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## Harmful Use and the Takings Clause in the Eye of the Beholder: Lucas v. South Carolina Coastal Council

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HARMFUL USE AND THE TAKINGS CLAUSE IN THE EYE  
OF THE BEHOLDER: *LUCAS v. SOUTH CAROLINA*  
COASTAL COUNCIL

CHARLES H. CLARKE<sup>1</sup>

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## I. INTRODUCTION

A. *Recent Takings Clause Decisions and the Police Power*

The police power has been steadily losing ground to the Takings Clause<sup>2</sup> in recent Supreme Court decisions. The Takings Clause now requires interim compensation when a regulation of land turns out to be a taking.<sup>3</sup> This requirement may induce state and local governments to forego valid regulation through zoning laws rather than risk payment of interim compensation for good faith enactments that are later held unconstitutional. The Takings Clause may also prove hostile to rent control under ordinary conditions in peacetime.<sup>4</sup> Further, a requirement for a donation of a small strip of land to protect public rights in the use of the beach from the encroaching use of beachfront owners who seek a large increase in the use of their lots has also been struck down.<sup>5</sup> In retrospect, at least, this decision may have signalled diminished police power protection for public ecological resources.

In a recent Supreme Court case, *Lucas v. South Carolina Coastal Council*,<sup>6</sup> the Court addressed the issue of whether the common law of nuisance should prohibit as well as authorize state regulation of property to some extent. The common law of nuisance can be quite protective of landowners who want to make a destructive use of their land. It allows destructive land use provided it is not a common law nuisance. It is not surprising, then, that landowners who would like to make a destructive use of their land have asked the Supreme Court more than once to make this common law right to use land a constitutional right.

These requests were made randomly during the second and third decades of the present century, and all of them were unsuccessful.<sup>7</sup> Throughout these

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<sup>2</sup>The pertinent language of the amendment states: "[n]or shall private property be taken for public use without just compensation." U.S. CONST. amend. v.

<sup>3</sup>First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987).

<sup>4</sup>See *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The Court dismissed a Takings Clause challenge to hardship tenant provisions in a municipal rent control ordinance because it was premature. *Id.* at 15. Justices Scalia and O'Connor dissented, however, on the ground that the hardship provisions violated the Takings Clause. They also thought that only emergency conditions that involved exorbitant prices would justify rent control. *Id.* at 20.

<sup>5</sup>*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 829, 838-39, 853 (1987).  
6112 S. Ct. 2886 (1992).

<sup>7</sup>In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), a landowner unsuccessfully resisted regulatory shutdown of his brick factory on the ground that it was not a common law nuisance. *Id.* at 406, 410. Regulatory destruction of red cedar trees that had rust disease which was fatal to apple orchards, although harmless to the host trees, elicited a similar claim in *Miller v. Schoene*, 276 U.S. 272, 273-74 (1928); cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (presenting a challenge of a real estate broker to zoning regulations that drastically reduced the value of some of his holdings, thereby

years, a Supreme Court that cannot be justly accused of unfriendliness toward private enterprise and property rights flatly turned down all of these requests.<sup>8</sup> What has been withheld for a century, however, may yet become a constitutional right.<sup>9</sup>

Thus, a regulation that totally deprives a landowner of all productive use of his land becomes unique, requiring a unique rule.<sup>10</sup> Near nuisance precedents, on the other hand, become harmful use precedents.<sup>11</sup> A harmful use, in turn, becomes harmful only in the eye of the beholder, allowing an equally opposite perspective that the use is really harmless.<sup>12</sup>

Further, harmful use precedents that allowed the state to make the survival choice between two incompatible uses now mean something less than they obviously imply. These precedents, however, may involve only the traditional subject matter of the police power.<sup>13</sup> Subject matter that departs from tradition, therefore, may deserve a different degree of protection from the police power or perhaps none at all.<sup>14</sup> The issue is left to two conflicting possibilities of what constitutes a nuisance.<sup>15</sup>

Whichever of these two possibilities prevails, both possibilities require the courts to perform essentially legislative functions regardless, in other words, of whether public ecological resources receive insufficient or ample protection from private enterprise that wants to consume them. The traditional Takings Clause precedents, on the other hand, would give public ecological resources

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impliedly asserting constitutional freedom from drastic property regulation when a land use is not a nuisance).

<sup>8</sup>At that time, the nation had a laissez faire regime of constitutional law. The market was the virtual regulator of rents, wages and prices. See *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546-48 (1924) (holding ordinary peacetime rent control unconstitutional); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (holding wage controls unconstitutional); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (holding price control unconstitutional), *overruled by Olsen v. Nebraska*, 313 U.S. 236 (1941). Price control was permissible only for a business affected with a public interest, *Id.* at 239-40. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-4, at 570-74 (2d ed. 1981). Congress' commerce power did not extend to labor relations in the mines, mills and factories of the nation. See *Hammer v. Dagenhart* 247 U.S. 251, 269 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941).

<sup>9</sup>See *Lucas*, 112 S. Ct. at 38-39 (Blackmun, J., dissenting).

<sup>10</sup>See *infra* pp. 36-37.

<sup>11</sup>See *infra* pp. 36-38.

<sup>12</sup>See *infra* pp. 39-41.

<sup>13</sup>See *infra* pp. 50-51.

<sup>14</sup>See *infra* pp. 46-48.

<sup>15</sup>See *infra* pp. 46-48.

and private property ample protection with minimum judicial oversight.<sup>16</sup> The traditional position seems preferable for this reason.

*B. An Overview of Lucas—The Facts and Court Litigation*

Lucas was a building contractor who lived in a subdivision on the Isle of Palms, a barrier island east of Charleston, South Carolina.<sup>17</sup> He also owned two of the last four vacant lots in the subdivision.<sup>18</sup> Extensive residential development had already occurred on the island.<sup>19</sup>

South Carolina had enacted a Coastal Zone Management Act in 1977 to protect the beach-dune system of the seashore from residential development close to the beach.<sup>20</sup> Initially, the Act required a permit for a change of land use in the critical area along the beach, which included the beach as well as immediately adjacent sand dunes.<sup>21</sup> Lucas' two vacant lots were inland to the critical area on the island when he acquired them, and the Act's permit requirement did not apply to his lots at that time.<sup>22</sup>

The initial Act, however, did not stop the loss of shoreline.<sup>23</sup> Consequently, the initial Act was amended by the Beachfront Management Act which moved the baseline of the critical area along the beach landward placing the baseline within Lucas' property lines.<sup>24</sup> The new baseline of the critical area for Lucas' lots was determined by connecting the most landward points of erosion in the property's inlet erosion zone during the preceding forty years.<sup>25</sup> The amended Act prohibited Lucas from placing any habitable structure on his lots, and it provided no exception from the ban.<sup>26</sup>

The Beachfront Management Act recited more than one reason for protection of the beach-dune system.<sup>27</sup> The system, for example, protected life and property by serving as a storm barrier.<sup>28</sup> Further, the Act declared that residential development along the beach accelerated the erosion of the beaches

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<sup>16</sup>See *infra* pp. 36-38.

<sup>17</sup>*Lucas*, 112 S. Ct. at 2889, 2905.

<sup>18</sup>*Id.* at 2905.

<sup>19</sup>*Id.* at 2889.

<sup>20</sup>*Id.* at 2889, 2904-05.

<sup>21</sup>*Id.* at 2889.

<sup>22</sup>112 S. Ct. at 2889.

<sup>23</sup>*Id.* at 2905.

<sup>24</sup>*Id.* at 2889.

<sup>25</sup>*Id.* at 2889 n.1.

<sup>26</sup>*Id.* at 2889-90.

<sup>27</sup>112 S. Ct. at 2896, n.10.

<sup>28</sup>*Id.* at 2896.

and dunes.<sup>29</sup> The Act also said that the beach-dune system protected public use of the beaches,<sup>30</sup> the state's tourist industry,<sup>31</sup> and habitats for endangered and threatened species.<sup>32</sup>

The Act also declared that it was necessary to let the beach accrete and erode in its natural cycle and that discouraging new construction and encouraging the withdrawal of structures that were already too near the beach were necessary to accomplish this objective.<sup>33</sup> If existing structures were destroyed, the Act would not permit rebuilding.<sup>34</sup> The Act also forbade repairing seawalls,<sup>35</sup> and required some owners of existing structures to replenish the beach with sand annually.<sup>36</sup>

Time and tide alike had affected Lucas' land over the years; the land was once part of the beach.<sup>37</sup> In 1963, the land was under water.<sup>38</sup> Lucas purchased the lots for \$975,000 two years before he was prohibited from building homes upon them.<sup>39</sup>

Lucas sued for compensation due to a permanent taking of his land.<sup>40</sup> He claimed that because the Beachfront Management Act,<sup>41</sup> as amended, deprived him of all productive use of his land, he was entitled to compensation regardless of whether the Act furthered legitimate objectives of the police power.<sup>42</sup> The state trial court agreed and awarded him judgment in the amount of \$1,232,387.50.<sup>43</sup>

The Supreme Court of South Carolina, however, understood Lucas to concede that the Act furthered its objectives and, therefore, was a valid exercise of the police power.<sup>44</sup> Consequently, the court applied the harmful or noxious

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<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>112 S. Ct. at 2896.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 2924

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>112 S. Ct. at 2905.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 2889.

<sup>40</sup>*Id.* at 2890.

<sup>41</sup>S.C. CODE ANN. § 48-39-10, 280(A)(1), (2) (Law Co-op 1988).

<sup>42</sup>112 S. Ct. at 2890.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

use precedents of the Takings Clause.<sup>45</sup> These precedents allow the state to prohibit private use of land when it harms interests within the protective scope of the police power without paying the private landowner compensation for the ensuing drastic regulatory loss.<sup>46</sup> Therefore, the court reversed the trial court's judgment for Lucas.<sup>47</sup>

The United States Supreme Court viewed the case differently than both of the state courts. A majority of five judges,<sup>48</sup> including Justice White, minted a new rule for the Takings Clause. The Court held that a total regulatory use deprivation of land requires compensation unless the prohibited use was antecedently proscribable under state nuisance or similar principles of property law.<sup>49</sup> In other words, a landowner has a constitutional right to make use of his land, even if it is destructive of public ecological resources, when it is the only available productive use of his land and the use is not a nuisance. Thus, the newly minted rule is a *per se* takings rule for total use deprivation with a *per se* nuisance exception.<sup>50</sup>

Four justices refused to join the Court's majority opinion and agree with its rule. Justice Blackmun and Justice Stevens dissented, insisting upon a straight-

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<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>112 S. Ct. at 2890.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 2899-2901.

<sup>50</sup>*Id.* at 2901. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) held that a total regulatory use deprivation of land is constitutional if it furthers an objective of the police power. The Court assumed, *arguendo*, that an interim floodplain ordinance deprived the landowner of all use of his land. *Id.* at 307, 313, 322. The Court then said that it had no occasion to decide "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations." *Id.* at 313. At this juncture in the opinion, the Court did not mention nuisance at all, but instead cited the harmful use precedents. *Id.* At the end of the opinion, the Court ruled that invalidation of the ordinance would require interim compensation. *Id.* at 322.

Some recent cases do contain a statement that a taking occurs when a regulation denies the landowner economically viable use of his land. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.*, 452 U.S. 264, 295-96 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). *See also Lucas*, 112 S. Ct. at 2893 n.6. *But see Keystone*, 480 U.S. 485 (containing a proposition that contradicted this statement). Further, *Hodel* was decided six years before *First English*, but like *Nollan*, which was decided seventeen days after *First English*, it simply repeated the statement as it appeared in *Agins* and an earlier case. *Nollan*, 483 U.S. at 834, and *Hodel*, 452 U.S. at 295-96. Further, this statement, itself, was unqualified. *Lucas* added a qualifier, namely, a nuisance exception. The *Lucas* rule is brand new. *Lucas*, 112 S. Ct. at 2911, n.10 (Blackmun, J., dissenting).

forward application of the harmful use precedents.<sup>51</sup> Justice Souter voted to dismiss the case on the ground that the request to review it had been improvidently granted.<sup>52</sup> He explained that the assumptions that provided the basis for decision in the case throughout the litigation did not provide enough facts to mark out any dimensions for the new rule.<sup>53</sup> Finally, Justice Kennedy wrote a brief concurring opinion that did not subscribe to the new rule.<sup>54</sup> He did say, nevertheless, that the promotion of the state's tourist industry did not justify the drastic regulatory imposition upon Lucas.<sup>55</sup>

### C. *The Result of Lucas: Uncertainty*

As a result of *Lucas*, uncertainty exists as to whether this nuisance rule will come to have an inflexible or flexible approach in determining what constitutes nuisance.<sup>56</sup> An inflexible approach could hold some exercises of the state's police power to only a marginal increase beyond what the common law, strictly applied, would permit.<sup>57</sup> A flexible approach toward nuisance, on the other hand, might allow the police power to give public ecological resources as much protection as its traditional subjects.<sup>58</sup>

Justice White, who was part of the five-judge majority in *Lucas*, may be the reason for this uncertainty in the scope of the nuisance rule.<sup>59</sup> He finds an inflexible conception of nuisance unacceptable, in view of his position in *Keystone Bituminous Coal Ass'n v. De Benedictis*,<sup>60</sup> the four other justices in the *Lucas* majority, however, may prefer an inflexible approach to nuisance as it reduces the police power.<sup>61</sup> The holding in *Keystone* allowed Pennsylvania to compel the coal industry to leave 27,000,000 tons of coal in the ground to spare

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<sup>51</sup>*Lucas*, 112 S. Ct. at 2904, 2910-12, 2917, 2920-22.

<sup>52</sup>*Id.* at 2925.

<sup>53</sup>*Id.* at 2925-26.

<sup>54</sup>*Id.* at 2902-03.

<sup>55</sup>*Id.* at 2904.

<sup>56</sup>112 S. Ct. at 2904.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* Justice Blackmun, dissenting, did not seem to read the court's opinion to foreclose a conception of nuisance that would adequately accommodate the regulatory needs of the state to address conflicts between private land uses and new enlarged interests of the police power. 112 S. Ct. at 2912-14. The outlook of Justice Stevens in this regard, however, was dismal. He said: "Under the court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision." *Id.* at 2921.

<sup>59</sup>*Lucas*, 112 S. Ct. at 2888.

<sup>60</sup>480 U.S. 470 (1987); see *infra* pp. 43-46.

<sup>61</sup>See *infra* pp. 43-46.



the state's bituminous coal communities from a mining practice that would destroy them.<sup>62</sup> The outlook of Justice White, then, may permit an expansion of the nuisance element of the new *Lucas* rule, and the outlook of all four of the justices who did not subscribe to the rule may be equally accommodating.<sup>63</sup>

Still, the harmful use precedents underwent a transformation in *Lucas* which, itself, is not necessarily remarkable. What is remarkable, however, is that the harmful use precedents are Takings Clause precedents of great renown,<sup>64</sup> and that their basis is nuisance. It is possible to overlook the fact that the newly minted rule in *Lucas* for the Takings Clause can rest upon nuisance rather than harmful use.<sup>65</sup> It would seem impossible, though, to mint a new rule for the Takings Clause that rests upon nuisance without mentioning that the rule appears to reject Takings Clause precedent that also rests upon nuisance. But that is exactly what the *Lucas* Court did.<sup>66</sup>

One might wonder, naturally, how constitutional law, at this late date, can be in equipoise between a constitutional claim that has always been rejected and a common police power argument that has always been acceptable. One might guess that it is due, in part, to the remarkable susceptibility of precedents to transformation and restructuring when the Supreme Court finds that these precedents no longer serve the perceived needs of the times.

## II. THE HARMFUL USE PRECEDENTS HAVE A NUISANCE RATIONALE THAT PERMITS NEAR TOTAL REGULATORY USE DEPRIVATION OF PROPERTY

*Mugler v. Kansas*<sup>67</sup> allowed the state to mandate liquor prohibition without paying the liquor industry a cent for the prescribed uselessness of its distilleries, breweries, and their fixtures.<sup>68</sup> The word *nuisance* pervasively appears throughout the opinion.<sup>69</sup> Zoning regulation passed constitutional muster in *Village of Euclid v. Ambler Realty Company*,<sup>70</sup> and it also caused a 75% reduction

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<sup>62</sup>480 U.S. at 498.

<sup>63</sup>See *infra* pp. 43-46.

<sup>64</sup>See RICHARD A. EPSTEIN, TAKINGS, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 113-14, 120, 130-34 (1985).

<sup>65</sup>*Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting).

<sup>66</sup>The *Lucas* majority did make two references to the South Carolina Supreme Court's understanding of the harmful use precedents to permit proscription of a harmful use that was tantamount to a public nuisance. 112 S. Ct. at 2890, 2896-97. The *Lucas* majority, however, did not say that these precedents rested upon a nuisance rationale. See *infra* note 177 and accompanying text for the kind of analysis that the Court decided not to mention or make, notwithstanding recent confirmation of its constitutional status in *Keystone Bituminous Coal Ass'n. v. De Benedictis*, 480 U.S. 470, 492, 512-14 (1987).

<sup>67</sup>123 U.S. 623 (1887).

<sup>68</sup>*Id.* at 657.

<sup>69</sup>*Id.* at 655-58, 669-70, 672-73.

<sup>70</sup>272 U.S. 365 (1926).

in value of some of the holdings of the real estate broker who challenged the zoning law.<sup>71</sup> He had acquired his holdings for industrial development, and the zoning plan restricted much of his land to residential uses.<sup>72</sup> A real estate developer does not create a nuisance simply by putting down factories on undeveloped rural acreage, but nuisance is the basic, pervasive theme of *Euclid*.<sup>73</sup>

Justice Sutherland, who spoke for the court in *Euclid*, explained that a nuisance could be the right thing in the wrong place, "like a pig in the parlor instead of the barnyard."<sup>74</sup> Consequently, keeping factories and commercial uses out of residential areas can be an exercise in nuisance prevention.<sup>75</sup> The law of nuisance provided the basis for this exclusion.<sup>76</sup>

Similarly, apartment buildings did not belong in residential areas if the government thought that a different location was more suitable. The *Euclid* Court observed that an apartment house could become a mere parasite,<sup>77</sup> that one apartment frequently attracted another to an area "destroying the entire section for private house purposes and that apartment houses frequently monopolize the rays of the sun"<sup>78</sup> and cause a lot of noise and traffic until finally they come "very near to being nuisances."<sup>79</sup>

Earlier, *Hadachek v. Sebastian*<sup>80</sup> upheld imposition of a drastic regulatory remedy for incompatible uses that zoning regulation might have avoided. *Hadachek* permitted the uncompensated shutdown of a brick factory when it precluded residential development of nearby rural acreage.<sup>81</sup> The shutdown deprived the owner of the brick factory of 92.5% of the value of his land.<sup>82</sup> The Court, nevertheless, held that the legislature can declare a preexisting lawful business to be a "nuisance in law and fact" although it is not a nuisance per se.<sup>83</sup>

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<sup>71</sup>*Id.* at 384.

<sup>72</sup>*Id.* at 385, 389.

<sup>73</sup>*Id.* at 387-88.

<sup>74</sup>*Id.* at 388.

<sup>75</sup>272 U.S. at 388.

<sup>76</sup>*Id.* at 388-89.

<sup>77</sup>*Id.* at 394.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 395.

<sup>80</sup>239 U.S. 394 (1915).

<sup>81</sup>*Id.* at 410.

<sup>82</sup>*Id.* at 405.

<sup>83</sup>*Id.* at 410-11.

Similarly, *Miller v. Schoene*,<sup>84</sup> another incompatible use case, permitted Virginia to order destruction of red cedar trees without compensation when they became infected with a rust disease and, thereby, fatal to nearby apple orchards although the disease was harmless to the host tree.<sup>85</sup> The diseased cedar trees were a threat to the state's apple industry.<sup>86</sup> The Court found the "injury to property no more serious, nor the public interest less" than in *Hadachek*.<sup>87</sup> It also cited *Hadachek* for the proposition that the Court did not have to weigh with nicety the question of whether the diseased cedar trees were a nuisance at common law or could be declared a nuisance by statute.<sup>88</sup>

For the *Lucas* majority, however, the nuisance precedents became harmful use precedents, and a harmful use became a use that was harmful only in the eye of the beholder.<sup>89</sup> Perhaps these changes would be a little easier to see, however, if a totally regulatory use deprivation were unique. This situation became unique and received a newly minted rule to address it.

### III. TOTAL REGULATORY USE DEPRIVATION—ITS UNIQUENESS—REASONS FOR A UNIQUE PROTECTIVE TAKINGS RULE

The *Lucas* Court thought that the nuisance or harmful use precedents were different than the case before it. The harmful use precedents were not as extreme. Unlike the situation in *Lucas*, they did not involve regulation that deprived the landowner of all productive use of his land.<sup>90</sup> The Court then gave several reasons why a total regulatory use deprivation requires a different, more protective rule. All of these reasons, however, seem unpersuasive.

The Court stated, for example, that total regulatory deprivation of land is not simply an adjustment of the benefits and burdens of economic life, an adjustment that secures an average reciprocity of advantage for everyone concerned.<sup>91</sup> Similarly, the Court reasoned that such drastic regulation is not consistent with the functional truth that government could hardly go on unless it could reduce property values to some extent by general regulation.<sup>92</sup> Admittedly, all of these remarks are true. But the Court clearly knew, as its precedents show, that an occasional near total regulatory destruction of property values is necessary to prevent a land use from destroying other property values that the state can protect.

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<sup>84</sup>276 U.S. 272 (1928).

<sup>85</sup>*Id.* at 278.

<sup>86</sup>*Id.* at 279.

<sup>87</sup>*Id.* at 280.

<sup>88</sup>*Id.*

<sup>89</sup>See text accompanying notes 71-100.

<sup>90</sup>*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899, n.13 (1992).

<sup>91</sup>*Id.* at 2894.

<sup>92</sup>*Id.*

The Court also argued that from the perspective of the regulated landowner, a total regulatory use deprivation is the equivalent of physical appropriation.<sup>93</sup> Even if this is true, the nuisance precedents show that a regulatory cure must be strong enough to overcome the harm at which it is directed.

The Court then explained that total regulatory deprivation of land has a heightened risk of impermissibly pressing private property into public service under the guise of mitigating serious public harm.<sup>94</sup> If this is true, however, the camouflage should be easy to see through.

Five years before *Lucas*, in *Nollan v. California Coastal Commission*,<sup>95</sup> a five-judge Court majority had no trouble seeing a state regulatory land grab that the four dissenting justices could not see at all.<sup>96</sup> *Nollan* struck down a donation requirement of a small strip of land along the beach to accommodate the right of the public to use the beach with the conflicting rights of adjacent beachfront property owners.<sup>97</sup>

The *Nollan* Court also confirmed that the Takings Clause provides landowners with enhanced protection from regulatory takings. Instead of a rational basis test that might be too lenient and permissive of state regulation, the Court held that a regulation that targets a small group for a regulatory sacrifice must be substantially related to a substantial state objective.<sup>98</sup> The *Lucas* rule, of course, may end up giving such landowners much more protection than the *Nollan* rule.

Further, the *Lucas* Court's reasons for unique status for a total regulatory use deprivation expressed only part of its dissatisfaction with the harmful use or nuisance precedents. A double-barreled parting shot completed its critique. The *Lucas* Court's final pronouncements did cast the harmful use precedents in a new light. Like the rest of the Court's criticisms, however, these pronouncements seemed to miss their target completely.

#### IV. HARMFUL USE—ITS ILLUSORY DISTINCTION BETWEEN HARM PREVENTION AND BENEFITS CONFERMENT—ITS OBSTRUCTION OF VALUE-FREE JUDGMENT

The *Lucas* Court stated that the basic premise of the nuisance precedents was harmful use.<sup>99</sup> The Court reasoned, however, that the concept of harm was too illusory to permit value-free judgments.<sup>100</sup> Therefore, the Court declared that

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<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 2894-95.

<sup>95</sup>483 U.S. 825 (1987).

<sup>96</sup>*Id.* at 825, 828-29, 838-39, 853.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 834-35 n.3.

<sup>99</sup>*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992).

<sup>100</sup>*Id.* at 2897-99.

harm prevention cannot be used as a basis for determining when a regulation of property is a taking of property.<sup>101</sup>

Thus, the Court concluded that almost everything is harmful to land in some way because almost everything interferes to some extent with what other persons want to do with their land.<sup>102</sup> Harmfulness in this sense, as the Court explained, naturally, does not support a drastic regulatory reduction in the value of property. This kind of harmfulness always exists and would always permit the state to drastically regulate property without having to observe the limitations of the Takings Clause.<sup>103</sup>

The Court opined that whether the state is drastically regulating property to prevent harm or, instead, to confer benefits often depends only upon the eye of the beholder.<sup>104</sup> To illustrate, the Court cited two contradictory state precedents that involved the issue of whether protection of the environment permits the state to prohibit the owner of wetlands from filling them in without paying him compensation.<sup>105</sup> The Court reasoned that the eye of the beholder might see either harm prevention or ecological benefits in this situation.<sup>106</sup> The Court concluded that the case before it was capable of creating the same ambiguous impression. "One could say that imposing a servitude upon Lucas' land is necessary in order to prevent his use of it from 'harming' South Carolina's ecological resources; or, instead, in order to achieve the benefits of an ecological preserve."<sup>107</sup>

The Court continued with its discussion of the ambiguity in harm prevention and added another dimension to it: it is really incorrect to describe a land use as harmful merely because it is inconsistent with some other land use.<sup>108</sup> The Court's reasoning in support of this position was that both uses can be perfectly innocent and independently desirable although one of them must yield to the other.<sup>109</sup> "Whether Lucas' construction of single-family residences on his parcels should be described as bringing a 'harm' to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that any adjacent use must yield."<sup>110</sup>

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<sup>101</sup>*Id.* at 2899.

<sup>102</sup>*Id.* at 2898.

<sup>103</sup>*Id.* at 2899.

<sup>104</sup>112 S. Ct. at 2897.

<sup>105</sup>*Id.* at 2898.

<sup>106</sup>*Id.* at 2898.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>112 S. Ct. at 2898.

<sup>110</sup>*Id.*

Moreover, the Court did not want to leave the conclusion to be drawn from all of this ambiguity in the eye of the beholder, especially if the beholder was the state legislature. After all, when a harmful use is not really harmful, then harmful use cannot be a reason for drastic regulatory reduction in the value of property. The Court stated:

[t]he 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. A fortiori the legislature's recitation of a noxious-use justification cannot be a basis for departing from our categorical rule that total regulatory takings must be compensated.<sup>111</sup>

Although most of what the Court said is true, this reasoning does not support the Court's conclusions. That almost everyone harms another, for example, by simply getting in his way does not mean that this idea of harm is useless as a basis for regulation. Instead, it frequently is the reason for laws of general applicability to minimize some kinds of interference.

Further, the Court surely did not mean to suggest that it is usually impossible to tell whether harm suppression occurs actually to suppress harm or to confer benefits. In fact, harm suppression occurs to accomplish both objectives. Abatement of a common law nuisance will benefit persons whom the nuisance harmed. Harm suppression and benefits conferment naturally go hand-in-hand.

Moreover, the Court's position about totally incompatible land uses that are innocent and beneficial when independent of each other would perfectly fit two of the well-known Takings Clause precedents. The cedar trees in *Miller v. Schoene*,<sup>112</sup> while infested with rust disease harmless to themselves, were beneficial, except when they happened to be near apple orchards susceptible to the disease.<sup>113</sup> The brick factory in *Hadacheck v. Sebastian*<sup>114</sup> was beneficial all by itself, but not when it precluded residential community development of the surrounding countryside.<sup>115</sup>

The issue in such cases is, as the *Lucas* Court said, whether one use is of enough importance to require the other use to yield to it. Still, only one use can survive. Obviously, as the Court pointed out, it is impossible to make this survival choice on a value-free basis.

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<sup>111</sup>*Id.* at 2898-99.

<sup>112</sup>276 U.S. 272 (1928).

<sup>113</sup>See *supra* text accompanying notes 84-88.

<sup>114</sup>239 U.S. 394 (1915).

<sup>115</sup>See *supra* text accompanying notes 80-83.

The survival choice will simply be value-laden, no matter who makes it. Consequently, it would seem that making such choices should be exclusively a legislative function. The *Lucas* rule, however, will permit the Supreme Court to take these choices out of the hands of legislatures and make them itself. The Court will have the final say upon whether a state's common law classifies a total regulatory use deprivation as a nuisance with the requisite antecedent clarity.<sup>116</sup>

Moreover, the *Lucas* rule may deprive legislatures of regulatory freedom in the future that the drastic regulation precedents permitted in the past. Still, the new formulation in *Lucas* lacks content at the moment.<sup>117</sup> This lack of content for a new rule that may reduce state regulatory power suggests a lack of agreement on what its content should be.<sup>118</sup>

The cause of this lack of agreement may be garnered from *Keystone Bituminous Coal Ass'n v. De Benedictis*,<sup>119</sup> at least among the five-judge *Lucas* coalition. Three, and perhaps more, judges in the *Lucas* majority probably want to overrule *Keystone* and restore *Pennsylvania Coal Co. v. Mahon*<sup>120</sup> to the full precedential status that it had in the past.<sup>121</sup>

*Keystone* let the state of Pennsylvania compel the coal industry to leave 27,000,000 tons of coal in the ground to save the state's bituminous coal communities from a destructive mining practice.<sup>122</sup> Consequently, *Keystone* might have enough clout to save the Atlantic beaches from destruction by residential development. A full restoration of *Mahon*, on the other hand, might well constitutionalize such destruction and, in the eye of the beholder, reduce the police power of the state far more than occasional drastic property regulation would reduce the rights of private property. Discussion of *Mahon* and *Keystone* will show what is meant.

#### V. TWO COAL CASES FROM PENNSYLVANIA AND ONE COAL CASE FOR THE ATLANTIC BEACHES

In *Pennsylvania Coal Co. v. Mahon*,<sup>123</sup> the coal industry acquired the right to mine coal beneath the anthracite communities in northeastern Pennsylvania, but left ownership of the surface in homeowners and others.<sup>124</sup> The mining rights included the right to mine away the coal support pillars that kept the

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<sup>116</sup>See *infra* pp. 52-53.

<sup>117</sup>See *infra* pp. 45-47.

<sup>118</sup>See *infra* pp. 45-46.

<sup>119</sup>480 U.S. 470 (1987).

<sup>120</sup>260 U.S. 393 (1922).

<sup>121</sup>See *supra* text accompanying notes 101-47.

<sup>122</sup>480 U.S. at 498.

<sup>123</sup>260 U.S. 393 (1922).

<sup>124</sup>*Id.* at 412-15.

anthracite communities above ground.<sup>125</sup> Removal of these pillars involved secondary or residual mining and also terminal mining for the coal communities as well.<sup>126</sup> Thus, the properties on the land became threatened with destruction and the value of the land plummeted.

The acquisition of these mining rights began well before the turn of the century.<sup>127</sup> Forty years later, terminal mining in the anthracite region was occurring.<sup>128</sup> It is hardly surprising that the Pennsylvania legislature enacted a law, the Kohler Act, to forbid the destructive mining practice that threatened to destroy large areas of the state's land surface and also uproot a substantial part of the state's population.<sup>129</sup> Equally without surprise was the coal industry's challenge to the law on the ground that it was an uncompensated taking of their property. In a characteristically brief and lucid opinion authored by Justice Oliver Wendell Holmes, Jr., the Court simply held that the coal industry could keep what it bought and paid for.<sup>130</sup>

The only plaintiffs in *Mahon* were the owners of a single house who sued to enjoin mining operations that would cause it to subside into the ground.<sup>131</sup> Still, they did live in one of the cities for whose protection the challenged law was enacted.<sup>132</sup> Further, the coal industry as well as state and local governments participated in the case.<sup>133</sup> Consequently, the Court sensibly treated the case as a constitutional challenge to the Kohler Act.<sup>134</sup>

In ruling upon this challenge, it was relevant that the right to mine away the surface support pillars had acquired the status of a separate estate in land under Pennsylvania law.<sup>135</sup> This separate estate did not permit its owner to engage in mining operations without the consent of the owner of the mineral estate, although a coal company usually owned both the support and mineral estates.<sup>136</sup> But the support estate could be sold by its owner to the owner of the

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<sup>125</sup>*Id.*

<sup>126</sup>See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 578-79 (1978).

<sup>127</sup>260 U.S. at 412; cf. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987).

<sup>128</sup>*Mahon*, 260 U.S. at 412.

<sup>129</sup>*Id.* at 412-13.

<sup>130</sup>*Id.* at 414-15.

<sup>131</sup>*Id.* at 412-13.

<sup>132</sup>*Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 492 (Pa. 1922), *rev'd*, 260 U.S. 393 (1922).

<sup>133</sup>260 U.S. at 414.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.*; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 519-20 (1987).

<sup>136</sup>*Keystone*, 480 U.S. at 500-01.



surface or mineral estate.<sup>137</sup> Thus, the Kohler Act was a total regulatory deprivation of a preexisting estate in land.<sup>138</sup>

The Court, therefore, proceeded to consider the purposes of the Act and whether the police power justified this total regulatory deprivation of land use. One purpose that the Act seemed to lack was the protection of any health interests. Further, since the Act applied only when the land surface and mineral rights were held in separate ownership, the Court concluded that environmental protection, especially protection of the land surface, was not a purpose of the Act.<sup>139</sup> The Court also held that public safety could be secured merely by giving timely notice of the intention to mine away the support pillars, thereby permitting persons on the surface to depart in safety.<sup>140</sup>

Further, the argument of the surface owners and state and local governments had alluded to the preservation of the anthracite communities.<sup>141</sup> This allusion was advisable, of course. *Laissez faire* was the constitutional law of the land at the time,<sup>142</sup> and a large regulatory sacrifice of coal industry property to provide what would have been perceived as free living space and housing was a constitutional claim that would have met certain death. To dispel any allusions, the Court observed that peacetime rent control to provide for the immediate aftermath of World War I, which had involved wartime rent control, went to the verge of the law.<sup>143</sup> Shortly after *Mahon*, the Court held that rent control in ordinary peacetime would violate the Takings Clause.<sup>144</sup> The *Mahon* Court itself said that the case before it went beyond the rent control cases that involved war's aftermath.<sup>145</sup> Then, after having casually observed at the outset of its opinion that the Kohler Act surely would have failed for lack of a public purpose if its only purpose had been to protect the single house of the plaintiffs,<sup>146</sup> the Court held the Act unconstitutional in its entirety.<sup>147</sup>

Some issues of constitutional law, however, do not rest easily once they have been decided. An expansive role for government to provide for the general

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<sup>137</sup>*Id.* at 579-80.

<sup>138</sup>260 U.S. at 414.

<sup>139</sup>*Id.* at 413-14.

<sup>140</sup>*Id.* at 414.

<sup>141</sup>*Id.* at 409, 411 (presenting argument for Pennsylvania) (citing *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 492-93 (Pa. 1922)).

<sup>142</sup>*See supra* note 8.

<sup>143</sup>260 U.S. at 416.

<sup>144</sup>*Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546-48 (1924).

<sup>145</sup>260 U.S. at 416.

<sup>146</sup>*Id.* at 414.

<sup>147</sup>*Id.*

welfare became acceptable in the decades following *Mahon*.<sup>148</sup> Along with this power came the recognized need to protect and conserve the environment. That *Mahon*, itself, would be put to a test someday was inevitable. The test came sixty-seven years later in *Keystone Bituminous Coal Association v. De Benedictis*.<sup>149</sup> It involved the same terminal, destructive mining practice as *Mahon*.

The protective legislation in *Keystone*, however, did not have quite the same coverage as that in *Mahon*.<sup>150</sup> Further, the law in *Keystone* protected streams, impoundments, and aquifers;<sup>151</sup> and it also forbade removal of the coal support pillars for the surface without state permission when both interests were held in common ownership.<sup>152</sup> Apart from these differences, however, the two cases were the same except that *Keystone* arose in Pennsylvania's bituminous coal region. The purpose of the challenged laws in both cases was to protect Pennsylvania's coal communities from destructive terminal mining operations.

The coal industry, naturally, invoked *Mahon*,<sup>153</sup> and it must have been surprised when the *Keystone* Court held that *Mahon* had only decided a very insignificant point of law instead of providing the controlling law in *Keystone*. This lackluster ruling in *Mahon* was that a regulatory destruction of mining rights to protect merely a single house does not have a valid public purpose.<sup>154</sup> The rest of the *Mahon* opinion was said to have been advisory only.<sup>155</sup>

This cavalier treatment of *Mahon* reduced Justice Holmes' precedential pronouncements about what the coal industry had bought, paid for, and could keep to the status of dignified commentary. Four dissenting *Keystone* justices

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<sup>148</sup>Minimum wage legislation was held constitutional in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) which overruled *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923). Price regulation became constitutional in *Nebbia v. New York*, 291 U.S. 502, 531-32, 540-42 (1934). Subsequently, *Olsen v. Nebraska*, 313 U.S. 236, 244-247 (1941) overruled *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929). *Williams* had invalidated price regulation for gasoline. In 1983, approximately ten per cent of the nation's rental housing was subject to rent control. See Kenneth K. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 725 n.1 (1983). Fourteen years earlier, *Eisen v. Eastman*, 421 F.2d. 560, 567 (2d. Cir. 1969), cert. denied, 400 U.S. 841 (1970), dismissed a constitutional challenge to the rent control program of New York City in a single paragraph. Eventually, Congress' commerce power reached small industry, *United States v. Darby*, 312 U.S. 100, 116-17, 123 (1941), overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); small farms, *Wickard v. Filburn*, 317 U.S. 111, 114 (1942); and arson of a single two-unit apartment building, *Russell v. United States*, 471 U.S. 858, 859 (1985).

<sup>149</sup>480 U.S. 470 (1987).

<sup>150</sup>*Id.* at 485-86.

<sup>151</sup>*Id.* at 477.

<sup>152</sup>*Id.* at 486.

<sup>153</sup>*Id.* at 481.

<sup>154</sup>480 U.S. at 483-84.

<sup>155</sup>*Id.* at 484.

protested this mutilation of *Mahon* in vain;<sup>156</sup> they were unable to see any important differences in purpose between the challenged laws in the two cases.<sup>157</sup> However, after the *Keystone* Court had sufficiently distinguished *Mahon*, it was able to write on a clean slate.

The *Keystone* Court then proceeded to reason that the challenged law protected valid objectives of the police power, namely, public health, safety, and the environment.<sup>158</sup> The preservation of the bituminous coal communities from a destructive mining practice also became a valid objective of the police power.<sup>159</sup> Therefore, the *Keystone* Court found these objectives lacking in *Mahon*, and it also thought that the protected interests in *Keystone* were different than the interests that the coal industry in *Mahon* had settled by contract and title deeds fairly made and executed.

The coal industry in *Keystone*, of course, also complained about its enormous regulatory loss of coal.<sup>160</sup> The industry, however, did not attempt to show to what extent the loss might affect profitable operations.<sup>161</sup> The calculations that would have been required for this purpose were complicated,<sup>162</sup> and the industry, naturally, thought it had strong precedent in *Mahon* on its side to support its facial challenge to a law that destroyed its right to mine away support pillars for surface land. The *Keystone* Court ruled, however, that profitable mining operations must be presumed, absent data to the contrary, and that regulatory loss to promote police power objectives was consistent with the Takings Clause when the regulation permitted profitable operations.<sup>163</sup>

The regulatory loss of coal in *Keystone* was about 27,000,000 tons although the Court accurately said that it was less than 2% of the coal in place.<sup>164</sup> The Court's emphasis upon loss of a small percentage rather than a large tonnage would have been relevant if the coal industry had only been using its property in a way that interfered with the ownership rights of the surface owners. The surface estate, however, was a limited estate. Colloquially, it was a collapsible fee simple interest. Therefore, a collapse did not deprive the surface owners of any property interests.

One can justifiably argue, nevertheless, that because of its impact upon the public, the police power should always be able to prohibit the fulfillment of an arrangement like that in *Keystone*, regardless of how it would affect profitable

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<sup>156</sup>*Id.* at 507-08.

<sup>157</sup>*Id.* at 509-511.

<sup>158</sup>*Id.* at 485-86, 488.

<sup>159</sup>480 U.S. at 488.

<sup>160</sup>*Id.* at 498.

<sup>161</sup>*Id.* at 493.

<sup>162</sup>*Id.*

<sup>163</sup>*Id.* at 495-96, 499, 501-02.

<sup>164</sup>480 U.S. at 496, 498.

mining operations. But *Keystone* did not say this, and *Mahon* announced the opposite position.<sup>165</sup> In other words, *Keystone* simply straddled the middle between two extremes. The nature and magnitude of the impact of residual mining would have been the same in *Keystone* and *Mahon*. Both cases also involved the support estate for the surface. Consequently, the small percent of regulatory loss in *Keystone* does not distinguish it from *Mahon*.

Finally, the *Keystone* Court emphasized another difference between *Mahon* and itself. The difference was that the Kohler Act in *Mahon* made some mining operations commercially unprofitable,<sup>166</sup> a circumstance that appeared incidental to the *Mahon* Court.<sup>167</sup> What this supposed difference ignores, nevertheless, is that the laws in both cases made terminal mining operations unprofitable. Further, there was no showing in *Mahon* that terminal mining was necessary for profitable anthracite mining, although the support pillars may have comprised one-third of the coal in an anthracite field.<sup>168</sup> Thus, *Keystone*, without distinguishing Justice Holmes' dignified commentary in *Mahon*, technically left open the issue of whether the total uncompensated regulatory destruction of property in furtherance of police power objectives violates the Takings Clause.<sup>169</sup>

This was also the issue that the *Lucas* Court found itself free to decide without, however, mentioning the dignified commentary in *Mahon* that had already addressed the issue. Instead, *Lucas* announced something different for the moment, at least: a new per se takings rule with a per se nuisance exception.

A total regulatory deprivation of property naturally precludes any profitable use of the property. It is submitted, nevertheless, that neither the total proscriptiveness of a regulation nor its foreclosure of any profitable use is crucial in a regulatory takings case. Profitable operations for the coal industry, for example, failed to persuade the four dissenting judges in *Keystone* that its challenged regulation was valid. Further, the majority justices in *Keystone* expressly refused to let the coal communities be turned into shambles in rejecting the coal industry's claim under the Contract Clause<sup>170</sup> of the Consti-

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<sup>165</sup>*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922).

<sup>166</sup>480 U.S. at 484, 493.

<sup>167</sup>260 U.S. at 414-15.

<sup>168</sup>See *Rose*, *supra* note 126, at 567 n.38.

<sup>169</sup>The Court in *Lucas* conceded that it is uncertain whether a regulation is a total use deprivation in some situations. It also admitted that *Mahon* and *Keystone* contain inconsistent pronouncements about this issue. The Court then suggested that resolution of the question may depend upon how the regulating state's law of property has shaped the landowner's reasonable expectations of land use. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992). See *supra* text accompanying notes 100-18.

<sup>170</sup>"No state shall . . . pass any . . . Law impairing the obligation of contracts. . . ." U.S. CONST. art. I, § 10.

tution, which the industry had also invoked.<sup>171</sup> A court with this perspective would have hardly let unprofitable mining operations compel a sham use of the Takings Clause either.

Moreover, a near total regulatory deprivation of property with a resulting near total reduction in profitability has been upheld when use of the property would destroy valid interests of the police power.<sup>172</sup> The difference between total and near total regulatory deprivation of property, in other words, can be strictly arithmetical. Drastic regulation and reduction of profitability are hardly new in Takings Clause litigation.<sup>173</sup>

Similarly, a nuisance exception for a regulation raising a claim under the Takings Clause is not new.<sup>174</sup> For example, the power of the state to suppress a nuisance appeared in 1922, in *Mahon*, in Justice Brandeis' sole dissenting opinion concerning public safety,<sup>175</sup> which the majority held could be adequately protected by giving notice of mining operations.<sup>176</sup> Further, the entire Court in *Keystone* expressly discussed a nuisance exception from the Takings Clause that included the harmful use precedents, although the justices disagreed by a narrow margin (5-4) about its scope.<sup>177</sup>

Consequently, a nuisance, like a harmful use, can depend upon the eye of the beholder. Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia would likely use the nuisance concept to reduce the state's police power because they protested the mutilation of *Mahon* by dissenting in *Keystone*.<sup>178</sup> Justice Thomas may have the same inclination although he has not been on the Court long enough for his views on the Takings Clause to become known.

Justice White, however, voted with the court majority in both *Keystone* and *Lucas*.<sup>179</sup> Therefore, he seems unlikely to agree that the law of nuisance should severely curtail the police power. Justice Blackmun and Justice Stevens are set

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<sup>171</sup>*Keystone v. Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 504 (1987). The Contracts Clause does not prevent substantial or even total impairments of private contracts when such impositions are reasonably appropriate for the effectuation of a significant and legitimate public purpose. *Id.* at 504 n.31, 505. Consequently, the Contracts Clause provides less protection than the Takings Clause.

<sup>172</sup>*See supra* text accompanying notes 62-89 for a discussion of near nuisance precedents.

<sup>173</sup>*Id.*

<sup>174</sup>*Id.* Cf. EPSTEIN, *supra* note 64, at 113-14, 120, 130-34.

<sup>175</sup>*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922).

<sup>176</sup>*Id.* at 414.

<sup>177</sup>*Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 488-92, 512-14 (1987).

<sup>178</sup>*Id.* at 507-08.

<sup>179</sup>*Id.* at 472; *See also* *Lucas v. South Carolina Coastal Council* 112 S. Ct. 2886, 2888 (1992).

against this use of nuisance doctrine because they dissented in *Lucas*.<sup>180</sup> Finally, Justice Souter and Justice Kennedy, in *Lucas*, refused to agree to the use of nuisance doctrine to severely contract the police power.<sup>181</sup> Therefore, it is possible that the nuisance component of the *Lucas* rule will permit an expansive use of the police power that will permit as much protection for ecological interests as other regulatory objectives.

It is also possible, however, that there will be a severely restrictive nuisance limitation upon drastic property regulation. Four justices on the Court may press hard for the restoration of *Mahon* and give freedom of private enterprise a constitutional dimension once again.

#### VI. DRASTIC PROPERTY REGULATION: A MARGINAL OR LARGER INCREASE BEYOND THE COMMON LAW OF NUISANCE

There is already an existing conception of nuisance law in the Supreme Court precedents that allows regulatory freedom of choice to the state when a use of property is totally incompatible with another use of property in a particular locale, and also injurious to some other protectible interest of the police power. Prohibition of destructive mining practices, brick factories, and cedar trees is illustrative.<sup>182</sup> Further, this version of what a nuisance is does not always require total incompatibility. Liquor prohibition, for example, recognizes that palpable serious loss of life, limb, and health is enough. These interests also fall within the protective scope of the traditional police power.

Straightforward application of these nuisance precedents would clearly allow South Carolina to protect its beaches from residential development that would destroy them. The *Lucas* majority opinion, however, was less than straightforward. This hesitation suggests that some or all of the majority justices think that the existing nuisance precedents would allow the state too much freedom to address new conditions.

Thus, with the exception of *Keystone*, about which as little as possible was said, the *Lucas* majority merely affirmed the incompatible use precedents "explicitly with respect to the full scope of the State's police power."<sup>183</sup> By now, of course, preventing people and uses from getting in each other's way under modern living conditions is a traditional exercise of the police power that permits drastic property regulation.<sup>184</sup> The Court might also have included the validity of restrictions upon the strip mining of coal that are really an invitation

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<sup>180</sup>112 S. Ct. at 2904, 2917.

<sup>181</sup>*Id.* at 2902-03, 2925.

<sup>182</sup>*See supra* text accompanying notes 44-55, 100-22.

<sup>183</sup>112 S. Ct. at 2897.

<sup>184</sup>The zoning ordinances in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380-83 (1926) is an example. The zoning ordinance was alleged to have reduced the value of some land holdings by 75%. *Id.* at 384.

to leave all of it in the ground.<sup>185</sup> Strip mining can cause pollution of streams, soil erosion, and floods, all of which undoubtedly fall within traditional police power regulation.<sup>186</sup>

In the eyes of some or all of the *Lucas* justices, then, the incompatible use precedents do not give the state complete regulatory freedom over incompatible interests. Instead, the *Lucas* majority leaves open some possibility that these precedents may rest, or may come to rest, upon antecedent principles of state nuisance and property law that make the use of property unlawful and also permit the state to make this unlawfulness explicit when the need to do so arises.<sup>187</sup> Further, this power, as the Court says, would not allow the state to totally proscribe a "productive use that was previously permissible under relevant property and nuisance principles."<sup>188</sup> What the *Lucas* majority leaves to the future, nevertheless, is the calculus for determining when a once lawful use becomes a proscribable nuisance, especially for the protection of ecological interests that traditionally have received destruction instead of the protection of the police power.

Further, the Court's examples of acceptable drastic property regulation will be chilling to its exercise if they are also meant to illustrate limitations beyond which the state cannot go. Compensation would not be required, for example, when the state forbade "a landfilling operation that would have the effect of flooding others' land."<sup>189</sup> Similarly, the state could require the owner of a nuclear generating plant to move it without compensation when he built it upon an earthquake fault.<sup>190</sup> The state can also destroy property without compensation, in cases of actual necessity, to prevent a fire from spreading.<sup>191</sup> Turned around as limitations upon state power to drastically prohibit, however, these illustrations would be capable of letting loose private activity of considerable destructive magnitude.<sup>192</sup>

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<sup>185</sup>*Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 269 (1981) (upholding detailed regulations concerning the restoration of stripmined land).

<sup>186</sup>*Id.* at 277.

<sup>187</sup>112 S. Ct. at 2900-01.

<sup>188</sup>*Id.* at 2901.

<sup>189</sup>*Id.* at 2900.

<sup>190</sup>*Id.*

<sup>191</sup>*Id.*

<sup>192</sup>The Court in *Lucas* provided the appropriate language by saying:

A law or decree . . . must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

112 S. Ct. at 2900.

Other portions of the *Lucas* majority opinion, however, seem to look in the opposite direction. Thus, the Court said that the total takings inquiry required will ordinarily involve consideration of the degree of harm presented by the proscribed use as well as its social utility and the relative ease with which the harm can be avoided by all concerned, including the regulated party.<sup>193</sup> Harm is still relevant, then, even though elsewhere the Court largely disavowed harmful use analysis and even expressly said that "noxious-use logic cannot serve as a touchstone to distinguish regulatory takings."<sup>194</sup> Finally, the last footnote in the majority opinion expressly allows a court some leeway in interpreting state law when it makes a nuisance inquiry.<sup>195</sup> Therefore, the *Lucas* opinion seems to leave some room for an expansive exercise of the police power that would let the state adjust new incompatible interests in the same way that the precedents permit for the incompatibilities of the past.

The basic issue, however, in all of this ambiguity, tension, and contradiction seems apparent. It is not simply whether the lawfulness of a destructive use of property over time constitutionalizes it as long as the destructive capacity of the use remains the same and was always apparent. This was the question that *Mahon* answered. The question in *Lucas* is larger because a use that prevails under the Takings Clause when it becomes intolerable, as in *Mahon*, certainly could not have been proscribed at the outset. One possibility for the rule of nuisance in *Lucas* is that a destructive use that is initially not a nuisance is unlikely ever to become one.

#### VII. APPLYING THE NUISANCE RULE OF *LUCAS* IS ESSENTIALLY A LEGISLATIVE FUNCTION

An inflexible conception of the common law of nuisance would permit only a marginal expansion of what the common law of nuisance forbids. This conception of nuisance for determining the permissibility of drastic property regulation would reduce the police power, taking hard policy choices out of the hands of the legislature and placing them with the courts. A flexible conception of common law nuisance, on the other hand, would require the courts to strike a balance between conflicting interests in the same way that the legislature acts when it legislates. Either way, the nuisance rule would direct the courts to do the work of legislatures, subject to Supreme Court supervision.

An inflexible conception of the common law of nuisance for the *Lucas* rule is likely to make drastic regulation of many destructive property uses almost always untimely. State intervention will not be permissible until it is too late. Harmless uses, naturally, do not require state intervention. But many potentially destructive uses are not likely to be common law nuisances initially; therefore, they will become constitutional property rights at the outset. When disaster is finally at hand and state intervention may become permissible, it

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<sup>193</sup>*Id.* at 2901.

<sup>194</sup>*Id.* at 2899.

<sup>195</sup>*Id.* at 2902 n.18.



probably will be too little and too late. Moreover, this possible outcome for the nuisance rule in *Lucas* would result from legislative harm-balancing that the rule has already performed in advance.

*Pennsylvania Coal Company v. Mahon*<sup>196</sup> and its destructive mining practice show what is meant. This mining practice might have been acceptable when provision for it was first made. At the time, there might have been a surplus of both living space and environment. Under these circumstances, a potentially destructive mining practice arguably deserved a chance to show whether it might do much more good than harm, provided the legislature could halt the practice if it became too destructive. This response might also have been better than prohibiting the practice initially. It certainly seems preferable to creating a constitutional right for the practice to begin, and, then, to let it run its course because the practice never strictly was a common law nuisance.

Similarly, residential development that is potentially destructive of the beach is likely to be a constitutional right before it can become a nuisance, leaving little beach to save if catastrophe has to be at hand before state intervention becomes permissible. The policy choices in such an inflexible rule are obvious. The rule would give real estate developers and their customers a market-driven constitutional right to consume the ecological resources of the public.

A flexible rule of common law nuisance, of course, would be much more protective of these ecological resources, but the protection would really come from the courts rather than legislatures. A flexible version of the nuisance rule directs the courts to engage in harm-balancing of conflicting interests. The process requires weighing the degree of harm from a particular use against its social utility and the feasibility of controlling the harm with other means than total suppression. This version of the *Lucas* rule would invite the courts to consider what legislatures usually consider when they make hard policy choices in regulatory practices in real estate markets.<sup>197</sup> Letting legislatures do what they have traditionally done in regulating land uses, however, seems preferable to either version of the *Lucas* rule.

#### VIII. THE POLICE POWER TO CONTROL GAIN AND LOSS IN REAL ESTATE MARKETS AND LIMITATIONS THEREON

Because someone's gain is also frequently someone else's loss, gain and loss may be as elusive in the eye of the beholder as benefits conferment and harm prevention. Gain and loss, however, are what the police power and the land use precedents are about. The public may want to foreclose private gain, including investment principal, that will cause public loss unless the public believes that both the gain and the loss best promote the common good. The precedents show that the state has this power and should keep it, subject to minimal judicial oversight. Thus, the state can prescribe the destruction of

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<sup>196</sup>260 U.S. 393 (1922).

<sup>197</sup>See *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting).

useful cedar trees when they will inflict loss upon the state's apple industry.<sup>198</sup> The state can also mandate the shutdown of a brick factory when it will preclude residential community development.<sup>199</sup> Similarly, the right of a real estate broker to maximize the industrial development of his land and also his profit must yield to orderly planned community development when the state wants the benefits of zoning.<sup>200</sup> The common law of nuisance allowed helter-skelter land development<sup>201</sup> that was thought to result in less land values, overall, than zoning would provide.<sup>202</sup> Dollar loss or cost to the public seems apparent in all of these situations, and the police power is not limited to the protection of interests that have a dollar value.<sup>203</sup>

There must be limits, naturally, upon state regulatory power to drastically reduce the value of property. Instead of drastic regulation, accommodation may occasionally be compelled in resolving a conflict between a land use and other state interests. Drastic property regulation, for example, should ordinarily be impermissible when the state's regulatory plan, itself, generally chooses accommodation rather than drastic regulation to protect state interests. Thus, for example, the basic premises of zoning regulation do not automatically justify the shutdown of a previously existing sanitarium in a newly created residential district.<sup>204</sup> Zoning, after all, does require conflicting uses to meet each other throughout the zoning plan at the boundary lines of various use districts. Successful accommodation, however, assumes that one interest will not destroy or even substantially impair other interests. But many times accommodation simply will not work; a substantial margin for error is necessary to secure the interests that the police power protects. Therefore, accommodation should usually be a matter of legislative discretion when the potential for conflict between a land use and other interests is real.

Further, the Constitution should forbid drastic property regulation to protect the remnant of an interest in a particular locale when permitted lawful uses have almost destroyed the interest. Real estate developers, naturally, must have the right to drive away the field mice when they turn rural acreage into a new town. The right, however, arguably does not include the right to extinguish a species.<sup>205</sup>

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<sup>198</sup>Miller v. Schoene, 276 U.S. 272 (1928).

<sup>199</sup>Hadacheck v. Sebastian, 239 U.S. 394 (1915).

<sup>200</sup>Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

<sup>201</sup>*Id.* at 392-93.

<sup>202</sup>DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, § 3.13 at 62 (2d ed. 1986).

<sup>203</sup>Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Berman v. Parker 348 U.S. 26, 32-33 (1954).

<sup>204</sup>Jones v. City of Los Angeles, 295 P. 14, 17, 19, 22 (Cal. 1931).

<sup>205</sup>See *supra* text pp. 52-53; see *infra* text pp. 50-51.

The news media frequently reports episodes about residential development along the seashore and lakeshore and its incompatibility with the existence of beach areas. Apparently, the erosive impact of residential development in some locales can devour beach areas and thereby foreclose all rights in them, including rights of access and use by the public. This loss may also increase the precariousness of endangered or threatened species. The *Lucas* nuisance rationale does not yet give landowners a constitutional right to inflict destruction of this magnitude upon the ecological resources of the public.<sup>206</sup> Moreover, the protective capacity of the police power would easily be large enough to prevent these losses if public ecological resources receive the same degree of protection that traditional subject matter of the police power has received.

#### IX. CONCLUSION - *LUCAS* AND THE ATLANTIC BEACHES

What the *Lucas* rule will mean for the Atlantic beaches is uncertain at the moment. *Lucas*, himself, owned two of the last four vacant lots in a subdivision on a barrier island where extensive residential development had already occurred.<sup>207</sup> Whatever harm from residential development the police power might have prevented on the island may have already occurred or have been set in motion irreversibly. Other stretches of uninhabited beach must remain, however. Some of them may have residential subdivisions with primarily unoccupied lots. Others may have tracts of high market value that await subdivision. It may still be possible to stop the construction of houses on these parts of the beach.

The peculiar turn of events in the *Lucas* litigation, precluded any factual determination of the destructive capacity of residential construction in beach areas. Essentially, in the trial court, *Lucas* said that determination of this destructive capacity did not make any difference because the regulatory deprivation of his property was total; therefore, he was entitled to compensation, even though improving his lots might present a risk to protectible state interests on the barrier island.<sup>208</sup> The trial court agreed with *Lucas*.<sup>209</sup> Upon appeal, the Supreme Court of South Carolina disagreed and reversed the trial court.<sup>210</sup> Then, the United States Supreme Court rendered corrective judgment.<sup>211</sup> Consequently, the determination of harm to the beaches will occur after remand in *Lucas* or in another case.

The determination may not occur in the *Lucas* litigation at all. After oral argument, but before decision in the Supreme Court of South Carolina, the state

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<sup>206</sup>*Id.*

<sup>207</sup>*Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2889, 2905 (1992).

<sup>208</sup>*Id.* at 2890.

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>*Id.* at 2899-2901.

amended its Beachfront Management Act to allow the issuance of special permits.<sup>212</sup> The amendment may well accommodate Lucas,<sup>213</sup> rescind any permanent taking that the unamended act might have effectuated,<sup>214</sup> and reduce Lucas' claim to one of total temporary taking.<sup>215</sup>

This posture of the case, however, may foreclose any compensation for Lucas altogether. His lots were escalating in value so rapidly during the trial that he might have had no intention of developing them pending the outcome of this lawsuit.<sup>216</sup> Planned deliberate idleness for the use of land, naturally, is not an injury that is cognizable under the Takings Clause.<sup>217</sup>

Moreover, state administrative procedures may have been available to Lucas, and use of them probably would have altered or resolved the case. In addition to the provision for a permit under the amended Beachfront Management Act,<sup>218</sup> a state administrative remedy might also have provided a permit.<sup>219</sup> The issuance of a permit, of course, would have eliminated the claim for a total permanent taking.<sup>220</sup> Similarly, any planned idleness for Lucas' lots would have foreclosed compensation for any total temporary taking.<sup>221</sup>

Certain development plans for the lots, on the other hand, would have presented a case that probably would have included evidence of specific harm to the beach from residential development. The South Carolina Supreme Court, however, expressly refused a request to require use of state permit or other administrative procedures.<sup>222</sup> The United States Supreme Court held that this disposition of the administrative issues foreclosed Lucas' claim for compensation for a total temporary taking.<sup>223</sup> It then proceeded to hear and decide the case as it had been presented.<sup>224</sup> Undoubtedly, the Supreme Court's new rule in *Lucas* would have been more informed if the record had disclosed how much loss residential development in beach areas can cause. The Court,

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<sup>212</sup>112 S. Ct. at 2890-91.

<sup>213</sup>*Id.* at 2891-92.

<sup>214</sup>*Id.* at 2891-92, 2907; see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

<sup>215</sup>112 S. Ct. at 2891.

<sup>216</sup>*Id.* at 2902, 2907-08, 2917.

<sup>217</sup>*Id.* at 2891-92 n.3, 2902, 2907-08, 2917.

<sup>218</sup>*Id.* at 2890-91, 2907.

<sup>219</sup>*Id.* at 2907.

<sup>220</sup>112 S. Ct. at 2891, 2892 n.4.

<sup>221</sup>*Id.* at 2891-92 n.3, 2902, 2907-08.

<sup>222</sup>*Id.* at 2891. Ordinarily, a regulatory takings claim is not ripe for a decision until exhaustion of permit and variance procedures disclose the extent of the deprivation; *Id.*

<sup>223</sup>*Id.*

<sup>224</sup>*Id.* at 2891-92.

however, decided to change the applicable rule, or at least its emphasis, for cases of total regulatory deprivation. Unlike the Court's rule in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,<sup>225</sup> which appeared to require compensation for a total regulatory deprivation only if it did not further an objective of the police power,<sup>226</sup> the *Lucas* rule is quite different.

Perhaps the *Lucas* Court wanted to set a new course without having to subject *Lucas* to another round of trial and appellate litigation before making the announcement. In any event, the Court succeeded in doing what it wanted to do in *Lucas*. The future will reveal what this is, and the Court's newly minted rule for the permissible constitutional protection of public ecological resources may prove as protectively fragile as the practices of the real estate industry itself.

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<sup>225</sup>482 U.S. 304 (1987).

<sup>226</sup>See *supra* text accompanying notes 17-26.