigent circumstances involving severe and immediate threats to public health or safety where the regulation is designed specifically to control the danger. Only with a narrow interpretation could Fifth Amendment compensatory rights be protected. The opposite conclusion, that compensation is necessary despite the regulation's focus on preventing a traditional nuisance, would require a per se rule of compensation for any regulation that renders property entirely unusable. This answer is too expansive a reading of the Takings Clause; there is no explicit support for it in any of the takings cases. To expand on \textit{Pennsylvania Coal}'s oft-cited warning, "[g]overnment could hardly go on if [the State is liable per se] for every . . . change in the general law."\textsuperscript{266}

Under the \textit{Lucas} analysis, would shoreline regulation qualify as nuisance-prevention regulation?\textsuperscript{267} Shoreline regulation addresses

\textsuperscript{263} See id. at 1640.

\textsuperscript{264} See \textit{Lucas}, 112 S. Ct. at 2899-2900 (recognizing an implied limitation on the use of property for activities outside the "bundle of rights" attached to the title); see also Berger, supra note 55, at 771 (discussing cases in which particular noxious uses were precluded without compensation).

\textsuperscript{265} \textit{Lucas}, 112 S. Ct. at 2901-02 (noting that, on remand, South Carolina could prevail only if it could "identify background principles of nuisance and property law that prohibit the uses \textit{[Lucas]} now intends in the circumstances in which the property is presently found").

\textsuperscript{266} See \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 413 (1922).

\textsuperscript{267} Cf. \textit{Lucas}, 112 S. Ct. at 2900 ("On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others'
long-term erosion and other beach damage caused by overbuilding. However, while it does seek to prevent harm to the community in general, it does not seek to prevent exigent dangers to health or safety, as envisioned by Justice Rehnquist's *Penn Central* dissent. Although it has been argued that coastal setback regulations should be classified as nuisance-preventing on the theory that the problem is a pre-eminently public safety concern, more often than not, the regulations are designed to prevent damage to the regulated property itself, rather than to other properties. These problems at least raise the question of whether shoreline regulations are meant to prevent a traditional nuisance, to impose paternalistic controls on private property, or to exact a public good at private cost.

Fashioning a just compensation test based on private nuisance law and background principles of state property law avoids the problem of state legislatures defining and redefining private property rights to avoid situations in which they owe compensation under the Fifth Amendment. The *Lucas* opinion seeks a firmer foundation by requiring, in situations of total deprivation of use, that any limitation on an owner’s property rights relative to governmental regulation “inhere in the title itself,” not in the legislative decree.

VI. THE REGULATORY TAKINGS DOCTRINE AFTER *Lucas*

The majority opinion in *Lucas* has injected some certainty and much-needed guidance into land use regulatory takings jurisprudence. A nuisance-abatement statute is a valid exercise of the police power; it does not, assuming it meets the rational-basis standard,
 violate the Constitution’s Due Process Clauses. Because it takes no recognized property right, it does not constitute a taking of property. 273 When a land use regulation goes beyond prohibiting a common-law nuisance, however, it will cause a taking warranting just compensation for any affected property owners under the reaffirmed Pennsylvania Coal quantitative balancing test if the regulation fails to “substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.” 274 After Lucas, there no longer is any question whether “or” means “or.” A taking occurs irrespective of the first Agins prong if the property owner is denied economically viable use of his land, either because it involves a physical invasion or because it renders the land entirely valueless. 275

As the majority suggests, however, the vastly greater number of controversial land use regulations do not involve the control of noxious uses, do further a legitimate state interest, and diminish—but do not destroy—the economic value of the affected properties. 276 The effects of Lucas on the judicial resolution of most land use regulatory takings cases therefore will not be as dramatic as Lucas itself. Yet the opinion contains some clarifying aspects. The per se rule that deprivation of all value mandates just compensation is not applicable to takings challenges involving personal property, such as the prohibition on the sale of eagle feathers in Andrus v. Allard, 277 because of “the State’s traditionally high degree of control over commercial dealings.” 278 Further, in the increasing number of non-categorical cases involving environmental and similar socially desirable regulations, the takings determination will continue to be an ad hoc balancing of the sufficiency of the public interests supported by the regulation under challenge with the significance of the private

273. See id. at 2900-02.
275. Lucas, 112 S. Ct. at 2893. Although Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), is a physical invasion case, the Court reaffirmed that public purpose and effect on property are separate tests:
   The Court of Appeals determined that [the statute] serves the legitimate public purpose of “rapid development of and maximum penetration by a means of communication which has important educational and community aspects,” and thus is within the State’s police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.
Id. at 425 (citations omitted); see also United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (dicta); Kaiser Aetna, 444 U.S. at 174.
276. See Lucas, 112 S. Ct. at 2894.
278. Lucas, 112 S. Ct. at 2899.
costs. As to the private costs, several Justices in *Lucas* suggested that courts should continue to consider the extent of the diminution in value and the extent of any interference with reasonable investment-backed expectations.\(^{279}\) Additionally, as to the public interests enumerated in support of the regulation, courts should evaluate those interests free from the muddling effect of the former nuisance exception.

Although the *Lucas* decision is a landmark development with respect to the scope of “taken” for purposes of the Fifth Amendment, it provided no guidance for defining the proper unit of property for purposes of making a takings determination.\(^ {280}\) As Justice Blackmun correctly pointed out in his dissent, the evaluation of the regulation’s economic impact on a property owner will vary with the parcel of property viewed as taken.\(^ {281}\) The old problem of the three estates in coal mining property,\(^ {282}\) for example, remains unresolved by the *Lucas* contributions to land use regulatory takings jurisprudence. Such problems are inherent in a quantitative ad hoc weighing of relevant factors. Yet they are balanced somewhat by the consequential flexibility. After *Lucas*, courts must still ultimately impose the costs of legitimate and desirable land use regulations on either the public taxpayers who will benefit or on the affected landowners. The analytical framework established by *Lucas* is designed to allow this while achieving “justice and fairness.”\(^ {283}\)

Implicit in the judicial test that balances public gain against private harm is the question of who should fund public resources in a democracy. When regulations prevent an owner from making a publicly harmful use of property, society will tolerate the result even if it causes a large decrease in property values. When the loss is total, however, basic fairness requires that society as a whole bear

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\(^{279}\) See id. at 2895 n.8; id. at 2903 (Kennedy, J., concurring); id. at 2925 (Stevens, J., dissenting).

\(^{280}\) The majority specifically reserved the issue of defining the property interest. *Lucas*, 112 S. Ct. at 2894 n.7.

In *Penn Central*, the Supreme Court did not find a taking even though the Landmarks Preservation Law prohibited entirely the use of the air rights on the property, because *Penn Central* retained the use of the Terminal itself. The Court recognized that there was a diminution of the total value of the parcel (considering the air rights as part of the “bundle of rights” comprising the Terminal property, not as an independent property interest), but found that, as long as the existing use was preserved and some additional subsequent uses were possible, the diminution in value was insufficient to entitle the property owner to relief. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136-37 (1978). *See infra* notes 345-348 and accompanying text.

\(^{281}\) See *Lucas*, 112 S. Ct. at 2913 (Blackmun, J., dissenting).

\(^{282}\) See supra notes 27-32, 96-102 and accompanying text.

\(^{283}\) See supra notes 50-51 and accompanying text.
the cost, rather than the sole property owner.\textsuperscript{284} It is just such loading of the loss on one property owner that the Fifth Amendment was designed to prevent.\textsuperscript{285} Public policy should not be determined by accidents of ownership; rather, society as a whole should pay for societal benefits.

The Supreme Court opinion in \textit{Lucas} created categorical rules for determining when compensation must be paid in the event of certain expansive regulatory takings.\textsuperscript{286} The Court recognized two "discrete categories" of regulatory takings cases in which compensation must be paid per se. The first category is the case of a physical invasion of real estate.\textsuperscript{287} The second category is the case where a regulation denies the property owner all economic use of the property.\textsuperscript{288} In recognizing these two distinct categories, the \textit{Lucas} majority followed the second prong of the \textit{Agins} test literally.\textsuperscript{289}

There is no question that control of nuisance is a proper end of the police power.\textsuperscript{290} To say this, however, only partially addresses the first prong of the two-prong \textit{Agins} test. The larger issue, and the one involved in \textit{Lucas}, is determining what result obtains when government seeks to regulate or prohibit uses in the public interest when those uses are not nuisances in and of themselves. Clearly, government can prohibit or regulate activities in such cases as long as the governmental action substantially advances a legitimate governmental goal.\textsuperscript{291} In all of these cases, however, the courts still must reach the second \textit{Agins} prong and consider the effect of the regulation on the use and value of the land. The cases indicate that

\textsuperscript{284} See \textit{Lucas}, 112 S. Ct. at 2893 (warning that "the natural tendency of human nature" to expand police-power restrictions on private property must be checked).
\textsuperscript{285} The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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.
\textsuperscript{286} \textit{Lucas}, 112 S. Ct. at 2893.
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} See id. at 2893-94.
\textsuperscript{290} See \textit{Epstein, supra} note 220, at 112.
\textsuperscript{291} See \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825, 836-39 (1987); \textit{Agins v. City of Tiburon}, 447 U.S. 255, 261-62 (1980); \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365, 388 (1926). The legitimate-governmental-goal test is not a rigorous test for measuring government action. See \textit{Epstein, supra} note 220, at 109 ("The legitimate state interest test in vogue today is a bare conclusion, tantamount to asserting that the action is legitimate because it is lawful.").
the closer the prohibited use comes to being a traditionally recognized nuisance, the greater the reduction in use and value of the land the courts will tolerate.292 Until the Lucas decision, however, the Supreme Court had not considered the result when the owner was totally deprived of the use or value of his real estate. Despite the Keystone majority's reliance on Mugler, the Supreme Court had never held, even under the nuisance doctrine, that the government can deprive an owner of all use or value.

The rationale for Lucas's categorical rule appears to be related to the oft-stated underlying purpose of the Fifth Amendment: when a regulation leaves a property owner with no economic use of his property, it is more than likely that the property is being used to benefit the public.293 This may be true even though the legislative enactment endeavors to make it appear that the purpose of the regulation is to mitigate serious public harms.294 The Court seems to regard these circumstances as a de facto taking for public use. Viewed in this light, the property owner would be entitled to compensation through direct application of the Fifth Amendment, rather than the indirect approach of an inverse condemnation or regulatory taking action.295

There also may be an argument that Lucas was entitled to compensation under the "character of the government action" factor of the economic viability test. Although this test has been interpreted primarily as referring to a physical invasion of property,296 an argument can be made, based on the purpose and nature of the restrictions in coastal-regulation cases, that an interest in the property virtually has been granted to the public. If beachfront property owners cannot build on their property, then all they have left is bare possession. Such a regulation arguably creates rights in the public, whom the regulation is designed to benefit.297 The property owner must maintain the property for the benefit of the public, whom the landowner has no way of recouping costs or


294. See Lucas, 112 S. Ct. at 2894-95 (warning that regulations designed to preserve land in its natural state "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm").


298. Id.
receiving any return on the property.

This analysis would make the "harmful or noxious use" principle of *Mugler v. Kansas* and its progeny a consideration under the first (substantial advancement) prong of the *Agins* test. If the governmental purpose behind a regulation is controlling a harmful or noxious use, that purpose clearly provides a sufficient police-power basis for the regulation. This analysis merely states that the government has a legitimate goal that permits it to affect property value by regulation without an obligation to compensate. It is entirely consistent with Supreme Court precedent to allow the government to prohibit a particular use without the necessity of paying compensation. The harmful-use inquiry therefore clearly goes to the first prong of the *Agins* test. In the early cases, the nuisance doctrine was used to define the permissible scope of the police power, rather than to create an exception to the requirement of paying just compensation.

A better reading of the case law distinguishes between due process and just compensation. The extent to which a regulation seeks to serve the public interest, including whether it prevents a private property owner from harming public interests, relates to the determination of whether it is a valid police-power measure: does the regulation substantially advance a legitimate state interest? A regulation passing muster under the due-process test then must be examined to see whether it deprives the property owner of all viable use or value. Not until *Pennsylvania Coal Co. v. Mahon* did the

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299. 123 U.S. 623 (1887).
300. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897, 2899 (1992). Justice Scalia warned, however, that this rationale "cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 2899.
306. 260 U.S. 393 (1922).
Supreme Court explicitly decide that a regulatory enactment could be invalidated as a taking if it too severely diminished the value of the property. The relationship between the Due Process and Takings Clauses was succinctly stated by the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*.

"This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." This rationale is consistent with the analytical framework established by the Court in *Agins v. City of Tiburon*.

A regulation violates the Fifth Amendment when it *either* fails to substantially advance a legitimate governmental interest or denies the owner economically viable use of her land.

The Supreme Court opinion in *Lucas* brings considerable order to two seemingly contradictory lines of authority: the Mugler case and its progeny, on the one hand, and *Pennsylvania Coal* and the more-modern takings cases, on the other. In the first instance, the majority simply chose the *Pennsylvania Coal* opinion over the Mugler line of cases. Although the *Lucas* opinion amounted to a rejection of the Mugler principle, it did not overrule or explicitly reject Mugler; rather, the majority distinguished the Mugler line of cases on two separate grounds.

First, the majority distinguished the Mugler line on the basis that those cases did not depend on the noxiousness of the use. The Court pointed out, as it did in *Penn Central*, that the uses involved in the Mugler line of cases were perfectly lawful in themselves and did not constitute common-law nuisances. Second, the *Lucas* majority pointed out that neither Mugler nor any of the other cases in-
volved a total deprivation of use or value of the regulated property.\textsuperscript{315} In all of these cases, the regulation prohibited only one specific use of the property.\textsuperscript{316} The same was true of the early cases upholding government demolition of unsafe structures.\textsuperscript{317} In those cases, the courts held that structures in danger of collapse constituted nuisances and could be demolished without compensation, but that the property owner nonetheless retained title to the underlying property and could put it to any legal use.\textsuperscript{318} However, the conclusion that a public agency can demolish unsafe buildings without payment of compensation does not support the application of the nuisance exception to deny compensation when the property owner has no remaining viable use of the property.

The \textit{Lucas} holding is entirely consistent with the Court's opinion in \textit{Pennsylvania Coal}, and is a clear indication that the \textit{Lucas} Court affirmed the \textit{Pennsylvania Coal} framework in preference to that of the \textit{Mugler} line of cases. The \textit{Pennsylvania Coal} Court, in pointing out that the litigation involved a "single private house," held that a "source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The dam-


\textsuperscript{316} See \textit{Goldblatt} v. Town of Hempstead, 369 U.S. 590 (1962) (prohibiting excavation of sand and gravel below water table); Miller v. Schoene, 276 U.S. 272 (1928) (requiring cedar trees within two miles of apple groves to be cut down); \textit{Hadacheck} v. Sebastian, 239 U.S. 394 (1915) (prohibiting the manufacture of brick on property);


The Court was clear that the owner retained use of the property for any lawful purpose. See, e.g., \textit{Goldblatt}, 369 U.S. at 594 (relying on the absence of evidence in the record of a reduction in property value to indicate that property could still be put to profitable uses); \textit{Hadacheck}, 239 U.S. at 412 (noting that the ordinance prohibited manufacture of brick, but permitted removal of brick clay); \textit{Mugler}, 123 U.S. at 669 ("Such legislation does not disturb the owner in the control or use of his property for lawful purposes . . . .").

The same was true of \textit{Penn Central} to the extent that Justice Brennan's opinion could be read as implying that the New York Landmarks Preservation Law prevented Penn Central from creating a nuisance by alteration or destruction of the facade of Grand Central Terminal. \textit{Penn Cent. Transp. Co. v. New York City}, 438 U.S. 104, 133 n.30 (1978). \textit{Penn Central} was permitted to make any other lawful use of its property. \textit{Id.} at 136.


\textsuperscript{318} See id.
age is not common or public.”

The inherent difficulty in making this type of judgment led the Supreme Court to abandon one of its traditional approaches to takings cases, the analysis of whether the regulation “prevents harmful use” or “confers benefits.” Notably, the harm-versus-benefit test had already been seriously confused in the Court’s *Penn Central* opinion.

The Supreme Court has recognized that the police power is a governmental device to regulate private property to prevent its use in a manner detrimental to the public good. By definition, therefore, almost any exercise of the police power is harm-preventing. If this were the sole criterion for takings-cause analysis, a regulatory taking would rarely, if ever, be found. It was in direct response to this reading of *Mugler* that the Supreme Court evaluated the regulation at issue in *Pennsylvania Coal* and held 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.”

The Supreme Court’s opinion in *Lucas* indicated that the noxious-use rationale that appeared in the earlier cases led to the development of a broader, affirmative police-power basis for determining the validity of governmental regulations. Thus, the justification for noncompensable takings, that began as regulation designed to prevent public harm, metamorphosed into the broader standard of regulation for the public good. However, this portion of the analysis applies solely to the first prong of the *Agins* test: whether the

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319. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). In *Penn Central*, the statement of purpose in the Landmarks Preservation Law indicated that the regulation was not nuisance-based. See *Penn Cent. Transp.*, 438 U.S. at 109.

320. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (1992). Justice Scalia wrote that this “logic cannot serve as a touchstone to distinguish regulatory ‘taking’—which require compensation—from regulatory deprivations that do not require compensation.” *Id.*

321. See supra note 139 and accompanying text; Kmiec, supra note 139, at 1636 (noting that “even though restrictions may be characterized as preventing harms, some may be impermissibly designed to compel benefits”).


323. Cf. Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1177 (Fed. Cir.) (holding that the “public purpose” of a regulation cannot serve as the basis for a finding that, when the entire value of the regulated property is destroyed, no taking has occurred), cert. denied, 112 S. Ct. 406 (1991); Yancey v. United States, 915 F.2d 1534, 1540 (Fed. Cir. 1990) (“[P]roper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking.”).


regulation substantially advances a legitimate governmental interest. While generalized public benefits and harms may be sufficient to sustain a regulation on the grounds of substantial advancement, the Court now clearly recognizes that they are not a basis for depriving a property owner of compensation when the regulation destroys all economic use or value. In this respect, the *Keystone* opinion can be distinguished as holding merely that a regulation designed to prevent mine subsidence is sufficiently related to a valid governmental purpose to avoid a finding that there is a taking on lack-of-substantial-advancement grounds. Because the harm-versus-benefit distinction "is often in the eye of the beholder," it is not a reasonable basis to determine whether compensation should be available under the Fifth Amendment. The subjective nature of the harm-versus-benefit analysis led the *Lucas* Court to abandon it in favor of the categorical test.

The very basis of land use control involves the separation of uses in order to prevent adverse impacts of one use on another. Thus, industrial or other uses involving harmful externalities can be prohibited on land adjacent to residential areas without a taking, provided the owner is left with a reasonable use of the property. This separation of uses can be viewed as nuisance prevention, and justified as a reasonable exercise of the police power, since it is reasonably related to a valid public purpose. Viewed in this context, nuisance control is merely a focus for defining the public interest. Because it meets the first prong of the *Agins* test, it is noncompensable on that basis. In addition, most traditional land use controls, in separating one use from another, do not render property entirely useless, although an owner may be severely restricted in the use of her land to protect neighboring land. As long as the restriction does not deprive the owner of all use or value, the regulation is noncompensable under the second prong of the *Agins* test.

Arguably, the *Pennsylvania Coal* decision itself recognized the appropriate balance between the two prongs. In holding that "some values are enjoyed under an implied limitation and must yield to the police power," the Court recognized that all property

326. See id. at 2897.
330. See Kmiec, supra note 139, at 1636-37.
is subject to governmental regulation in the public interest, such as preventing public harms. On the other hand, if such regulation diminishes value too greatly, "in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."332

A doctrinal benefit of the categorical rule is that it allows a property owner to claim entitlement to compensation under the Fifth Amendment without challenging the validity of the regulation. Lucas himself chose not to challenge the South Carolina Coastal Council regulation. He conceded that it met the due-process test by substantially advancing legitimate governmental interests.333 The South Carolina Supreme Court held, however, that once this concession was made, the property owner was not entitled to compensation; the owner seeking compensation for a regulation that destroys value must challenge the regulation on due-process grounds.334 In so holding, the South Carolina opinion merged the two-pronged test for judging the validity of a regulatory program under the Fifth Amendment. Had this procedure survived Supreme Court review, it would have distorted the judicial process and wasted the time, effort, and resources of the litigants and the judiciary. Moreover, the disjunctive nature of the test was clear from the holdings in Agins and Nollan.335 In the Supreme Court's opinion in Lucas, discussion of the validity of the regulation—as distinct from its effect on property use and value—is a due-process consideration, placed analytically within consideration of whether the regulation

332. Id.
333. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2890 (1992); see generally Hwang, supra note 7, at 23-27 (discussing legitimate governmental interest within the context of shoreline setback regulations).
334. See Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), rev'd, 112 S. Ct. 2886 (1992). If this were a correct statement of the law, no case would ever be decided on the grounds that the regulation cut deeply into value. In order for landowners to prevail on the value issue, they would have to win on lack of substantial advancement grounds. However, once landowners prevail on this ground, the regulation must be held invalid; there would then be no need to decide economic impact (except to determine if there had been a temporary taking during the period the invalid regulation was in effect). As interpreted by the South Carolina Supreme Court, a property owner who lost a takings claim after challenging on due-process grounds could not then argue economic impact because nuisance-prevention would have provided the government with a complete defense.
335. See supra text accompanying notes 70, 78. The analysis in Keystone also discussed both prongs. After establishing the existence of a legitimate state interest, the Court found no taking because the landowner failed to establish a denial of all economically viable use or value of the property. Keystone Bituminous Coal Co. v. Mahon, 480 U.S. 470, 493 (1987). See supra notes 147-152 and accompanying text.
substantially advanced legitimate governmental interests. In recognizing this distinction, the Supreme Court underscored the "or" in the Agins test. A property owner can challenge a burdensome regulation on the first prong of the Agins test, and seek to invalidate it, or accept the regulation as meeting the due-process test but litigate its effect on the value of the property.

It would be useless to require a property owner to challenge the validity of a regulation as a prerequisite to an inverse condemnation suit. As the Court stated in First English, compensation is available under the Fifth Amendment "in the event of otherwise proper interference amounting to a taking." A property owner can challenge a burdensome regulation on the first prong of the Agins test, and seek to invalidate it, or accept the regulation as meeting the due-process test but litigate its effect on the value of the property.

It seems clear that the Lucas opinion will not create a revolution in takings jurisprudence, or open the courthouse and subject governmental entities to a flood of litigation. The holding applies only to situations involving total takings, in which owners are deprived of "all economically beneficial use" of their property. The Court recognized that these cases are relatively rare.

Although it might be hard to imagine a situation in which the only use of land is one that would directly injure neighbors or the public, this limitation results in a more reasonable application of a nuisance exception. Such situations would be rare, but that is

336. See Lucas, 112 S. Ct. at 2897.
337. See id. at 2900 (holding that a compensable taking occurs when a regulation "prohibit[s] all economically beneficial use of land" even if it addresses a legitimate state interest).
339. See Lucas, 112 S. Ct. at 2896.
341. Lucas, 112 S. Ct. at 2899. The Court recognized that even in cases involving less than total deprivation of use or value, the economic impact of the regulation—the extent to which it diminished value and interfered with investment-backed expectations—remains a factor that must be evaluated in the multi-factor analysis. Lucas, 112 S. Ct. at 2895 n.8.

Application of the investment-backed expectations test should favor Lucas. When he purchased his property, other houses existed on adjacent lots (including the lot between the two purchased by Lucas) and on other lots along the same stretch of beach. Id. at 2899. Lucas could well have supposed that he would be permitted to use his property in a manner similar to neighboring property owners.

342. The Court refers to "the extraordinary circumstance" and the "relatively rare" situation of total deprivation of all use or value. Id. at 2894.
343. See Connors, supra note 12, at 169 ("[T]otal elimination of value can be justified without compensation only if the exclusive use of the property is imminently danger-
to be expected when considering an exception to protections included in the Bill of Rights. Because the determination of public health and safety harms is necessarily subjective, an exception to the Takings Clause based on such determinations could lead to real abuse of individual rights.

A holding that compensation is due should not hinder government's authority to regulate for the public benefit. The availability of compensation to a private landowner does not affect the government's ability to impose the regulation;\(^{345}\) in *Lucas* itself, the only issue was the availability of compensation when a regulation was an otherwise proper exercise of the police power. Additionally, the number of cases in which compensation must be paid will be relatively small. Most regulations leave property owners some economically viable use of their property,\(^{346}\) and the courts have held that no compensable taking has occurred even when the loss in value has been great,\(^{347}\) or the remaining use is very small.\(^{348}\)

It will thus be relatively rare for a property owner to be entitled to compensation. This should provide an answer to critics who maintain that the public will be financially unable to implement much-needed regulatory initiatives if compensation becomes a read-

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\(^{344}\) In leading cases establishing the nuisance exception, the Court either did not find a common-law nuisance or did not consider that determination controlling. Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962) (question not controlling); Miller v. Schoene, 276 U.S. 272, 280 (1928) (refusing to decide whether the activity was a common-law nuisance); Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (question not controlling); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (question not controlling).

\(^{345}\) See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1960) (noting that the Fifth Amendment is designed "not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

\(^{346}\) See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1960); Mugler v. Kansas, 123 U.S. 623, 669 (1887). It may not be the use the owner desires or as profitable as the owner expected, but no taking will be found as long as the use is economically viable.

\(^{347}\) See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922); Hadacheck, 239 U.S. at 405; see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926). It is well established that a police power regulation can permissibly deprive an owner of the property's most beneficial use. Goldblatt, 369 U.S. at 592.

ily available remedy. A "crisis" is even less likely in view of the procedural and jurisdictional barriers to relief erected by the Supreme Court.

After Lucas, however, states probably will not be able to prohibit normal real estate development if the effect of the prohibition is to deprive the property owner of all economically beneficial use. The Lucas opinion requires, at least in cases where there is a total taking, that the state compensate property owners when the regulated use consists of normal development activity.

The Lucas majority took notice of the fact that normal development activities almost never constitute a nuisance: "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition . . . ." Lucas was not engaging in a noxious or dangerous activity. His request was to build two single-family homes on two building lots. This activity was no different from what other owners had customarily done with their land in the area; numerous other homes had been built on similarly situated lots adjacent to Lucas's property and nearby. It seems clear that background principles of South Caro-


Even if takings compensation were to materially increase the cost of governmental regulation, "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." Pennsylvania Coal, 260 U.S. at 416; see also First English, 482 U.S. at 321-22.


352. Id.; see also Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 166-67 (1990) (holding that mining a rock quarry was not a nuisance because other similar activities existed in the area).

353. Lucas, 112 S. Ct. at 2889. Lucas's right to build on his property is entitled to constitutional protection: "The right of [a landowner] to devote its land to any legitimate use is property within the protection of the Constitution." Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (commenting that building on one's property is a right, not a privilege, subject only to legitimate permitting requirements);
lina property law do not declare construction or ownership of beachfront homes a public nuisance.\(^{354}\)

**CONCLUSION**

*Lucas v. South Carolina Coastal Council* provided a firm foundation and much-needed guidance on both the regulatory takings doctrine and the position of the "nuisance exception" as a governmental defense to a takings claim. The opinion supports and gives context to the regulatory takings doctrine first enunciated in *Pennsylvania Coal Co. v. Mahon*, by clearly reaffirming that a nuisance-abatement statute is a valid exercise of the police power, conforms to due-process requirements if it substantially relates to a legitimate governmental purpose, and does not effect a taking unless it denies owners all economically viable use of their land or physically invades their property. The Court reaffirmed the *Agins* disjunctive test; if a regulation fails to substantially advance legitimate state interests, or if it deprives the owner of all use or value of the land, a taking has occurred. In deciding the latter prong, *Lucas* recognized two categories of per se takings: when a regulation constitutes a physical invasion and when it renders the land valueless.

The nuisance doctrine developed in a separate line of cases, commencing with *Mugler v. Kansas*, and crept into the takings cases through then-Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*. It was interpreted in a variety of divergent ways and legitimized in both majority and dissenting opinions in *Keystone Bituminous Coal Ass'n v. DeBenedictis* in 1987. The potential danger of the adoption of a broad nuisance exception, as loosely defined in *Keystone*, was nowhere better illustrated than in the South Carolina Supreme Court opinion in *Lucas*. That opinion accepted a nuisance-exception analysis as justification for denying Fifth Amendment just compensation, based only on a legislative assertion that the regulated activity constituted a great public harm. Had the United States Supreme Court affirmed that holding, every state legislature would have been able to redefine what constitutes a nuisance to avoid Fifth Amendment scrutiny, greatly weakening the protection accorded landowners.

\(^{354}\) See *Lucas*, 112 S. Ct. at 2901. On remand, the South Carolina Supreme Court agreed. See *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (denying that "any common law basis exists by which [the Council] could restrain Lucas's desired use of the land").
Instead, Lucas narrowly defined the scope of the nuisance exception, in line with Chief Justice Rehnquist's dissenting opinion in Keystone. First, the Court made clear that when a regulation renders land valueless, a legislative declaration of the public interest, regardless of its importance, cannot justify the regulation and avoid the requirement for Fifth Amendment compensation. Second, the Court held that total deprivation of use or value is permissible only when the property's use constituted a nuisance under background principles of state nuisance and property law, and therefore never was part of the owner's title.

This narrow reading of the nuisance exception is entirely consistent with the focus and purpose of the regulatory takings doctrine, once the Mugler line of cases is distinguished as applicable only to the due-process prong of the Agins test. A broader reading of the exception would have greatly weakened property rights by allowing most regulations to be self-justifying. Certainly, when government regulation denies an owner all viable use of the property, there must be a very significant and widely acknowledged justification that would allow the government to avoid the requirement of just compensation. Prevention of traditional common-law nuisances provides such a justification.

The opinion is important as well in its recognition that even in the case of less than a total deprivation of use or value, the property owner may still be entitled to a remedy.\textsuperscript{355} The categorical rule established in Lucas applies only to the case of complete reduction in value. In all cases, however, the court must assess the economic impact of the regulation and the extent to which it interferes with investment-backed expectations.\textsuperscript{356}

The Lucas opinion carefully and thoughtfully analyzed the impact of regulations in the public interest in our constitutional democracy, where individuals are free from being forced to shoulder burdens that benefit society in general.\textsuperscript{357} The costs of government regulation should not be allocated simply by accident of ownership. Lucas is another strong reminder that when laws sacrifice individual rights for the sake of the good of society as a whole, society has an obligation to pay back the individual.

\textsuperscript{355} See Lucas, 112 S. Ct. at 2895 n.8.
\textsuperscript{356} Id. (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
\textsuperscript{357} Armstrong v. United States, 364 U.S. 40, 49 (1960); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893); see supra note 285 and accompanying text.