University of Dayton Law Review

Volume 18 | Number 2 Article 8

1-1-1993

Property Law: Takings and the Nuisance Exception in the Aftermath of *Lucas v. South Carolina Coastal Council*

Thomas P. Glass
University of Dayton

PROPERTY LAW: TAKINGS AND THE NUISANCE EXCEPTION IN THE AFTERMATH OF *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992).

I. INTRODUCTION

Generally, the government[1] may not take private property[2] for public use without just compensation.[3] A taking, for which just compensation is due, can occur in two different ways. First, the government may compel a property owner to transfer title of the land to the government for public use.[4] This is termed the power of eminent domain.[5] When the government exercises its power of eminent domain, a taking occurs and just compensation is due to the property owner.[6]

Second, the government may leave the "property in the hands of the owners but [regulate] its use."[7] The government implements these

---

1. The term government includes federal, state, and local governmental entities.

2. Property is defined as "that which belongs exclusively to one." BLACK'S LAW DICTIONARY 1095 (5th ed. 1979). Property also describes the rights and interests which give property its value. *Id.* In addition, the term property encompasses rights and interests including "ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it." *Id.*

These rights, for the purposes of takings jurisprudence, are seen in aggregate. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). When determining if a taking has occurred, the Court will focus on "the character of the action and on the nature and extent of the interference with rights *in the parcel as a whole*." *Id. But see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) (property should be defined in terms of identifiable segments); *see also infra* notes 139-45 and accompanying text.

3. U.S. CONST. amend. V. The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

4. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 987 (2d ed. 1988).

5. *Id.*; *see also* 1 JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS: THE LAW OF EMINENT DOMAIN § 1.11, 1-7 (3d ed. 1992). This Casenote deals exclusively with the issue of regulatory takings; the issue of eminent domain, therefore, is not addressed.

6. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (regulation found not to be a taking because the state did not actually physically appropriate private property); *see also* SACKMAN & ROHAN, *supra* note 5, § 6.01[1], at 6-10. Exercise of the power of eminent domain always involves the transfer of title from individual property owner to governmental entity. DUKEMINIER & KRIER, *supra* note 4, at 987.

The Fifth Amendment does not prohibit the government from taking private property, but merely requires just compensation when a taking occurs. U.S. CONST. amend. V. Therefore, when the power of eminent domain is exercised, just compensation is always required. SACKMAN & ROHAN, *supra* note 5, § 6.01[1], at 6-10. The framers of the Bill of Rights were thinking specifically of eminent domain when they drafted the Fifth Amendment's prohibition on uncompensated takings. *Id.*

7. DUKEMINIER & KRIER, *supra* note 4, at 987.

land use regulations pursuant to its police power.[8] Land use regulations may or may not constitute a taking depending upon the severity of the government's action. Only those land use regulations which "go too far" are found to be takings for which just compensation is due.[9] These types of regulations are termed "regulatory takings."

In the recent case of *Lucas v. South Carolina Coastal Council*,[10] the South Carolina Supreme Court held that the Beachfront Management Act ("Act"),[11] did not constitute a "regulatory taking" of property for which just compensation was due.[12] In *Lucas*, the majority determined that the Act did not "go too far" because it was intended to prevent a use of property found to be harmful to the general public.[13] Thus, the *Lucas* majority espoused what is commonly known as the "nuisance exception" to regulatory takings.[14]

By relying upon the nuisance exception, the majority chose a very broad interpretation of past Supreme Court pronouncements on the takings issue.[15] The United States Supreme Court subsequently reversed the decision of the South Carolina Supreme Court and remanded the case for proceedings consistent with its opinion.[16] Justice

---

8. Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, *in* REGULATORY TAKINGS: THE LIMITS OF LAND USE CONTROLS 191, 195 (G. Richard Hill ed., 1990). The state enjoys, through its police power, a broad power to enact all necessary regulations to "secure the health, safety . . . and welfare . . . and all . . . property rights are held subject to its fair exercise." Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914).

The police power is not expressed in the Constitution but has become an integral part of Constitutional theory. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 8.2, at 263-64 (3d ed. 1986). Thus, the Supreme Court has routinely affirmed and expanded the exercise of the state police power. Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, *in* REGULATORY TAKINGS: THE LIMITS OF LAND USE CONTROLS 99 n.42 (G. Richard Hill ed., 1990).

9. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see infra* notes 60-81 and accompanying text for a discussion of when a regulation goes too far so as to constitute a taking for which just compensation is due.

10. 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992).

11. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. Supp. 1992); see *infra* note 188 for text of the relevant sections of the Act.

12. *Lucas*, 404 S.E.2d at 896.

13. *Id.* at 900.

14. See *infra* notes 42-59 and accompanying text for a discussion of the nuisance exception. But see *infra* notes 123-49 and accompanying text for discussion of an alternative view of the nuisance exception.

15. See *infra* notes 82-97 and accompanying text for a discussion of the current tests used by the Supreme Court to resolve the regulatory takings issue; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S 470, 495 (1987); Agins v. City of Tiburon, 447 U.S. 255, 261 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

16. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (interim ed. 1992).

Scalia, writing for the majority, found that the South Carolina Supreme Court improperly applied the nuisance exception.[17]

The *Lucas* decisions illustrate the confusion and controversy[18] that exist in takings cases. Additionally, the United States Supreme Court's decision may signal the beginning of the end of the nuisance exception. The Supreme Court's decision, however, focused solely on the nuisance exception issue and failed to resolve the question of whether a taking indeed had occurred.

This Casenote focuses on the proper standard to apply in regulatory takings cases. First, this Note provides the facts and holding of the South Carolina Supreme Court's decision in *Lucas*. Next, the background section discusses the history, evolution, and current status of regulatory takings. Then, the analysis section examines the South Carolina Supreme Court's decision in *Lucas*. This section also examines the result of the appeal from the South Carolina Supreme Court to the United States Supreme Court. Finally, the analysis section provides an example of the standard that should be applied in regulatory taking actions such as *Lucas* in the future.

II. Facts and Holding

In 1986, David Lucas purchased two vacant beachfront properties on the Isle of Palms in South Carolina.[19] The purchase price for these lots was $975,000.[20] Lucas purchased these lots with the intention of building a single family dwelling on each lot.[21] When Lucas purchased these lots they were situated in an area that was zoned for single family

---

17. *Id.* at 2896-2902. The Supreme Court also resolved the threshold issue of whether Lucas' claim was ripe. *Id.* at 2890-2892. The crux of the ripeness issue was that, after Lucas filed his suit, the Beachfront Management Act was amended to allow for a special permit to be issued so that habitable structures seaward of the setback line could be constructed. *Id.* at 2891.

The Coastal Council argued that Lucas was required to seek the special permit before resorting to the courts for relief. *Id.* The Supreme Court found that, because the South Carolina Supreme Court decision did not rest upon ripeness grounds, the issue was not a bar to review. *Id.* Further, the Supreme Court determined that, because Lucas was not alleging a temporary taking and had alleged injury-in-fact, his appeal was ripe for review. *Id.*

18. *See, e.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I - A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1301, 1301-02 (1989) (the takings issue is "controversial and perplexing"); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297, 299-300 (1990) (takings decisions have resulted in "a jurisdictional chameleon of ad hoc decisions that [have] bred considerable confusion").

19. Marcia Coyle, *Economic Rights Gurus Look to High Court*, Nat'l L. J., Jan. 27 1992, at 6.

20. *Id.*

21. *Lucas*, 404 S.E.2d at 907 (Harwell, J., dissenting), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992). Lucas' intention was to build the two houses, to live in one, and to sell the other. Petitioner's Brief on the Merits at 5, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992) [hereinafter Petitioner's Brief].

use.[22] Moreover, at the time of purchase there were no regulations in effect which would have prevented Lucas from building his houses.[23]

In 1988, the South Carolina legislature enacted the Beachfront Management Act ("Act").[24] The Act strictly regulates the building of permanent structures within a certain distance of a predetermined setback line.[25] Applied to Lucas' property, the Act prevented him from building any houses or other permanent structures on the lots.[26]

As a result, Lucas filed suit in the South Carolina Court of Common Pleas.[27] Lucas sought compensation for the regulatory taking of his property.[28] The issue for the court's consideration was whether the Act constituted a regulatory taking of Lucas' property.[29] Lucas argued that because the Act prevented him from using[30] his property, it was taken without just compensation.[31] The Court of Common Pleas agreed with Lucas and awarded him $1,232,387.50 "as just compensation for the 'regulatory taking.' "[32] Consequently, the South Carolina Coastal Council, as well as the administrator of the Act, appealed to the South Carolina Supreme Court.[33]

The South Carolina Supreme Court reversed the decision of the Court of Common Pleas.[34] The majority held that South Carolina, acting under its police power,[35] had regulated a use of property that had the potential to cause "serious public harm."[36] Such a regulation, the majority concluded, prevented a use which would be detrimental to the public.[37] As a result, the South Carolina Supreme Court held that the

---

22. Petitioner's Brief, *supra* note 21, at 5.

23. *Id.*

24. *Lucas*, 404 S.E.2d at 895 (citing S.C. CODE ANN. § 48-39-10 (Law. Co-op. Supp. 1989)); *see infra* note 186 and accompanying text for the pertinent parts of the Act.

25. *Lucas*, 404 S.E.2d at 896. This setback line was determined by drawing a line at the distance of forty times the average beach erosion rate measured from the top of the primary sand dune at the beach. *See* S.C. CODE ANN. § 48-39-280 (Law. Co-op. Supp. 1992).

26. *Lucas*, 404 S.E.2d at 896.

27. *Id.*

28. *Id.*

29. *Id.*

30. Under the Act, Lucas was permitted to erect a small deck or seawall. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 902.

35. See *infra* notes 42-59 and accompanying text for a discussion of the state police power.

36. *Lucas*, 404 S.E.2d at 900. This holding is based upon a theory of takings jurisprudence called the nuisance exception. *See generally* Lawrence, *supra* note 8. This theory has it roots in the Supreme Court case of Mugler v. Kansas, 123 U.S. 623, 665 (1887); *see also* notes 42-59 and accompanying text for a detailed discussion of *Mugler*. The essence of the *Mugler* rule is that the government may regulate property to prevent "harmful or noxious" uses. *Mugler*, 123 U.S. at 668-69.

37. *Lucas*, 404 S.E.2d at 901.

Act did not amount to a "taking" and that Lucas was not entitled to just compensation.[38]

On appeal, the United States Supreme Court reversed the decision of the South Carolina Supreme Court.[39] The Supreme Court found that the South Carolina Supreme Court had improperly applied the nuisance exception.[40] Thus, the Supreme Court remanded the case back to the trial court for a determination of whether Lucas was entitled to compensation under a narrower construction of the nuisance exception.[41]

III. BACKGROUND

A. State Police Power - the Nuisance Exception

The United States Supreme Court handed down the first significant takings decision in 1887.[42] In *Mugler v. Kansas*,[43] the Court created the "nuisance exception" to takings.[44] The "nuisance exception" provides that a land use regulation passed under the state police power to promote the public health, safety, or welfare is valid and does not require just compensation.[45] Mugler had constructed a brewery in the state of Kansas.[46] In 1880, Kansas amended its constitution and state laws to prohibit the manufacture and sale of intoxicating liquors within its borders.[47] As a result, Kansas prohibited Mugler from operating the

---

38. *Id.* at 901-02.

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

40. See *id.* at 2896-2902 for a discussion of the Court's reasoning.

41. *Id.* at 2902. See *infra* notes 197-208 for a discussion of Justice Scalia's analysis of the new and proper scope of the nuisance exception.

42. Lawrence, *supra* note 8, at 192.

43. 123 U.S. 623 (1887).

44. *Id.* at 668-69. The Court also set the proper standard for judicial review. The Court stated that courts should review the substantive reasonableness of legislation passed under the guise of state police power. *Id.* at 661; *see also* CRAIG R. DUCAT & HAROLD W. CHASE, CONSTITUTIONAL INTERPRETATION 606 (3d. ed. 1983). In reviewing the substantive reasonableness of legislation, the court applied strict scrutiny. *Mugler*, 123 U.S. at 661. Strict scrutiny requires a very close fit between the means and the ends of a statute. *Id.*

Justice Harlan, in *Mugler*, stated that if a regulation passed pursuant to the state police power "has no real or substantial relation to those objects [for which the legislation was enacted], or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge. . . ." *Id.*; *see also* DUCAT & CHASE, *supra*, at 606. Thus, from *Mugler* until the Court's decision in *United States v. Carolene Products Co.*, the proper standard of judicial review when considering state action under the police power was strict scrutiny. 304 U.S. 144, 152 n.4 (1938). This standard of review is significant due to the Supreme Court's return to strict scrutiny in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). See *infra* notes 152-75 and accompanying text for a discussion regarding *Nollan* and the proper standard of review in its aftermath.

45. *Mugler*, 123 U.S. at 668-69.

46. *Id.* at 625.

47. *Id.* at 624.

recently constructed brewery.[48] Thereafter, Mugler sued Kansas claiming that the prohibitory legislation violated the takings clause.[49]

The Court held that the State, through its police powers, possessed the proper authority to regulate property in order to protect the health, safety, and welfare of the public.[50] Moreover, the Court stated that no taking occurred unless the regulation actually physically appropriated Mugler's property.[51] Eminent domain transfers title from the private owner to the state; such a transfer constitutes a taking for which just compensation is due.[52] A regulation passed under the state police powers, however, leaves title in the hands of the private owner; thus, there is no state appropriation and no taking.[53] The Court, in *Mugler*, found that the state had not exercised its power of eminent domain and had merely sought to regulate a use of property that the state found to be a nuisance.[54] Thus, the *Mugler* Court drew the important distinction between the power of eminent domain and the use of a state's police power. Consequently, Mugler was not entitled to any compensation.

Under *Mugler*, the exercise of the state police power to regulate for the health, safety, and welfare of the public became synonymous with the nuisance exception. Any exercise of the state police power under these circumstances was deemed constitutional under the Fifth Amendment as long as it was substantially related to the abatement of a nuisance.[55] Given that every governmental act is purportedly for the health, safety, or welfare of the public, the only challenge a property owner could mount against a land use regulation pursuant to *Mugler* was to challenge the substantive reasonableness.[56]

The decision in *Mugler* presented two problems. First, it foreclosed any possibility of a taking occurring through land use regulation. As long as the title remained in the hands of the owner, there could not be a taking. Second, it permitted the government limitless authority to prohibit a use of property it deemed to be a harmful or noxious use—a nuisance. Under its legislative powers, the government may define what is a harmful or noxious use of property.[57] The government then may, under the auspices of its police powers, prohibit the harmful or noxious

48. *Id.*
49. *Id.* at 628.
50. *Id.* at 661-62.
51. *Id.* at 668-69.
52. *See supra* notes 5-6 and accompanying text.
53. *See supra* note 6 and accompanying text.
54. *Mugler*, 123 U.S. at 667-69.
55. *Id.* at 661. The "substantial relationship" analysis, at this time, was equivalent to the strict scrutiny test used by the Court today. *See infra* notes 240-45.
56. See discussion *infra* notes 243-56 on the significance of this point.
57. Lawrence, *supra* note 8, at 197.

use as a nuisance.[58] Thus, property owners would be left with little, if any, protection from state oppression.[59]

B. *Establishment of Regulatory Takings*

The resolution of the two problems created by *Mugler* occurred thirty-five years later in *Pennsylvania Coal Co. v. Mahon.*[60] First, the *Pennsylvania Coal* Court departed from the absolute police power, or nuisance exception, and adopted a more "flexible balance-of-interests analysis."[61] Second, the Court recognized that the imposition of a regulation may constitute a taking.

In *Pennsylvania Coal,* the Mahons sought and were granted an injunction against a coal company to prevent the mining of coal under their property.[62] The Chancellor granted an injunction pursuant to the Kohler Act, a Pennsylvania statute which prohibited the mining of anthracite coal in such a manner as to cause surface subsidence under, among other things, private property.[63] The coal company argued that the statute was not a valid exercise of the state police power and had caused severe diminution of the value of its property, thus violating the takings clause of the Fifth Amendment.[64]

Unlike *Mugler*, where the nature of the state action (police power) was the key issue, the *Pennsylvania Coal* Court focused on both the state action and the impact of the regulation upon the property owner. The Court balanced the public and the private interests. This balancing required the Court to focus on the impact of the regulation versus the benefit to the public served by the regulation.[65] Thus, the issue became whether the public benefit served by the statute outweighed the destruction of private property rights. The rationale behind the balancing approach was to ensure that the burden of the regulation was not placed upon one party.[66]

Justice Holmes, writing for the Court, viewed the Kohler Act as conferring a benefit to the general public at the expense of the coal companies.[67] Holmes stated that such a redistribution of benefits was

---

58. Lawrence, *supra* note 8, at 197.

59. Lawrence, *supra* note 8, at 197. The obvious danger is that the state may define an activity as harmful or noxious and then regulate that use without being in danger of violating the takings clause. *Id.* This provides a loophole for the states to avoid the Fifth Amendment. *Id.* As a result, the property owner is left with no protection and the takings clause is rendered sterile. *Id.*

60. 260 U.S. 393 (1922).

61. Lawrence, *supra* note 8, at 198.

62. 260 U.S. at 412.

63. *Id.* at 412-13.

64. *Id.* at 412.

65. *Id.* at 413-16.

66. *Id.* at 413-14.

67. *Id.* at 414-16.

permissible so long as there existed "an average reciprocity of advantage."[68] Justice Holmes reasoned that the Kohler Act needed to confer some benefit back upon the coal companies in order to be valid.[69] If the Kohler Act failed to confer a reciprocal benefit to the coal companies, the government must achieve its goals by "paying for the change."[70] As a result, the balancing test became the best method for determining whether reciprocal benefits existed. Holmes concluded that the coal companies bore the entire burden of the Kohler Act and that the surface estate owners enjoyed the sole benefit.[71] Under the balancing test, therefore, the coal companies did not receive an average reciprocity of advantage.

The Court found that the impact of the regulation upon the coal company made it "commercially impracticable to mine certain coal."[72] The Court also found that the alleged public benefit was to prevent the subsidence of surface estates.[73] In balancing these factors, Justice Holmes concluded that: (1) a regulation which makes it "commercially impracticable to mine certain coal has nearly the same effect for constitutional purposes as appropriating it or destroying it;"[74] and (2) the Kohler Act was aimed primarily at private interests and, as such, it was not a proper exercise of the state police power.[75] As a result, Holmes determined that the minimal public interest served by the Kohler Act did not justify the total destruction of a property right without compensation.[76]

Pennsylvania Coal is significant because it refutes the *Mugler* Court's holding that only actual physical appropriation by the state constitutes a taking.[77] *Pennsylvania Coal* did not, however, overrule

---

68. *Id.* at 415.
69. *Id.* at 415-16.
70. *Id.* at 416.
71. *Id.* at 415-16.
72. *Id.* at 414.
73. *Id.* at 397.
74. *Id.* at 414.
75. *Id.* at 413-14. Justice Holmes found the Kohler Act to serve primarily private interests for many reasons. First, the Kohler Act was aimed at protecting private property owners and not at protecting the general public. *Id.* Second, the Kohler Act applied only to subsidences caused by mining of anthracite coal and not to the mining of "bituminous . . . coal, or, for that matter, or iron ore, quartz or gravel." *Id.* at 399-400 (Argument for Plaintiff in Error). Third, the only power the Kohler Act gave the local municipalities in dealing with a case of threatened subsidence was to close the mine. *Id.* at 400. Justice Holmes reasoned that the local municipal authorities lacked authority to rope off the area or take other emergency measures. *Id.* Finally, Justice Holmes found that another legislative enactment, "the so-called Fowler Act," further illustrated the intent of the framers to single out anthracite coal companies. *Id.*
76. *Id.* at 416.
77. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

Mugler.[78] Physical appropriation still constitutes a per se taking.[79] Instead, *Pennsylvania Coal* established that "property may be regulated to a certain extent, [but] if the regulation goes too far it will be considered a taking."[80] Therefore, regulations based upon state police powers are valid until they reach a certain magnitude; at that point, the state must exercise its power of eminent domain and compensate the owner.[81] Moreover, *Pennsylvania Coal* established that the balancing test is the proper standard for determining if a regulation has "gone too far."

C. *Current Status of Takings Law*

The confusion and controversy[82] surrounding the takings issue is due to the search for a proper standard to determine when a regulation has "gone too far."[83] Since *Pennsylvania Coal*, the courts have been searching for the proper point at which a regulation becomes a taking.[84] In 1978, the United States Supreme Court attempted to inject some clarity and predictability into the regulatory takings analysis by defining the factors which must be balanced when determining if a regulation "goes too far."[85]

In *Penn Central Transportation Co. v. New York City*,[86] while upholding the validity of a landmark preservation regulation, the Supreme Court utilized the balancing-of-factors approach of *Pennsylvania Coal*. In *Penn Central*, the Court enunciated relevant factors to be used in determining whether a regulation has "gone too far."[87] The Court listed the factors relevant to finding a regulatory taking as: (1) "the 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" (physical occupation).[88] In subsequent decisions, the Court has

78. *Pennsylvania Coal*, 260 U.S. at 413; Lawrence, *supra* note 8, at 199.
79. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).
80. *Pennsylvania Coal*, 260 U.S. at 415.
81. NOWAK, *supra* note 8, § 11.12, at 403.
82. See sources cited *supra* note 18.
83. Lawrence, *supra* note 8, at 193.
84. Coletta, *supra* note 18, at 300.
85. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
86. 438 U.S. 104 (1978).
87. *See id.* at 124.
88. *Id.* One commentator describes the current status of takings law as follows:

[Takings appear] to be moving in the direction of resolution into a series of categorical "either-ors": *either* (a) the regulation is categorically a taking of property because (i) it works a permanent physical occupation (however practically trivial) of private property by the government, or, perhaps undermines a "distinct investment-backed expectation," or (ii)

not expressed a preference for one of these factors over another.[89] The only factor, however, that has consistently been sufficient by itself to constitute a taking is the third—physical appropriation.[90]

Two years after *Penn Central*, the Court again addressed the issue of regulatory takings.[91] In *Agins v. City of Tiburon,*[92] the Court again used a balancing-of-factors test, but it seemed to abandon the balancing factors enunciated in *Penn Central* and, instead, utilized two new factors.[93] In upholding the validity of a local zoning ordinance, the Court stated that a regulatory taking occurs if the regulation "does not substantially advance a legitimate state interest, or denies an owner economically viable use of his land."[94] Therefore, courts should balance the state's legitimate interest against the diminution of property value inflicted upon the owner. The confusion between the differing factors of *Agins* and *Penn Central* was clarified in 1986.

In 1986, the Supreme Court once again addressed regulatory takings in three different opinions. These cases clarified which balancing factors to use,[95] provided the proper standard for judicial review,[96] and determined the proper remedy for when a regulatory taking does occur.[97]

1. Keystone Bituminous Coal Ass'n v. DeBenedictis

Keystone Bituminous Coal Ass'n v. DeBenedictis[98] was the first, and most important, of the three regulatory takings cases decided by

---

it totally eliminates the property's economic value or "viability" to its nominal owner, *or* (b) the regulation is categorically not a taking.

Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1622 (1988) (citations omitted) [hereinafter *Takings, 1987*].

89. Lawrence, *supra* note 8, at 201.

90. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) (permanent physical occupation of private property is a per se taking).

91. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980).

92. 447 U.S. 255 (1980).

93. *Id.* at 260. The Court did not really abandon *Penn Central's* factors. In Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), the Court stated that both the *Agins* and *Penn Central* factors are to be used. *Id.* at 495; *see infra* notes 105-08 and accompanying text.

94. *Agins*, 447 U.S. at 260 (citations omitted).

95. *Keystone*, 480 U.S. at 495.

96. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987).

97. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Court held that, when a regulatory taking occurs, the proper remedy is compensation in the form of money, not invalidation of the regulation. *Id.* at 319. This Casenote does not deal with the issue of compensation so *First English* is not discussed. For a discussion of the facts, holding, and significance of *First English*, see Lawrence, *supra* note 8, at 226-31.

98. 480 U.S. 470 (1987).

the Court in 1986.[99] *Keystone* clarified the proper test to use in cases of land use regulation challenges.[100] In *Keystone,* a coalition of coal companies instituted a facial challenge[101] concerning the validity of Pennsylvania's Subsidence Act.[102] The Subsidence Act required fifty percent of the coal to be left in place under certain structures to provide surface support.[103] Consequently, the coal companies had to leave twenty-seven million tons of coal in the ground.[104]

In determining the proper standard to use in resolving this issue, the Court drew a distinction between facial[105] and "as applied"[106] challenges. The *Keystone* Court stated that the *Agins* factors applied in facial challenges and the *Penn Central* factors applied in "as applied" challenges.[107] The coal companies mounted a facial challenge to the Subsidence Act; therefore, the Court used the *Agins* factors.[108]

First, the Court reviewed whether the Subsidence Act "substantially advance[d] legitimate state interests."[109] Justice Stevens, writing for the Court, found that the Subsidence Act was properly enacted under the state's police powers.[110] Furthermore, Stevens found that the Subsidence Act addressed a serious public threat—the subsidence of the surface estates.[111] Thus, Stevens concluded that the Subsidence Act substantially advanced a legitimate state interest.[112]

---

99. Lawrence, *supra* note 8, at 205; *see also* Robert H. Freilich, *Update on the Taking Issue, Eminent Domain, and Evaluation - The Taking Issue*, ALI-ABA Course of Study (American Law Inst. 1991) [hereinafter *The Taking Issue*].

100. *Keystone,* 480 U.S. at 485. Additionally, Lucas relied upon *Keystone* in his arguments before both the South Carolina Supreme Court and the United States Supreme Court. *See generally* Petitioner's Brief, *supra* note 21.

101. See *infra* notes 105-08 for a discussion on the difference between a facial and an "as applied" challenge.

102. *Keystone*, 480 U.S. at 478-79; *see also id.* at 474 (citing PA. STAT. ANN. tit. 52, § 1406.1 (Purdon Supp. 1986)).

103. *Id.* at 478.

104. *Id.* at 498.

105. A facial challenge is a challenge to a land use regulation claiming that the "mere enactment" of the regulation violates the takings clause of the Fifth Amendment. *See The Taking Issue, supra* note 99, at 14.

106. An "as applied" challenge to a land use regulation claims that the regulation when applied to a particular piece of property violates the takings clause of the Fifth Amendment. *See The Taking Issue, supra* note 99, at 11. Lucas argued an "as applied" challenge to the South Carolina Beachfront Management Act. *See* Petitioner's Brief, *supra* note 21, at 13.

107. *Keystone,* 480 U.S. at 495.

108. *Id.*

109. *Id.* at 485 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

110. *Id.* at 489-92.

111. *Id.* at 485. Even though the Subsidence Act and Kohler Act were virtually identical, Justice Stevens distinguished them on the ground that the Kohler Act served primarily private interests while the Subsidence Act served purely public interests. *Id.* at 485-87.

112. *Id.* at 492.

Justice Stevens, however, did not find the Subsidence Act's validity to be conclusive on the taking issue.[113] Upon determining that the Act did advance a legitimate state interest, Stevens examined the second factor set forth in *Agins*—whether the Subsidence Act denied the coal companies the economically viable use of their land.[114] The Court found that the amount of coal left in the ground, twenty-seven million tons, constituted only two percent of the total coal owned by the coal companies.[115] Furthermore, the coal companies were still capable of operating at a profit from the coal they were allowed to extract.[116] Therefore, the Court concluded that the coal companies retained economically viable use of their land despite the Subsidence Act.[117]

Justice Rehnquist, in his dissent,[118] was disturbed by Stevens' view of the precedential value of *Pennsylvania Coal*.[119] Justice Stevens, in the majority opinion, indicated that the *Pennsylvania Coal* decision was merely advisory.[120] Justice Rehnquist, however, viewed *Pennsylvania Coal* as the cornerstone of takings jurisprudence over the last "65 years."[121] Thus, Justice Rehnquist followed the theory that a regulation is valid unless it "goes too far."[122]

In determining whether the Subsidence Act had gone too far, Rehnquist examined the proper scope of the nuisance exception.[123] He stated that the majority opinion implied that the nuisance exception was conclusive to resolve the issue in *Keystone*.[124] Rehnquist, however, found that the nuisance exception was not applicable.[125] Rehnquist declared that the Subsidence Act was not the type of regulation previously recognized by the Court as fitting into the nuisance exception.[126]

Traditionally, the nuisance exception applied in situations where the government acted to prevent a " 'misuse or illegal use of property.' "[127] Justice Rehnquist reasoned that the nuisance exception should not be permitted to prevent the "legal and essential use" of

---

113. *Id.*
114. *Id.* at 493.
115. *Id.* at 496.
116. *Id.*
117. *Id.* at 485.
118. *Id.* at 506. Justices Powell, O'Connor, and Scalia joined Chief Justice Rehnquist in dissent. *Id.*
119. *Id.* at 507-08 (Rehnquist, C.J., dissenting).
120. *See id.* at 478-505.
121. *Id.* (Rehnquist, C.J., dissenting).
122. *Id.* at 508. (Rehnquist, C.J., dissenting).
123. *Id.* at 512. (Rehnquist, C.J., dissenting).
124. *Id.* (Rehnquist, C.J., dissenting).
125. *Id.* (Rehnquist, C.J., dissenting).
126. *Id.* (Rehnquist, C.J., dissenting).
127. *Id.* (Rehnquist, C.J., dissenting). (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

property.[128] Rehnquist rejected an interpretation of *Mugler* which made the nuisance exception "coterminous with the state police power."[129] Instead, he posited that the nuisance exception should be interpreted very narrowly to prevent only "misuse or illegal use" of property.[130]

Justice Rehnquist derived this construction of the nuisance exception from Justice Holmes' "average reciprocal of advantage" theory in *Pennsylvania Coal*.[131] Rehnquist stated that the Fifth Amendment is

> designed to prevent the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.[132]

By expanding the nuisance exception to cover all state actions designed to promote the general health, safety, and welfare, the courts provide regulators with entirely too much power over private property.[133] Generally, all state action is intended to further the public health, safety, or welfare.[134] Therefore, Rehnquist declared that a broad definition of the nuisance exception allows the government unlimited authority to impinge upon property rights.[135] Thus, the theory underlying the Fifth Amendment would be entirely frustrated by this broad construction of the nuisance exception.[136]

A narrow construction of the nuisance exception, however, protects the integrity of the Fifth Amendment. Justice Rehnquist stated that there are two principles which narrow the nuisance exception.[137] First, the nuisance exception should be limited exclusively to the abatement of nuisances.[138] The Kohler Act was aimed at preserving the surface estates.[139] Thus, Rehnquist reasoned that the primary purpose of the

---

128. *Id.* (Rehnquist, C.J., dissenting).

129. *Id.* (Rehnquist, C.J., dissenting). See *supra* notes 42-59 for a discussion on how the nuisance exception came to be "coterminous with the state police power."

130. *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting).

131. *Id.* (Rehnquist, C.J., dissenting); *see also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

132. *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)).

133. *Id.* at 513. (Rehnquist, C.J., dissenting).

134. *Id.* (Rehnquist, C.J., dissenting).

135. *Id.* (Rehnquist, C.J., dissenting).

136. *Id.* (Rehnquist, C.J., dissenting).

137. *Id.* (Rehnquist, C.J., dissenting).

138. *Id.* (Rehnquist, C.J., dissenting); *see also* Miller v. Schoene, 276 U.S. 272 (1928) (requiring the destruction of diseased trees); Mugler v. Kansas, 123 U.S. 623 (1887) (preventing the manufacture of intoxicating liquors).

139. *Keystone*, 480 U.S. at 513. (Rehnquist, C.J., dissenting).

Kohler Act was economic in nature and that the nuisance exception should not apply to a situation where the government has primarily economic concerns in mind.[140]

The second narrowing principle is that the nuisance exception does not allow the "complete extinction of the value of a parcel of property."[141] Rehnquist found that the Act "completely destroyed" the entire value of certain coal deposits.[142] In order to reach this conclusion, Rehnquist took a view of property that had never been previously accepted by the Court.[143] Rehnquist espoused the view that each piece of property can be broken into an "identifiable segment of property."[144] Thus, twenty-seven million tons of coal required to be left in the ground pursuant to the Subsidence Act constituted an "identifiable segment of property."[145]

According to Justice Rehnquist, the Subsidence Act did not "merely inhibit one strand in the bundle, . . . but instead destroys completely any interest in a segment of property."[146] Therefore, when viewed as a separate segment of property, the value of the twenty-seven million tons of coal required to be left in the ground was completely extinguished.[147] Conversely, Justice Stevens viewed the twenty-seven million tons as part of the entire amount of coal deposits in the ground.[148] Thus, Stevens concluded that the value of the coal had been severely diminished but not extinguished.[149]

As a result of the *Keystone* decision, courts confronted with a facial challenge[150] to a regulation must determine: (1) whether the regulation substantially advances a legitimate state interest; and (2) whether the regulation denies an owner an economically viable use of property. While the *Keystone* Court used the language "substantially advance," it offered no guidance as to what "substantially advance"

---

140. *Id.* (Rehnquist, C.J., dissenting).

141. *Id.* (Rehnquist, C.J., dissenting). The Court, however, has sustained nuisance regulations despite a substantial reduction in the value of a parcel of land. *Id.* In *Mugler*, for example, Kansas prohibited the use of the brewery. 123 U.S. at 668-69. Mugler, however, was permitted to use the building for other purposes. *Id.* Similarly, in *Miller*, the government required the destruction of certain trees. 276 U.S. at 278. The owner of the trees, however, was permitted to retain the land as well as the felled trees. *Id.* at 277. Therefore, in both *Mugler* and *Miller*, the value of property was diminished but not completely destroyed.

142. *Keystone*, 480 U.S. at 514 (Rehnquist, C.J., dissenting).

143. Lawrence, *supra* note 8, at 217.

144. *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting).

145. *Id.* (Rehnquist, C.J., dissenting).

146. *Id.* at 518 (Rehnquist, C.J., dissenting) (citations omitted).

147. *Id.* (Rehnquist, C.J., dissenting).

148. *Id.* at 498.

149. *Id.* at 498-99.

150. *Keystone* also affirmed Agins v. City of Tiburon, 447 U.S. 255 (1980), which enunciated the proper balancing factors for "as applied" challenges. *Keystone*, 480 U.S. at 495.

means. In the second regulatory takings case of 1986, however, the Court addressed the meaning of the words "substantially advance."

2. Nollan v. California Coastal Commission

Nollan v. California Coastal Commission[151] may represent a reversion to the substantive due process analysis as applied to economic regulations. The era of substantive due process of economic regulations began in 1887[152] and ended in 1938.[153] This era, known as the *Lochner* era, was marked by the Supreme Court's invalidation of economic legislation based upon its substantive reasonableness.[154] During this era, the Court took a very active role in searching for the rationale behind regulations.[155] In determining the validity of legislative acts, the Court reviewed both the wisdom and the need for regulations.[156] The Court used strict scrutiny, a high level of judicial review, in its search for the rationale and need for the legislative acts. Strict scrutiny requires a very close nexus between the means and the ends of a regulation.[157] Therefore, during the *Lochner* era, not all exercises of the state police power were deemed per se valid.[158]

In *United States v. Carolene Products Co.*,[159] the Supreme Court abandoned strict scrutiny with respect to economic and social welfare regulations, and stated that it would be reserved for only challenges concerning freedom of press, freedom of speech, or freedom of religion.[160] Since 1938, the Court has presumed the validity of legislative enactments dealing with economic and social welfare issues.[161] Economic and social welfare legislation, therefore, only needed to pass a mere rationality test.[162] The mere rationality standard requires only that the statute be rational to be constitutional. The decision in *Nollan*,

---

151. 483 U.S. 825 (1987).

152. *See* Mugler v. Kansas, 123 U.S. 623 (1887) (Court stated it would begin to examine the substantive reasonableness of legislative acts).

153. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

154. DUCAT & CHASE, *supra* note 44, at 607.

155. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1908) (legislative acts under the police power no longer to receive a presumption of validity).

156. *See* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1927). In *Nectow*, the Court found that a zoning ordinance which imposed a restriction upon the plaintiff's land did not "bear a substantial relation to the public health, safety, morals, or general welfare." *Id.* (quoting Euclid v. Ambler Co., 272 U.S. 365 (1926)).

157. See *infra* notes 164-76 for an example of the Court applying strict scrutiny in a takings case.

158. *Nectow*, 277 U.S. at 188.

159. 304 U.S. 144 (1938).

160. *Id.* at 153 n.4; *see also* JOHN E. NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW 718-19, 844-45 (1978).

161. NOWAK, *supra* note 160, at 407.

162. NOWAK, *supra* note 160, at 407.

however, may signal a return to the strict scrutiny standard of the *Lochner* era.[163]

In *Nollan*,[164] property owners challenged the validity of an order requiring them to grant a public easement laterally across their beach as a condition to rebuilding a beachhouse.[165] The state's rationale for requiring the easement was to protect "the public's ability to see the beach, [assist] the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and [prevent] congestion on the public beaches."[166] The Court found these purposes to be a valid basis for the exercise of the state police power.[167] The problem, however, arose in the means the state chose in order to accomplish these goals.

Surprisingly, the Court applied strict scrutiny to the statute's requirement of the easement.[168] Justice Scalia, writing for the Court, required a close nexus between the goals of the Coastal Commission and the requirement that the easement exist.[169] Scalia defended the use of strict scrutiny on the basis that the requirement of the easement was a physical appropriation of the Nollan's property.[170] Thus, the use of strict scrutiny in regulatory takings cases was limited to instances of physical appropriation. Under *Nollan*, when the government acts pursuant to its police powers to burden property, and that action results in physical appropriation, the courts should review the substantive reasonableness of the regulation with strict scrutiny.[171]

Justice Scalia reasoned that the alleged goals of providing public visibility, permitting public access, and alleviating congestion on public beaches were not substantially related to the requirement of an easement across the Nollan's beach.[172] First, Scalia stated, a lateral easement across the Nollan's property would not enhance the public's ability to view the beaches from the public roads.[173] Scalia stated that a regulation, for example, which limited the height of the Nollan's new house would have been a proper means to accomplish the goal of visi-

---

163. Note, *Taking a Step Back: Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448, 448-49 (1988); *see also Takings, 1987*, supra note 88, at 1600-01.

164. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

165. *Id.* at 827-28.

166. *Id.* at 835.

167. *Id.* at 834-35.

168. *Id.* at 836-37.

169. *Id.* at 837.

170. *Id.* at 831-32.

171. See *infra* notes 243-56 for a discussion of why strict scrutiny should be utilized *any* time the government uses the police powers to implement regulations to abate nuisances.

172. *Nollan*, 483 U.S. at 838.

173. *Id.* at 836.

bility.[174] Second, because the easement was lateral across the Nollan's beach, it would in no way provide access to the public beaches.[175] Finally, Scalia found no basis for the theory that the lateral easement would lessen congestion on the abutting public beaches.[176]

Thus, *Nollan* stands for the proposition that even a legitimate exercise of a state's police power may constitute a taking for which compensation is due. This is the same conclusion *Pennsylvania Coal* reached when it held that a regulation constitutes a taking when it "goes too far." The difference between *Nollan* and *Pennsylvania Coal*, however, is that *Nollan* focused on the relationship between the state interest and the regulation, while *Pennsylvania Coal* focused on the impact of the regulation on the property owner.

In the aftermath of *Keystone* and *Nollan*, the current status of takings law can be summarized as follows. *Mugler* is limited to the proposition that regulations passed under a state's police powers are valid but may not "go too far." In order to determine if a regulation has "gone too far," the courts should engage in a balancing of factors. The appropriate factors are determined by the type of challenge raised. In *Lucas*, however, the South Carolina Supreme Court failed to recognize the evolution of takings law, particularly the importance of *Keystone*.

IV. Analysis

A. *South Carolina Supreme Court's Decision*

In *Lucas v. South Carolina Coastal Council*, the South Carolina Supreme Court held that the Beachfront Management Act was a valid exercise of the state's police power to abate a nuisance and thereby denied Lucas' takings claim.[177] The South Carolina Supreme Court reached its conclusion by applying the nuisance exception from *Mugler*.[178]

In light of *Keystone*, however, the court's decision to follow *Mugler* was incorrect. Since 1922, the United States Supreme Court has endorsed a balancing-of-factors approach to takings law.[179] *Keystone* requires the courts to balance the relevant factors depending

174. *Id.*

175. *Id.* at 838.

176. *Id.* at 838-39.

177. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 902 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992).

178. *Id.* at 900-01.

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

upon the type of challenge raised.[180] *Mugler*, on the other hand, does not utilize this balancing-of-factors approach. Therefore, the South Carolina Supreme Court disregarded the developments in takings law during the past century.

1. Lucas' Arguments Before the South Carolina Supreme Court

Lucas' sole argument was that the Act deprived him of " 'all economically viable use of' his property."[181] This argument comes from the balancing-of-factors test utilized in *Keystone*.[182] Lucas challenged the Act "as applied" to his property.[183] Therefore, the proper factors to be used are the *Penn Central* factors.[184]

Lucas used language from the *Agins* test which is only to be utilized for "facial" challenges.[185] Lucas' argument should have been based on the second prong of the *Penn Central* test: "the regulation's interference with investment-backed expectations."[186] Although Lucas used the incorrect language, nevertheless, the substance of his complaint remains—the regulation destroyed the value of his property.[187] It is irrelevant what language Lucas used to frame his complaint because, under both facial and "as applied" challenges, the courts must employ a balancing test. Furthermore, there is little difference between the facial and "as applied" challenges. The only significant difference between the two challenges is that the facial challenge does not employ the "character of the governmental action" prong. This prong is not employed in a facial attack because the regulation has yet to be applied to any particular parcel of land.

The South Carolina Supreme Court, however, failed to acknowledge the difference between facial and "as applied" challenges. In addition, the court refused to apply a balancing-of-factors approach. Instead, the court chose to follow the holding of *Mugler* and to forego the balancing of any factors altogether.

---

180. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987). The relevant factors are determined according to the type of challenge instituted by the plaintiff. *Id.* A facial challenge uses different factors than an "as applied" challenge. See *supra* notes 87-94 and accompanying text for the relevant factors used by the Court in a takings case; see *supra* notes 105-108 for a discussion of the proper factors to use depending on the type of challenge.

181. *Id.* at 898 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

182. *Keystone*, 480 U.S. at 495.

183. *Lucas*, 404 S.E.2d at 896.

184. *See supra* notes 87-89 and accompanying text.

185. *Lucas*, 404 S.E.2d at 896.

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

187. *See id.* at 138 n.36. The Court accepted the term "economically viable" as constituting a valid argument under the economic impact of the regulation prong of the balancing test. *Id.*

2. The South Carolina Supreme Court's Reasoning in *Lucas*

The court found that Lucas' failure to challenge the legislative findings contained in the Act[188] amounted to a concession by Lucas

---

188. S.C. CODE ANN. § 48-39-10 to -360 (Law. Co-op. Supp. 1992). The purpose of the Act is defined in the legislative findings and policy statement of the Act. *Id.* at §§ 48-39-250, 48-39-260. The legislative findings are as follows:

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

(d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39 of Title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion- threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1992). The policy statement of the Act reads as follows:

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

that *Mugler* applied.[189] The court repeatedly stated that it was Lucas' failure to challenge the legislative findings in the Act that led it to use *Mugler* to resolve the takings question.[190] In essence, the court required a substantive challenge of the regulation as a condition precedent to the use of the balancing test.[191] Therefore, the logical conclusion is that, if Lucas would have challenged the legislative findings, the balancing test would have been used.

Lucas, however, mounted an "as applied" challenge to the Act.[192] Under an "as applied" challenge, a property owner claims that a land use regulation is unconstitutional as it applies to a particular parcel of land.[193] An "as applied" challenge does not contend that the regulation itself is unconstitutional; rather, such a challenge only asserts that the regulation is unconstitutional as applied to a certain piece of land.[194] In fact, a claim that the regulation is unconstitutional on its face is not an

---

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;

(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the South Carolina Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

S.C. CODE ANN. § 48-39-260 (Law. Co-op. Supp. 1992).

189. *Lucas*, 404 S.E.2d at 900.

190. *Id.* at 898, 900-02.

191. *Id.* at 900.

192. Petitioner's Brief, *supra* note 21, at 13.

193. *The Taking Issue*, *supra* note 99, at 11.

194. *The Taking Issue*, *supra* note 99, at 11.

element of an "as applied" challenge.[195] Therefore, it was not necessary for Lucas to challenge the constitutionality of the Act itself.[196]

The court, however, did not cite any case to support its conclusion that a failure to challenge the substance of a regulation amounts to a concession that *Mugler* applies. Indeed, the court's reasoning runs contrary to recent precedent. In *Keystone*, the United States Supreme Court affirmed the balancing tests of both *Agins* and *Penn Central*, leaving no doubt that one test or the other should always be used. Therefore, the court clearly erred when it abandoned the balancing tests enunciated in *Agins* and *Penn Central* and returned to *Mugler*.

B. United States Supreme Court's Decision

On appeal, the United States Supreme Court resolved the case by clarifying the application of *Mugler's* nuisance exception.[197] The Court, however, remanded the case and did not decide the ultimate question of whether a taking had occurred.[198] The Court began its analysis by accepting the trial court's finding that the regulation deprived Lucas of all economically viable use of his land.[199] From this premise, the Court proceeded to clarify the scope of the nuisance exception. Justice Scalia, writing for the Court, stated that "the South Carolina Supreme Court

---

195. *The Taking Issue*, *supra* note 99, at 11.

196. To mount a successful "as applied" challenge, the takings claim must be ripe. *The Taking Issue*, *supra* note 99, at 11. To be ripe, the plaintiff's claim must demonstrate: (1) a prima facie case that the regulation has "gone to far;" and (2) there was no just compensation for the alleged taking. *Id.* In establishing that a regulation has gone too far, the property owner must show that a development plan and a request for a variance have been denied. *Id.*

At the time Lucas filed his complaint he had exhausted all administrative remedies. Petitioner's Brief, *supra* note 21, at 12-13. The Act was subsequently amended to allow for the filing of a variance with the Coastal Council. *Id.* at 12. The amendment, however, prohibited the building of any structure on a "primary oceanfront sand dune or on the active beach." *Id.* Lucas' proposed development was seaward of the setback line on an active beach. *Id.* Therefore, Lucas would not have been eligible for a building variance.

197. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (interim ed. 1992). The Court first resolved the threshold issue of whether the issue was ripe. *Id.* at 2890-92. The Act, which prohibited Lucas from building his houses, had been amended to allow for the issuance of a special permit for construction of habitable structures seaward of the setback line. This amendment occurred after oral argument before the South Carolina Supreme Court but before issuance of its opinion. *Id.* at 2891. The South Carolina Coastal Council argued the taking issue was not ripe because Lucas had failed to attempt to obtain this special permit. *Id.*

The Supreme Court found that the lower court had based its decision on the merits rather than on ripeness grounds. *Id.* It therefore declined to insist that Lucas pursue the later-created special permit procedure before his claim would be considered ripe. *Id.* Finally, the Court found Lucas had alleged "Article III injury-in-fact" for the deprivation of his property prior to the amendment. *Id.*

198. *Id.* at 2902.

199. *Id.* at 2896 n.9.

was too quick to conclude that . . . [the nuisance exception] decides the present case."[200]

Justice Scalia found that the application of the nuisance exception rests upon the threshold question of whether the "proscribed use interests were not part of" the landowners title upon acquisition.[201] In this respect, Scalia adopted the view of the nuisance exception espoused by Chief Justice Rehnquist in his *Keystone* dissent.[202] According to Rehnquist, the nuisance exception should be limited to situations in which a "misuse or illegal use" is contemplated.[203] Justice Scalia's threshold inquiry is, in essence, a vehicle to determine whether the proscribed use fits Rehnquist's narrow construction of the nuisance exception. Thus, the government may not prohibit what, at the time title to the land was acquired, was a lawful use of land without compensation.[204]

The Court found that state nuisance law is the proper framework in which to determine what is a lawful use of land at the time title is acquired.[205] This inquiry considers:

> among other things, the 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 . . . ."[206]

Scalia also added, however, that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."[207] In light of Scalia's view, every takings case should now begin with an inquiry into that state's nuisance law.

The Court's decision, however, was limited solely to resolving the issue of the scope of the nuisance exception. The Court remanded the case to determine the ultimate takings issue.[208] Justice Scalia's opinion

---

200. *Id.* at 2897.

201. *Id.* at 2899.

202. See *supra* notes 128-48 for a discussion of Justice Rehnquist's view of the nuisance exception.

203. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting).

204. *See Lucas*, 112 S. Ct. at 2901.

205. *Id.* at 2901.

206. *Id.* (citations omitted).

207. *Id.* (citations omitted). Justice Scalia thought it would be unlikely that building "habitable or productive improvements" on Lucas' land violated any common-law principles. *Id.* The Court, however, left this issue to be resolved on remand. *Id.* at 2902.

208. *Id.* at 2902.

leaves no doubt that, when a takings case comes before a court, the court should first apply state nuisance law. If the contemplated use offends existing state nuisance law, then the government may regulate that use without providing compensation.

The weakness of *Lucas*, however, is that it provides no direction if the threshold question is answered in the negative. If the contemplated use does not offend existing state nuisance law, questions still remain whether compensation is then required or whether the court should continue its inquiry and apply the balancing factors from either *Penn Central* and *Agins*. The latter seems the most logical because neither *Penn Central* nor *Agins* has been overruled. Further, the balancing test is the accepted manner in which to ensure that the "average reciprocity of advantage is attained."[209]

The most logical conclusion is that the balancing-of-factors test should be used.[210] Therefore, the courts should still consider the economic impact of the regulation upon the property, the extent to which the regulation interferes with reasonable investment-backed expectations, and the nature of the governmental action. In future cases, the nuisance exception should either be: (1) completely abrogated as an independent element of takings law and simply considered under the nature of the governmental action in the balancing-of-factors test; or (2) the narrow construction of the nuisance exception espoused by Justices Rehnquist and Scalia should be applied, but with a heightened level of scrutiny, as applied in *Nollan*.

C. *Application of Balancing-of-Factors Test to the Facts of Lucas*

Lucas claimed the Act, "as applied" to his property, constituted a taking.[211] As stated previously, the factors from *Penn Central* should be utilized in cases involving "as applied" challenges.[212] The factors from *Penn Central* are as follows: (1) "the economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment- backed expectations;" and (3) "the character of the governmental action."[213]

---

209. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 416 (1922). The concept of average reciprocity of advantage was also espoused by Chief Justice Rehnquist in his *Keystone* dissent. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting). Thus, it would appear that the concept is still viable in the aftermath of *Nollan*.

210. This conclusion is based upon the fact that, even in dissent, Justices Rehnquist and Scalia found the balancing-of-factors test to be the best mode of resolving takings cases. *See Keystone*, 480 U.S. at 516.

211. *Lucas*, 404 S.E.2d at 896.

212. *Keystone*, 480 U.S. at 495.

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

1. The Economic Impact of the Act Upon Lucas' Property

When determining the economic impact of a regulation upon property, the United States Supreme Court focuses on the reasonable uses of land that exist after imposition of the regulation.[214] This inquiry involves a comparison of the "value that has been taken from the property with the value that remains in the property."[215] Property, for purposes of takings law, is considered to be the entire piece of real property, including the rights that accompany ownership.[216]

Property rights, therefore, are viewed as a "bundle" of rights.[217] The destruction of one of these rights is not sufficient to find a taking because the rights must be viewed in aggregate.[218] Thus, in *Lucas*, all of Lucas' property rights, including the rights to own, build on, and sell his property are to be viewed as one "bundle" of rights.

Under this definition of property, the economic impact analysis becomes a comparison of the market value before the imposition of the Act with the market value after imposition of the Act.[219] Lucas maintained, and the trial court agreed, that the market value of the lots was completely extinguished by the Act.[220] Therefore, the economic impact of the Act is that it left Lucas with worthless property.

Correspondingly, under the theory espoused by Justice Rehnquist in his *Keystone* dissent, the analysis would lead to the conclusion that a taking has occurred. Rehnquist views property as consisting of separate and identifiable interests.[221] In *Keystone*, the separate and identifiable property interest was the twenty-seven million tons of coal required to be left in the ground.[222] Under this analysis, the area of the beach in *Lucas* could be defined as a separate and identifiable parcel of land. The reason that the coal in *Keystone* was an identifiable segment of property was because it was singled out from the rest of the coal by the Subsidence Act.[223] Similarly, the beachfront property in *Lucas* was separated by the Act into identifiable segments. The area seaward of

---

214. *Id.* at 125-28; *see also Keystone*, 480 U.S. at 497.

215. *Keystone*, 480 U.S. at 497.

216. *Id.*; *see also* Andrus v. Allard, 444 U.S. 51 (1979).

217. *Andrus*, 444 U.S. at 66. See *supra* note 2 for a discussion of property rights.

218. *Andrus*, 444 U.S. at 66. *But see Keystone*, 480 U.S. at 515 (Rehnquist, C.J., dissenting) (interference with a separate identifiable segment of property is sufficient to constitute a taking).

219. *Keystone*, 480 U.S. at 497.

220. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 907 (S.C. 1991) (Harwell, J. dissenting), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992); *see also* Petitioner's Brief, *supra* note 21, at 13.

221. *Keystone*, 480 U.S. at 517 (Rehnquist, C.J., dissenting).

222. *Id.* (Rehnquist, C.J., dissenting).

223. *Id.* (Rehnquist, C.J., dissenting).

the setback line is burdened by the statute while the remaining area is not. Therefore, the burdened property interest in *Lucas* is easily identified.

As a result, under Justice Rehnquist's analysis, the Court should consider whether the value of the separate burdened segment of property had been totally extinguished or merely diminished.[224] Lucas was unable to build or in any other way develop the burdened parcel of land. Under Rehnquist's analysis, Lucas' interest in this land has been completely destroyed.[225] The area of Lucas' property seaward of the setback line is for all practical purposes rendered useless by the Act. Moreover, the trial court found, as a matter of law, that Lucas' property had lost all of its market value.[226] Thus, the value of the property in the area seaward of the setback line was completely extinguished.

2. The Extent to Which the Act has Interfered with Lucas's Distinct Investment-Backed Expectations

This part of the balancing test focuses on the use of property that is permitted under a regulation and whether the property owner receives a "reasonable return" from that use.[227] This factor is called the "reasonable beneficial use" of property.[228] To determine the "reasonable beneficial use" of property, the Court looks to how the land was being used before the regulation and compares that use with the use permitted after the regulation takes effect.[229] If the land owner is permitted to use the property in the same fashion as before the imposition of the regulation, it is unlikely that investment-backed expectations have been frustrated.[230] This is especially true if the land owner continues to receive a reasonable return from the existing use of the property.[231]

Lucas purchased the two beachfront lots for $975,000 with the intention of building two houses.[232] He was going to live in one house and sell the other.[233] Therefore, Lucas' use of the property before the Act consisted of investment property and future housing. The Act completely inhibited this use of the property: Lucas was not permitted to use his property in the same manner after the Act as he was before the

224. *Id.* at 513 (Rehnquist, C.J., dissenting).
225. *Id.* at 518 (Rehnquist, C.J., dissenting).
226. Petitioner's Brief, *supra* note 21, at 13.
227. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 110 (1978).
228. *Id.*
229. *Id.* at 136.
230. *Id.* at 124.
231. *Id.* at 136.
232. Petitioner's Brief, *supra* note 21, at 10.
233. Petitioner's Brief, *supra* note 21, at 10.

Act. Additionally, the trial court found that Lucas' property had no fair market value due to the Act. Therefore, Lucas could not receive any "reasonable return" for his property. In effect, Lucas incurred a $975,000 loss.

Clearly, Lucas purchased the lots with the intention of using them in a certain manner. Because of the Act, Lucas was precluded from using his property according to his original intentions. Therefore, it is clear that Lucas' reasonable investment-backed expectations were frustrated.

3. The Character of the Government Action

In many cases, this prong of the test inquires into whether the government has physically appropriated property.[234] Lucas conceded that no physical appropriation occurred.[235] Courts, however, also use this prong of the test to consider the justification for the regulation.[236] In *Keystone*, the Court found the justification for the Subsidence Act in the state police power.[237] Under the rationale of *Mugler*, the state is permitted to use the police power to regulate for the health, safety and welfare of the public.[238] Thus, the *Keystone* Court relied heavily upon the nuisance exception of *Mugler* in considering the "character of the government action."[239]

In *Lucas*, consideration of this prong of the test would revolve around South Carolina's justification for passing the Act. The Act purports to serve economic, environmental, ecological, and safety interests.[240] These are valid purposes under the police powers.[241] If the exercise of the state police powers is construed to be synonymous with the nuisance exception, as in *Keystone*, this prong of the test weighs against the finding of a taking. First, South Carolina acted in the interest of the health, safety, and welfare of the public. Second, any exercise of the police powers, under *Keystone's* rationale, fits into the nuisance exception. Therefore, the Act would be classified as a nuisance statute

234. Peterson, *supra* note 18, at 1317; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("character of the government action . . . [is] determinative").

235. Petitioner's Brief, *supra* note 21, at 13.

236. Peterson, *supra* note 18, at 1318; *see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1986) ("Pennsylvania . . . acted to arrest what it perceived to be a significant threat to the common welfare").

237. *Keystone*, 480 U.S. at 485. This is the view that the police power and nuisance exception are "coterminous." *Id.* at 512 (Rehnquist, C.J., dissenting).

238. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).

239. Peterson, *supra* note 18, at 1319; *see generally Keystone*, 480 U.S. at 485-92.

240. See *supra* note 188 for the text of the legislative findings and policy statement behind the Act.

241. *See, e.g., Keystone*, 480 U.S. at 485-92.

and would be exempted from the Fifth Amendment. This is exactly what the South Carolina Supreme Court held.[242]

Given this result, the heightened scrutiny applied in *Nollan* should be utilized in applications of the nuisance exception. Initially, applying a nuisance exception under the *Mugler* rationale fails to recognize the change in the level of judicial scrutiny.[243] The Court decided *Mugler* in 1887. At that time, the Court looked very closely at the substantive reasonableness of a legislative act.[244] This type of judicial review used a level of strict scrutiny to determine if a regulation was closely tailored to address its purported purpose.[245] In *Mugler,* for example, Kansas sought to abate the effects of intoxicating liquors.[246] The regulation prohibiting the operation of the brewery substantially advanced the State's purpose of abating the effects of intoxicating liquors.[247] Therefore, the regulation in *Mugler* was found to be a valid exercise of the state police power.[248]

Alternatively, if a legislative act did not substantially advance its purported goals, the enactment would be unconstitutional.[249] Therefore, under *Mugler*, a property owner was left with at least some minimal protection against government interference with property rights. This protection, however, vanished half a century later. In 1938, the Court abandoned the use of strict scrutiny to review the substantive reasonableness of economic regulations in favor of a mere rationality test.[250]

---

242. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 900-02 (S.C. 1991), *rev'd*, 112 S. Ct. 2886 (interim ed. 1992).

243. Pursuant to the United States Supreme Court's decision in United States v. Carolene Products Co., 304 U.S. 144 (1938), the substantive reasonableness of economic regulations was to be determined according to a mere rationality standard. See discussion *infra* notes 247-49 and accompanying text.

244. DUCAT & CHASE, *supra* note 44, at 606.

245. *See, e.g.*, Nollan v. California Coastal Comm'n., 483 U.S. 825, 837 (1987) (for an example of the usage of the strict scrutiny analysis).

246. Mugler v. Kansas, 123 U.S. 623, 662 (1887).

247. *Id.*

248. *Id.*

249. *Id.* at 661.

250. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). *But see* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Justice Scalia, writing for the *Nollan* Court, returned to a use of strict scrutiny to review a land use regulation. Justice Scalia stated that takings claims are special and distinct from due process and equal protection claims which use a mere rationality test. *Id.* at 834 n.3; *see also Takings, 1987*, *supra* note 88, at 1612. Justice Scalia suggested that takings cases deserve a higher level of scrutiny than mere rationality because they involve a "sensitive constitutional" issue much like a First Amendment claim. *Nollan*, 483 U.S. at 834 n.3; *Takings, 1987*, *supra* at 1612-13.

Nollan, however, may not signal a wholesale return to strict scrutiny in land use cases. The Court found that an actual physical appropriation had taken place which warranted the use of strict scrutiny. *Nollan*, 483 U.S. at 832. Therefore, the use of strict scrutiny under *Nollan* can be limited to instances in which a land use regulation effects an actual physical appropriation of land.

Strict scrutiny, the Court held, was reserved for challenges by suspect classes under the Fourteenth Amendment.[251]

The new test, mere rationality, presumed that a regulation is valid.[252] In order to invalidate a land use regulation a property owner must show that the regulation is irrational.[253] Thus, after 1938, the minimal protection originally provided by *Mugler* vanished. A property owner no longer could challenge a land use regulation because it did not substantially advance a valid state purpose. This change in the standard of judicial review is significant because the nuisance exception, coupled with a mere rationality test, instead of a strict scrutiny test, creates a situation in which it is extremely easy for regulators to infringe upon property rights.

By allowing any exercise of the state's police powers to fall within the nuisance exception, the courts have subverted the goals of the Fifth Amendment.[254] As Justice Rehnquist pointed out in his dissent in *Keystone*, almost every regulation enacted by a state is for the health, safety, or welfare of the public.[255] Therefore, if the police powers are construed to be "coterminous" with the nuisance exception, every land use regulation would be exempt from the Fifth Amendment. This result is precisely the concern addressed by Justice Rehnquist in *Keystone*.[256]

Justice Rehnquist argued for a more narrow application of the nuisance exception.[257] First, Rehnquist suggests that the nuisance exception should only apply in cases of the "misuse or illegal use"[258] of property. Second, he states that the nuisance exception should never be used to permit the total destruction of the value of property.[259] Applying Rehnquist's analysis to the facts of *Lucas*, this prong of the test would weigh in favor of finding a taking.

First, the Act in *Lucas* would not be construed to be a nuisance statute. The Act is concerned, among other things, with preserving the beach so as not to affect tourism.[260] South Carolina receives about two-thirds of its annual tourism revenue from the use of its beaches.[261]

---

251. *Carolene Products*, 304 U.S. at 152 n.4; *see also* DUCAT & CHASE, *supra* note 44, at 690.

252. *Carolene Products*, 304 U.S. at 151-52.

253. *Id.*

254. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. S.C. CODE ANN. §§ 48-39-250(1)(b), 48-39-260(1)(b) (Law. Co-op. Supp. 1992).

261. S.C. CODE ANN. § 48-39-250(1)(b) (Law. Co-op. Supp. 1992).

These economic interests should remove the Act from the category of a nuisance statute. In *Keystone*, Rehnquist found that the Subsidence Act served primarily economic interests and, therefore, was not a traditional nuisance statute.[262]

Similarly, the Act in *Lucas* serves primarily economic interests and should not be considered a traditional nuisance statute. Traditional nuisance statutes prohibit the "misuse or illegal use" of property.[263] The Act is not aimed at the "misuse or illegal use" of property but at "a legal and essential use of property."[264] Lucas can argue that building a house to live in is the most "legal and essential use of property."[265] There is no statute in South Carolina prohibiting the use of private property for use as a residence. Therefore, the Act prohibits what is a legal use of property.

Justice Rehnquist also would prevent the application of a nuisance exception where the regulation completely destroys the value of the parcel of property.[266] Viewing the area seaward of the setback line in *Lucas* as a separate segment of property, the Act has completely destroyed the value of the property.[267] The trial court found specifically that the property had lost its market value due to the imposition of the Act.[268] Therefore, the value of the relevant segment of property was completely destroyed.

Under Justice Rehnquist's analysis, the South Carolina court should conclude that the Act does not fit within the traditional category of nuisance statutes. First, the Act does not seek to prohibit a "misuse or illegal use;" rather, it prohibits a "legal and essential use." Second, the Act completely destroys the value of the property burdened by the regulation. Therefore, the lower court should find that the Act is not a traditional nuisance statute and that this prong of the test weighs in favor of finding a taking.[269]

---

262. *Keystone*, 480 U.S. at 513.

263. *Id.* at 512. For cases explaining a "misuse or illegal use" of property, see Miller v. Schoene, 276 U.S. 272 (1928) (trees ordered destroyed to protect surrounding coves from infection); Mugler v. Kansas, 123 U.S. 623 (1887) (preventing the sale of intoxicating liquors).

264. *Keystone*, 480 U.S. at 512 (quoting Curtin v. Benson, 222 U.S. 78, 86 (1911)).

265. *See id.* In fact, Lucas did argue that building a house cannot be considered a nuisance. Petitioner's Brief, *supra* note 21, at 28.

266. *Keystone*, 480 U.S. at 513.

267. See *supra* notes 141-47 for a discussion of Justice Rehnquist's construction of the relevant parcel to use in determining whether a taking has occurred.

268. Petitioner's Brief, *supra* note 21, at 18.

269. Upon remand from the United State Supreme Court, the South Carolina Supreme Court held that Lucas' proposed use of his land did not violate any state nuisance laws. Lucas v. South Carolina Coastal Council, 1992 S.C. LEXIS 236 (Nov. 20, 1992), at *3. As a result, the court held that the Act worked a temporary taking of Lucas' property for which he was entitled to compensation. *Id.*; *see also* First English Evangelical Lutheran Church v. County of Los Angeles,

V. CONCLUSION

The United States Supreme Court must clarify takings law. The scope of the nuisance exception has been clearly defined by *Nollan*. The interplay between the nuisance exception and the balancing-of-factors test, however, is still unclear. The use of the balancing-of-factors tests is still a viable tool to determine if a regulation has "gone too far." Further, the balancing-of-factors test is a safeguard to ensure that an "average reciprocity of advantage" exists. Until the next takings case reaches the Supreme Court, however, takings jurisprudence is still left with some uncertainty.

Thomas P. Glass

---

482 U.S. 304, 318 (1987) (temporary taking no different than permanent taking and requires compensation).

The South Carolina Supreme Court remanded the case to the trial court level for a determination as to the proper amount of damages. *Lucas*, 1992 S.C. LEXIS 236, at *3. Damages were to be measured from the time of enactment of the 1988 Act until the date of the November 1992 order. *Id.* This is the method of measuring damages as set forth by the Supreme Court in *First English*. *See First English*, 482 U.S. at 319.

It should be noted that the South Carolina Supreme Court did not utilize the balancing-of-factors test in reaching its conclusion that a taking had occurred. The court merely found that Lucas' proposed use did not violate existing state nuisance law. If this is the result Justice Scalia intended, then the balancing-of-factors test is dead. State nuisance law would govern takings jurisprudence, and the protections of the Fifth Amendment would vary depending upon in which state one's property was located. Thus, there would be no uniformity.

Examination of state nuisance law is supposed to be an "antecedent inquiry," not the sole inquiry. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2899 (interim ed. 1992). The logical conclusion is to subsequently apply the balancing-of-factors test. It is quite possible that Lucas' use of the property, while not offensive under state nuisance law, may nonetheless be prohibited under the *Agins* or *Penn Central* tests. See *supra* notes 209-69 for a discussion of the application of the balancing-of-factors test to the facts of *Lucas*.