EMINENT DOMAIN—Loss of All Economically Beneficial Use of Real Property Constitutes a "Taking" Within Meaning of Fifth Amendment Unless Principles of State Property and Nuisance Law Give Rise to Restrictions on Land's Use—*Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992).

I. INTRODUCTION

The Fifth Amendment to the United States Constitution requires payment of just compensation to property owners when a governmental body takes private property for public use.[1] Recently, the United States Supreme Court created an upper limit past which a state must compensate a private property owner for regulatory deprivations of real estate usage.[2] The Court qualified the rule, however, holding payment might not be required if state nuisance law allowed the deprivation.[3]

II. CASE HISTORY

A. *Factual Background*

In 1986, David Lucas purchased two lots on the Isle of Palms, a barrier island in Charleston County, South Carolina.[4] Lucas paid $975,000 for the two lots, which were located about three hundred feet from the beach.[5] He planned to build two single-family dwellings, one for his family and one for resale.[6] The lots were zoned for single-family residential dwellings, and no state regulation prohibited construction of such a structure before Lucas's purchase.[7] Two years later, the South Carolina legislature enacted the Beachfront Management Act ("Act").[8] The Act prohibited construction of occupiable structures between the shoreline and a point twenty feet beyond a "baseline" on land.[9] The Lucas property lay entirely within the newly regulated area.[10]

B. *Adjudication in South Carolina State Courts*

Lucas brought an action in the South Carolina Court of Common Pleas asserting the new building restrictions constituted a taking requiring compensa-

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1. U.S. CONST. amend. V.
2. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 (1992).
3. *Id.* at 2900-01.
4. *Id.* at 2889.
5. *Id.*
6. Petition for Writ of Certiorari at 3, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), *cert. granted,* 112 S. Ct. 436 (1991) (No. 91-453), *and judgment reversed by* 112 S. Ct. 2886 (1992).
7. Petitioner's Brief at 3, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (No. 91-453).
8. Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2889 (citing S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. Supp. 1988)).
9. *Id.* at 2889-90 (citing S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Supp. 1988)).
10. *Id.* at 2889.

tion.[11] Lucas claimed the state restriction on development, whether or not a valid use of South Carolina's police powers to protect against public harm, constituted a taking requiring compensation under the Fifth Amendment.[12] The restriction, he maintained, deprived his property of "all economically viable use."[13] The trial court agreed and awarded Lucas $1,232,387.50 as compensation.[14]

The South Carolina Coastal Council ("Coastal Council"), the Beachfront Management Act's administrator, appealed and the South Carolina Supreme Court reversed the trial court.[15] The court held the regulation prevented serious public harm and therefore was a valid use of the state's police power.[16] "[T]he Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public *harm*, there is no 'taking' for which compensation is due."[17] The court rejected the argument that diminution in property value should be considered in determining a constitutional taking.[18] Rather, the court held, "'[T]he State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity.'"[19]

Two South Carolina Supreme Court Justices dissented from the three-justice majority.[20] Although the dissenters agreed the state could regulate property to a certain degree, they contended, "'[I]f regulation goes too far it will be recognized as a taking.'"[21] The dissent concluded the relevant United States Supreme Court cases did not "'grant carte blanche to government agencies to regulate private property into oblivion.'"[22]

C. *Supreme Court Conclusion*

The United States Supreme Court granted certiorari in *Lucas* and *held*, reversed and remanded.[23] The loss of all economically beneficial use of real

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11. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (1992). The Fifth Amendment to the United States Constitution requires the government pay a landowner "just compensation" when private property is taken for public use. The relevant part of the Fifth Amendment provides, "[No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

12. Lucas v. South Carolina Coastal Council, 404 S.E.2d at 896.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 900-02.

17. *Id.* at 900.

18. *Id.* at 900-01.

19. *Id.* at 899 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987)).

20. *Id.* at 902 (Harwell, J., dissenting).

21. *Id.* at 904 (Harwell, J., dissenting) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

22. *Id.* at 906 (Harwell, J., dissenting) (quoting Michael M. Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. PUB. L. 261, 279 (1987)).

23. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2902 (1992).

property constitutes a taking within the meaning of the Fifth Amendment unless principles of the state's property and nuisance law give rise to the restrictions on the land's use. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

III. ANALYSIS PRIOR TO *LUCAS*

Although the Supreme Court has dealt with regulatory takings since the 1800s, many of the early decisions did not approach the constitutional issue.[24] The Fifth Amendment to the United States Constitution was not applied to the states until 1897.[25]

Until the Court's decision in *Pennsylvania Coal Co. v. Mahon*,[26] takings cases supported the theory that regulations were within the state's police power regardless of the extent of the property rights deprivation.[27] In *Pennsylvania Coal*, the Court recognized the applicability of the Fifth Amendment to states' regulatory police power activities.[28] Writing for the majority, Justice Oliver Wendell Holmes established the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[29] In subsequent cases, the Court attempted either to apply both the earlier takings holdings and the holding in *Pennsylvania Coal*, or to leave out the *Pennsylvania Coal* analysis altogether in allowing destruction of property interests.[30]

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24. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 180-81 (1871) (holding dam construction that caused flooding of landowner's property constituted a taking requiring compensation under the Wisconsin constitution, but not the federal constitution); Mugler v. Kansas, 123 U.S. 623, 667-69 (1887) (holding state statute prohibiting property's use as a distillery did not constitute a compensable taking because prohibition was within the state's police power).

25. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (requiring compensation under the Fourteenth Amendment for state condemnation of private property).

26. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (invalidating state act that limited mining of coal as exceeding state's police powers).

27. *See, e.g.*, Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (holding that prohibiting property's use as a livery stable in populated area was a valid use of police power); Hadacheck v. Sebastian, 239 U.S. 394, 413-14 (1915) (holding deprivation of an owner's use of property as a brick yard a valid use of police power).

28. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 412-13, 415-16. Justice Holmes wrote:

> As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits . . . . One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413.

29. *Id.* at 415.

30. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (allowing state to destroy cedar trees to protect apple orchards from spread of disease); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593-95 (1962) (allowing state to prohibit gravel mining in town below water table).

More recently, the Court has upheld restrictions limiting development of real estate,[31] prohibiting the sale of personal property,[32] and limiting the amount of coal a mine operator could remove.[33] The Court has found takings, however, when a state, through regulation, imposed permanent physical occupations on property,[34] or removed the landowner's right to exclude others.[35]

IV. THE *LUCAS* DECISION

A. *"All Economically Beneficial Uses" Test*

After finding the case ripe for review,[36] Justice Scalia, writing for the majority, approached the constitutional takings issue.[37] Generally, the Court has refrained from developing any bright-line test for constitutional takings, but rather decides cases on an "'essentially ad hoc, factual inquir[y].'"[38] The majority found, however, two exceptions to this factual inquiry requirement.[39] The first nonfact-specific category involves permanent physical occupations of

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31. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (allowing state to prohibit improvements to a state historical building); Agins v. City of Tiburon, 447 U.S. 255, 261-63 (1980) (allowing state to limit use of property to prevent ill effects of urbanization).

32. Andrus v. Allard, 444 U.S. 51, 64-68 (1979) (allowing prohibition on sale of eagle feathers).

33. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 506 (1987) (requiring coal mine operator to leave portion of coal in ground to support surface).

34. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982) (requiring compensation for permanent physical imposition of cable facilities on real estate). The Court finds takings requiring compensation in this area regardless of the extent of the physical invasion. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). The cable facilities in *Loretto* occupied only one and one-half cubic feet of building space. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 438 n.16.

35. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (requiring landowner to grant public easement across property as condition to granting building permit constitutes a taking).

36. Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2891. The Coastal Council argued the case should not have been heard because Lucas had not exhausted all administrative measures prior to petitioning for certiorari. *Id.* Before the publication of the South Carolina Supreme Court's opinion, the state's legislature amended the Beachfront Management Act to allow construction seaward of the baseline through special permit. *Id.* at 2890-91 (citing S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1991)). The Court found the case ripe regardless of whether the regulation could be overridden by the special permit because the permit did not compensate Lucas for his past property right's deprivation. *Id.*; *see, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987) (requiring compensation for temporary deprivations of all property use).

37. Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2892.

38. *Id.* at 2893 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

39. *Id.*

property,[40] and the second comes into play when a regulation "denies all economically beneficial or productive use of land."[41]

Although the majority determined states can impose a regulation affecting property values, the regulation violates the Fifth Amendment when it "'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*'"[42] Legislation affecting property rights and values is generally afforded the presumption that the legislature is simply shifting the economic benefits and burdens in a way that benefits everyone concerned.[43] The Court held this assumption "does not apply to the relatively rare situations where the government has deprived all economically beneficial land uses."[44] The Court continued:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially 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.[45]

Supreme Court cases before *Lucas* often allowed severe restrictions on property uses that were held not to constitute takings.[46] The *Lucas* Court determined other property uses were available in those cases, however, which supported the findings of no taking requiring compensation.[47] The trial court's finding of total deprivation of the property's value, however, set *Lucas* apart from the prior case law.[48]

The Court refused to consider whether the South Carolina regulation actually rendered Lucas's property valueless, relying instead on the trial court's

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40. *Id.*; *see supra* note 34 and accompanying text.

41. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992) (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

42. *Id.* at 2894 (quoting Agins v. City of Tiburon, 447 U.S. at 260).

43. *Id.* (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

44. *Id.* (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413).

45. *Id.* at 2894-95 (citations omitted).

46. *Id.* at 2899 n.13 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962) (prohibiting excavation but permitting other uses); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibiting manufacture of bricks in residential area but permitting other uses); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (declaring a livery stable a public nuisance but permitting other uses of the property); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding requirement that a "pillar" of coal be left in ground to safeguard mine workers because mineral rights could otherwise be exploited); Mugler v. Kansas, 123 U.S. 623 (1887) (prohibiting building to be used as a brewery because other uses permitted)).

47. *See supra* note 41 and accompanying text.

48. *See supra* note 41 and accompanying text.

finding.[49] The Coastal Council attempted to raise the issue in its brief,[50] but the Court held the issue was not timely brought.[51]

B. *The Nuisance Exception*

After determining *Lucas* fell within the "deprivation of all economically beneficial use" category, the Court created a narrow exception to the just compensation requirement applicable within the classification.[52] The Court held a state may avoid the just compensation requirement for real property if "background principles of the State's law of property and nuisance" give rise to restrictions on the land's use.[53] The Court wrote:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.[54]

A state cannot, in other words, regulate away all economically beneficial property uses unless the same result is achievable through the state's private nuisance law, the state's similar public nuisance abatement ability, or the state's ability to destroy property during times of actual necessity.[55] These property rights limitations adhere to real property and give rise to "pre-existing limitation[s] on the landowner's title."[56]

Property uses that were prohibited prior to a subsequent title transfer are always unlawful,[57] and background principles of state nuisance and property law may allow a state to impose new restrictions eliminating all economically beneficial property uses.[58] "When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[59]

The Court rejected the South Carolina Supreme Court's use of the "harmful or noxious uses" doctrine in sustaining the state regulation in *Lucas*.[60] The Court surmised the state supreme court found the Act a valid use of the state's police

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49. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2896 n.9 (1992).
50. Respondent's Brief at 11-12, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (No. 91-453).
51. Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2896 n.9.
52. *Id.* at 2900-01.
53. *Id.*
54. *Id.* at 2899.
55. *Id.* at 2900. The Court limited the term "actual necessity" to those cases involving the power to prevent "grave threats to the lives and property of others" as in the case of forest fires. *Id.* at 2900 n.16.
56. *Id.*
57. *Id.* at 2900-01.
58. *Id.* at 2900.
59. *Id.* at 2901.
60. *Id.* at 2897.

powers[61] because the regulation was within the state's power to prevent a public harm by precluding private property use deemed harmful and noxious.[62] Relying on the state's legislative findings,[63] the state supreme court found the Act prevented activities similar to public nuisances, which did not require just compensation under the United States Constitution.[64]

The "harmful and noxious uses" doctrine, the Court found, was simply the predecessor to the current requirement that a regulation substantially advance legitimate interests of the state.[65] In addition, the Court noted, "[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[66] For example, a regulation like the one in *Lucas* could be viewed as preventing a harm to South Carolina's populace by protecting state ecological resources from damage.[67] The regulation, however, could also be viewed as intending to confer a benefit to South Carolina's populace by creating an ecological preserve at no taxpayer expense.[68] In the end, the Court held the harmful and noxious uses doctrine was ineffectual in deciding taking issues involving removal of all economically beneficial property uses.[69]

Adhering to the traditional understanding of governmental property controls, the Court maintained some regulation of property should be expected.[70] Furthermore, the "State's traditionally high degree of control over commercial dealings" should give personal property owners fair notice the state can pass new regulations rendering their property economically worthless.[71]

The majority found this concept inapplicable to real property.[72] Rather, the Court held a state's removal of real property's economically beneficial uses "is

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61. *Id.* at 2896-97 (citing Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 899 (S.C. 1991)).

62. *Id.* (citing Lucas v. South Carolina Coastal Council, 404 S.E.2d at 899).

63. *Id.* at 2896 n.10 (citing S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1991)).

64. *Id.* at 2896-97.

65. *Id.* at 2897 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987)).

66. *Id.*

67. *Id.* at 2898.

68. *Id.*

69. *Id.* at 2898-99. The Court explained:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.

Id.

70. *Id.* at 2899.

71. *Id.* (citing Andrus v. Allard, 444 U.S. 51, 66-67 (1979) (prohibiting the sale of eagle feathers)).

72. *Id.* at 2900. Justice Blackmun rejected this argument, however. *See infra* notes 102-105 and accompanying text.

inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[73]

Noting the underlying nuisance law doctrine applicable to real property, the majority held an analysis of applicable state nuisance law would require, among other things, consideration of the following:

> [T]he degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government . . . .[74]

On remand, the Court held the South Carolina Supreme Court must identify the relevant state "background principles of nuisance and property law that prohibit" Lucas's intended property use.[75] Only on a showing that the property use restriction could have been achieved in the courts through the state's nuisance law could the State claim the Beachfront Management Act did not constitute a taking by proscribing all economically beneficial uses of the Lucas property.[76]

V. CONCLUSION

The Fifth Amendment's Takings Clause cuts to the core of property theory and forces courts to determine to what extent governmental regulation of privately held property is permissible. One theory of property rights expressly favors the greater social good over individual property owner's rights by allowing extensive property regulation.[77] Another theory prefers protection of property rights "to the same extent as other individual rights."[78] These theories date back to the time of Plato and Aristotle, "one [theory] looking to individualism to save society, the other to society to save the individual."[79]

The factual background of the *Lucas* case brought these conflicting theories before the Court. On one hand, ecologically sensitive areas, like the beachfront in *Lucas*, often require substantial regulative measures to protect the public's interest in preserving the area. On the other hand, if the Court had held the regulations on Lucas's property did not constitute a taking, Lucas would have been forced to bear the burden of the protective measure. The conservative majority in *Lucas* favored individual property owners' interests over society's

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

74. *Id.* at 2901 (citations omitted).

75. *Id.* at 2901-02.

76. *Id.* In addition, the majority specified a court must use "an *objectively reasonable application*" of precedent to eliminate all economically beneficial property uses. *Id.* at 2902 n.18.

77. Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529, 532 (1989).

78. *Id.* at 534.

79. *Id.* (quoting Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 728 (1938)).

interest by using, for the first time, the all economically beneficial uses test to find a taking.

The dissenting opinions in *Lucas*, authored by Justices Blackmun[80] and Stevens,[81] put forth the opposing theory that government should be allowed to interfere with property values even to the extent of complete diminution in value.[82] Noting prior case law, Justice Blackmun found that although the private interest in economically valuable property uses is unquestionably important, *Lucas* stands as the first case in which the Court held no public interest could outweigh private concerns.[83]

The fundamental problem in *Lucas* centers around the all economically beneficial uses test, a prime example of dicta turned dogma. The phrase, first used in *Agins v. City of Tiburon*[84] by Justice Powell who wrote for a unanimous Court, has since been cited numerous times but never actually relied on by the Court to find a constitutional taking.[85] All other takings claims adjudicated before the Court apparently involved retention of some residual property value, which negated the allegations of total diminution.[86]

Lucas was unique because the case came before the Court with an unchallenged trial court finding of removal of all economically beneficial property uses. The Court, relying on this finding, justifiably applied the all economically beneficial uses doctrine in determining a taking had occurred. The dissenting Justices castigated the majority for creating a category of nuisance cases outside the customary factual inquiry applicable to takings decisions.[87] This argument appears to be deftly defeated, however, by Justice Stevens's acceptance of the approach in the majority opinion he authored in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[88]

The four Justices who did not join the majority all found the trial court determination of total diminution in value highly questionable.[89] As Justice

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80. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2904 (1992) (Blackmun, J., dissenting).

81. *Id.* at 2917 (Stevens, J., dissenting).

82. *Id.* at 2910-11 (Blackmun, J., dissenting); *id.* at 2919 (Stevens, J., dissenting).

83. *Id.* at 2910 (Blackmun, J., dissenting).

84. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing Penn Cent. Transp. Co. v. City of New York, 104, 138 n.36 (1978)).

85. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987) (restricting amount of coal removable by mining operation not a constitutional taking because economically-viable use of property still present); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981) (holding statute did not prevent beneficial land use); Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980) (restricting land use not a taking because other uses available).

86. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 n.13 (1992).

87. *Id.* at 2910 (Blackmun, J., dissenting); *id.* at 2918 (Stevens, J., dissenting).

88. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987).

89. Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2903 (Kennedy, J., concurring) (noting "curious finding" that Lucas's property was left valueless); *id.* at 2908 (Blackmun, J., dissenting) (challenging trial court's finding of total diminution in value); *id.* at 2919 n.3 (Stevens, J., dissenting) (finding Lucas's property far from "valueless"); *id.* at 2925 (statement of Souter, J.) (questioning the trial court's conclusion).

Kennedy noted, the state supreme court could challenge the factual finding on remand, but the Supreme Court was obligated to abide by the trial court's finding.[90]

Clearly, some residual property value remained after the state imposed the regulation on the Lucas property. The property could still be used for camping and recreation, or could be sold to neighboring landowners as a buffer zone.[91] These remaining uses obviously should remove *Lucas* from the deprivation of all beneficial uses category.

The requirement that the regulation deprive the land of all economically beneficial uses will likely be the factor limiting the *Lucas* opinion's applicability. Findings of removal of all economically beneficial uses will be improbable at best. Enough room exists in the phraseology, however, to allow courts to embark on linguistic crusades to find removal of all economically beneficial uses, but these determinations, as the majority noted, will be relatively rare.[92]

Ultimately, the majority opinion raises more questions than it answers and further muddies the waters of regulatory taking jurisprudence. Specifically, the Court failed to consider what property interests should be included when determining removal of all economically beneficial uses.[93] It is unclear whether the Court will require just compensation for the regulatory removal of all economically beneficial uses of only a portion of a parcel, or whether partial deprivations through regulatory action will be held to be no taking at all.

Without some direction in the area, state legislatures may, as Justice Stevens suggested, partake in regulatory self-censorship to avoid this issue until further resolved by the courts.[94] The risk of making a mistake is forebidding, as evident from the result in *Lucas*, and state legislatures may neglect sound land-use policies to avoid the possibility of removing landowners' economically beneficial property uses.[95]

The Court's creation of the narrow nuisance exception to the categorical rule also brought forth a barrage of criticism. Justice Kennedy contended courts should be allowed to reach beyond nuisance law in depriving landowners of

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90. *Id.* at 2903 (Kennedy, J., dissenting). On remand, the Supreme Court of South Carolina did not, however, challenge the factual finding of the trial court. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 485 (S.C. 1992). Instead, the court held no common law principles of nuisance supported the Coastal Council's actions, and Lucas had been deprived of his property rights at least temporarily. *Id.* at 486. The South Carolina Supreme Court remanded the case back to the trial court for a determination of damages for the temporary deprivation of property rights. *Id.* The court stated that if the Coastal Council denied Lucas a special permit to build on the property, a subsequent suit for the permanent deprivation may lie. *Id.*

91. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2908 (Blackmun, J., dissenting).

92. *Id.* at 2894.

93. *Id.* at 2894 n.7.

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

95. *Id.* at 2922 n.6 (Stevens, J., dissenting).

valuable property use.[96] The court should, Kennedy surmised, look to the owner's reasonable expectations as well as the regulatory means and ends.[97]

Like Justice Kennedy, the two dissenting Justices contended the Court's limitation of the exception to state common-law nuisance and property law was imprudent.[98] Justices Blackmun and Stevens noted most modern nuisance law is statutory rather than common law.[99] Property, Stevens contended, is a concept often in need of revision, and the Court's holding effectively limits the state's ability to revise property law through legislation because legislative findings are not common law.[100]

Justice Souter, who authored a statement voting to dismiss the writ of certiorari as improvidently granted, suggested the Court's nuisance exception would likely never be applicable in a case to override a regulatory removal of all economically beneficial property uses.[101]

Justice Blackmun also squarely confronted the majority's rejection of the notion that privately held real property is retained subject to an implied limitation such that "the State may subsequently eliminate all economically valuable" property use.[102] The majority found the notion "inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[103] Justice Blackmun cited numerous authorities adhering to the proposition that property regulation did not fall under the Fifth Amendment's purview until the end of the nineteenth century.[104] "It is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding' comes from, but it does not appear to be history."[105]

The varying property interest theories are readily apparent from the dichotomy of the opinions in *Lucas*. Whether the analytical approach advanced in *Lucas* survives may well depend on the judicial philophies of the Justices sitting on the Supreme Court when the regulatory deprivation of all economically beneficial uses once again finds its way onto the Court's docket.[106]

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

97. *Id.* at 2904 (Kennedy, J., concurring).

98. *Id.* at 2912-13 (Blackmun, J., dissenting); *id.* at 2920-21 (Stevens, J., dissenting).

99. *Id.* at 2912 n.15 (Blackmun, J., dissenting); *id.* at 2921 (Stevens, J., dissenting).

100. *Id.* at 2921-22 (Stevens, J., dissenting) (noting current statutory changes in property law such as endangered species, wetlands, and estuary protection).

101. *Id.* at 2926 (statement of Souter, J.). "The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, . . . and the remedies for such conduct usually leave the property owner with other reasonable uses of his property." *Id.*

102. *Id.* at 2900.

103. *Id.*

104. *Id.* at 2915 (Blackmun, J., dissenting).

105. *Id.* at 2914 (Blackmun, J., dissenting).

106. Between the decisions in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) and Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), Justice Kennedy succeeded Justice Powell, Justice Souter succeeded Justice Brennan, and Justice Thomas succeeded Justice Marshall; since the *Lucas* decision, Justice Ginsburg has succeeded Justice White, and Justice Breyer has succeeded Justice Blackmun.

The theoretical understanding of the Fifth Amendment's takings clause may be the only common thread apparent in the takings tapestry. "The Supreme Court's decisions in 'taking' issues may properly be viewed as a 'crazy quilt pattern' of rulings."[107] Although *Lucas* adds another swatch to the takings quilt, it does little to organize the meandering pattern.

J. Bradley Horn

107. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.12(a) (4th ed. 1991).