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Lucas v. South Carolina Coastal Council: The Remaking of Takings Law and the Re-emergence of Lochner

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Lucas v. South Carolina Coastal Council: The Remaking of Takings Law and the Re-emergence of *Lochner*

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> Yesterday the active area in this field was concerned with "property." Today it is "civil liberties." Tomorrow it may be again be "property."
>
> Justice Frankfurter (1955)[1]

> Today the Court launches a missile to kill a mouse.
>
> Justice Blackmun, dissent in *Lucas*[2]

INTRODUCTION

Justice Frankfurter was prophetic. Justice Blackmun may be as well. Starting in the late 1970's, the Supreme Court turned increasing attention to private property rights and began reformulating the application of the Fifth Amendment's Taking Clause to government regulations.[3] Justice Scalia, writing for a five-justice

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[1] Felix Frankfurter, *John Marshall and the Judicial Function, in* OF LAW AND MEN, PAPERS AND ADDRESSES OF FELIX FRANKFURTER 3, 19 (Philip Elman ed., 1956).

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

[3] The major cases include MacDonald, Sommer, & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Kirby Forest Industries v. United States, 467 U.S. 1 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Agins v. City of Tiburon, 447 U.S. 255 (1980); Lake Country Estates Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The 1987 triumvirate includes: Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825

majority, created a new categorical takings rule in *Lucas v. South Carolina Coastal Council*.[4] Owners must now be compensated if their land has been deprived of "all economically beneficial use" by government regulations.[5] The rule applies whether the regulatory taking is temporary or permanent and regardless of the legislative purpose involved.[6] The majority also created an exception to the new rule that echoes the *Lochner v. New York*[7] era of conservative judicial activism based on substantive due process: such regulations can only be sustained if their limitations are already present in the state's law of property and nuisance.[8]

Lucas should be seen as the third case emerging from the Rehnquist Supreme Court that seeks, through extensive reinterpretation, to remake the judicial application of the Takings Clause to environmental and land use regulations. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, Justice Rehnquist's majority opinion held, for the first time in the Court's history, that a finding of a regulatory taking requires compensation.[9] In *Nollan v. California Coastal Commission*, Justice Scalia, in a now famous footnote to the majority opinion, suggested that the Takings Clause requires heightened judicial scrutiny.[10] These two decisions, in conjunction with the third takings case of the 1987 term, *Keystone Bituminous Coal Association v. DeBenedictis*,[11] provide a critical context for reviewing *Lucas* and will be discussed in part I. of this article.

As is often the case in the enunciation of new categorical rules, *Lucas* raises more questions than it settles. The case produced two acrimonious dissents by Justices Blackmun and Stevens that question each step of the majority's analysis,[12] a concurrence by Justice Kennedy that rejects much of the substance of the ma-

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(1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). The Court also addressed mobile home rent control ordinances as possible takings in Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988).

[4] *Lucas*, 112 S.Ct. 2886.

[5] *Id.* at 2894.

[6] *Id.*

[7] 198 U.S. 45 (1905).

[8] *Lucas*, 112 S.Ct. at 2895; *see infra* part VI. for a discussion of the re-emergence of *Lochner*.

[9] 482 U.S. 304, 321 (1987).

[10] 483 U.S. 825, 834-35 n.3 (1987).

[11] 480 U.S. 470 (1987).

[12] 112 S.Ct. at 2904, 2917.

jority opinion,[13] and a statement by Justice Souter in which he indicates both that the case should not have been heard and that the rule and its exception may be unsound.[14] The Court appears to be split five to four regarding the new categorical rule and exception. Part II. and the succeeding sections of this article address the debate through each step of the majority decision.

On remand, the South Carolina Supreme Court applied a very narrow reading of the majority opinion.[15] It held that the Coastal Council had to demonstrate support for the restrictions in the state's common law. Since support could not be shown, a taking was found, and the case was remanded to a trial court on the sole issue of determining damages.[16] Curiously, the court also held that the temporary taking extended from the date the statute went into effect until the date of its "Order on Remand."[17] The court did not set out the test to be used in determining actual damages.

The following review of the context of the *Lucas* decision and of the specific findings suggests that the result reached by the South Carolina Supreme Court was not inevitable and was based on the narrowest possible reading of the decision. It is doubtful that many states will follow this path in the future. The possible directions open to state courts in the future and the confusion that will result from this decision should become apparent.

I. THE 1987 TAKINGS DECISIONS

The application of the Takings Clause to governmental actions and regulations has never been entirely settled.[18] Prior to 1922, the clause had been applied only to government actions that constituted an actual physical appropriation of some type.[19] That limited application changed with Holmes' famous decision in *Pennsylvania Coal Co. v. Mahon* in which he declared that "while

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[13] *Id.* at 2902.

[14] *Id.* at 2925.

[15] Lucas v. South Carolina Coastal Council, *order on remand*, 424 S.E.2d 484 (S.C. 1992).

[16] *Id.* at 486.

[17] *Id.*

[18] For historical overview, see CHARLES M. HAAR & MICHAEL A. WOLF, LAND USE PLANNING 777-924 (4th ed. 1989); DANIEL MANDELKER, LAND USE LAW 19-54 (2d ed. 1988); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

[19] *See* HAAR & WOLF, *supra* note 18; MANDELKER, *supra* note 18.

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[20]

The full review of the takings issue following the Holmes decision is beyond the scope of this article. However, despite various interpretations of his meaning, certain principles were actually developed by state and federal courts that guided takings jurisprudence prior to 1987.[21] Although the term "taking" was applied both to physical appropriations and regulations which had gone too far, the power of eminent domain and the police power were clearly distinguished. A physical taking could be partial and was an exercise of eminent domain requiring compensation. No review or balance with the governmental purpose was required. Government regulations were exercises of the police power, could only occur in relation to the whole of the property, and therefore, could not be partial. The appropriate remedy for a regulatory taking was invalidation, and the purpose of the regulation was an important consideration.[22]

In *Keystone*, the Court followed accepted takings law in a five to four decision delivered by Justice Stevens.[23] The Court upheld new requirements for coal companies in Pennsylvania to leave fifty percent of the coal below structures or watercourses to avoid subsidence. In setting these new requirements, the Court distinguished the case from *Mahon*[24] on the basis of the broader public purposes served by the new legislation and the fact that economically-beneficial mining was not rendered impossible by the regulations.[25] In holding that the company's twenty-seven million tons of coal (two percent of the total) that were required to be kept in place did not constitute a separate property interest subject to a taking, the Court followed the position enunciated in *Penn Central Transportation Co. v. New York City*:[26]

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[20] 260 U.S. 393, 415 (1922).

[21] See FRED BOSSELMAN, ET AL., THE TAKINGS ISSUE (1973) for a full review of accepted principles at that time; *see also* Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447 (1983).

[22] *Id.* Robert Freilich makes this point perhaps more strongly than the other general reviews with the exception of Norman Williams, Jr., et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

[23] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[24] 260 U.S. 393.

[25] *Keystone*, 480 U.S. at 484-97.

[26] 438 U.S. 104 (1978).

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole.[27]

Justice Rehnquist, writing for the four dissenters, would not have distinguished the case and would have treated the coal as a separate property interest subject to taking and, thus, compensable.[28] The dissent may now claim a majority of the Court. The impacts of this view, in light of Justice Scalia's footnote on this issue, are discussed in part V.[29]

In *First English*, the Court essentially held that time delays due to regulations later invalidated as excessive were severable interests in property and that such temporary regulatory takings must be compensated.[30] The case arose after the church was denied permission to rebuild in a floodway following the destruction of its buildings by a flood.[31] The church brought an inverse condemnation action for compensation, and the California Supreme Court denied review of an appellate decision holding that compensation was not the appropriate remedy to be pursued in a challenge to a regulation.[32] The Supreme Court took the case on the sole issue of whether compensation was the required remedy for a regulatory taking. In a decision that equated physical and regulatory takings without explanation, the Court held that compensation was required.[33] Because of the posture of the case, the Court was not required to determine if a taking had occurred and remanded that issue to the state courts.[34] The California Court of Appeals promptly held that no taking had taken place because the regulation was a reasonable moratoria for a reasonable period of time, had not taken all use of the property, and directly protected

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[27] 480 U.S. at 497.

[28] *Id.* at 506-21.

[29] *See infra* text accompanying notes 86-91.

[30] 482 U.S. 304 (1987).

[31] *Id.*

[32] *See* First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (1989).

[33] 482 U.S. at 306. The decision implements the dissent of Justice Brennan in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636 (1981).

[34] 482 U.S. at 304.

the public health and safety.[35] The Supreme Court decision has yielded much criticism and little compensation.[36]

In *Nollan v. California Coastal Commission*,[37] the Court applied the determination of *Agins v. City of Tiburon*[38] that the Takings Clause is violated by a regulation which "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."[39] *Nollan* is the only decision to find a taking based on the first prong of this two-prong test. The decision invalidated a requirement by the California Coastal Commission that the Nollans provide a public easement across their property because the requirement did not have a reasonable nexus to a legitimate public purpose. The case is best known for Justice Scalia's footnote suggestion that heightened scrutiny is necessary in the application of the Takings Clause to regulations.[40]

II. THE FACTUAL CONTEXT OF *LUCAS*

The United States is increasingly a coastal nation. According to the 1990 census, fifty percent of our population currently resides within fifty miles of the coast, and that percentage is projected to increase to seventy-five percent by 2010.[41] An increasing amount of upscale residential development, heavily subsidized by the National Flood Insurance Program, has been built on the twenty-seven hundred miles of barrier islands along the Atlantic and Gulf coasts.[42] At the federal level, concern for overdevelop-

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[35] *First English*, 258 Cal. Rptr. at 894.

[36] *See* MANDELKER, *supra* note 18; Charles Siemon & Wendy U. Larsen, *The Taking Issue Triology: The Beginning of the End?* 33 WASH. U. J. URB. & CONTEMP. L. 169 (1988); John P. Lodise, *Retroactive Compensation and the Illusion of Economic Efficiency: An Analysis of the* First English *Decision*, 35 UCLA L. REV. 1267 (1988).

[37] 483 U.S. 825, 834-37 (1987).

[38] 447 U.S. 255, 260 (1980).

[39] *Nollan*, 483 U.S. at 836-42.

[40] *See id.* at 834-35 n.3. *Contra* Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. LAW 301 (1991) (providing an excellent review of *Nollan* and indicating that Justice Scalia is just plain wrong regarding heightened scrutiny, that the decision has caused confusion and a variety of results, and that the decision can make sense as establishing the requirement for a rational nexus between exactions and public purposes).

[41] Marya Morris, *Building on the Beach*, ENV'T & DEV. (Am. Plan. Ass'n), Sept. 1992, at 1.

[42] *See* Mike Donovan, *Government Subsidy of Coastal Barrier Development*, 1 J. LAND USE & ENVTL. L. 271 (1985); *see also* Rutherford H. Platt, *Congress and the Coast*, 27 ENV'T 14 (1985).

ment of barrier islands has led to the establishment of new National Seashores, the Coastal Barrier Resource System, and some reformulation of the National Flood Insurance Program.[43]

The Coastal Zone Management Act of 1972 (CZMA) provided financial and federal consistency incentives for states to implement new coastal planning in order to control the degradation and overdevelopment of the coast.[44] The South Carolina Coastal Zone Management Act of 1977 provided a framework for planning and designated a narrow "critical area" within which the construction of any habitable structure was prohibited.[45] These initial programs did not prove to be sufficient. In 1980, Congress amended the CZMA, directing states to strengthen their programs by "preventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas."[46]

In 1986, the South Carolina Coastal Council appointed a special committee on beachfront management, and their 1987 report led to the 1988 Beachfront Management Act (Act).[47] The Act extended the "critical area" by creating a baseline along the primary dune and a forty-year erosion control setback line landward of the baseline.[48] This amendment to the South Carolina Coastal Management Act, thus, extended the area covered by the original building ban and also prohibited the rebuilding of any structures within the area that might be completely or nearly destroyed.[49] In

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[43] *See* Platt, *supra* note 42, at 15-17, 34-35; Donovan, *supra* note 42, at 277-81; *see also* Harold J. Creely, Jr., Note, *Barrier Islands: The Conflict Between Federal Programs that Promote Development*, 33 S.C. L. REV. 373, 373-86 (1981-82).

[44] Coastal Zone Management Act of 1972, Pub. L. No. 89-454, § 302, 86 Stat. 1280 (codified at 16 U.S.C. §§1451-1464 (1988))[hereinafter CZMA].

[45] S.C. CODE ANN. §§48-39-10 to -360 (Law. Co-op. 1987 & Supp. 1992).

[46] CZMA § 302, 16 U.S.C. §1456b(a)(2) (Supp. II 1990); *see also* Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2904-05 (1992)(Blackmun, J., dissenting).

[47] S.C. CODE ANN. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1992).

[48] *Id.* at § 48-39-280 (Law. Co-op. Supp. 1992).

[49] The fact that the 1988 Act did not create, but merely extended, a ban that was in effect at the time Lucas bought the property may be important in determining whether his investment-backed expectations were reasonable. The majority opinion does not address this point except to note that in 1986, the critical area did not include the Lucas lots, and he was "not legally obliged to obtain a permit from the Council." *Lucas*, 112 S.Ct. at 2889. However, for about half of the last 40 years the lots may have been partially in the critical area and, in any case, he may have been put on constructive notice of the potential for regulatory change. This issue is discussed in part III., *infra*, and although it did arise on remand of this case, the investment-backed expectations aspect of the takings issue has not been eliminated for future decisions by the majority holding.

1990, the Act was amended to allow some construction under special circumstances.[50]

Lucas is a contractor, manager, and part owner of developments on the barrier island east of Charleston known as the Isle of Palms and has lived there since 1978. In 1986, he bought two remaining lots in one development for $975,000 with the apparent intention of developing them as home sites.[51] However, these sites are located in a very unstable area. As Justice Blackmun pointed out in his dissent:

> In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Between 1957 and 1963, petitioner's property was under water. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. In 1973 the first line of stable vegetation was about halfway through the property. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots.[52]

The passage of the 1988 Beachfront Management Act placed both lots in the critical area. At that time, the Act provided no exceptions to the construction ban.[53] Lucas declined to challenge the setback lines, did not file for permits or take any other administrative actions, and did not challenge the validity of the Beach Management Act as a lawful exercise of the State's police power.[54] Instead, he filed suit in the South Carolina courts, arguing that the Act completely extinguished the value of his property and, therefore, entitled him to compensation under *First English*.[55] Without distinguishing among the bundle of rights held by Lucas, the trial court held that the Act deprived Lucas of any

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[50] *See* S.C. CODE ANN. §§ 48-39-290 to -300 (Law. Co-op. Supp. 1992). As discussed *infra* at text accompanying note 58, Lucas could probably build homes after 1990, which makes the issue one of taking and compensation for the 1988-90 period.

[51] *Lucas*, 112 S.Ct. at 2889.

[52] *Id.* at 2905 (Blackmum, J., dissenting).

[53] S.C. CODE ANN. § 48-39-290(A) (Law. Co-op. Supp. 1992).

[54] *See Lucas*, 112 S.Ct. at 2905-06 (Blackmun, J., dissenting).

[55] *See id.* at 2890.

"reasonable economic use of the lots" and awarded him $1.2 million.[56]

The South Carolina Supreme Court reversed the decision. It held that the State had the power to prevent any harmful use of property, that a state statute was entitled to a presumption of constitutionality, and that the court was bound by the legislative finding that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."[57] In upholding a construction ban on permanent structures in an unstable and potentially dangerous area, the South Carolina Supreme Court decision appears very similar to the holding of the California Court of Appeals on remand in *First English*.[58] However, because the South Carolina Supreme Court reversed the decision on the basis of uncontested legislative findings, it did not, apparently, see any necessity for review of the trial court's determination that the property was rendered totally valueless.

Due to the 1990 amendments to the Beachfront Management Act that would have allowed some construction, Lucas could have applied for a permit to build after 1990 and during the period of state litigation.[59] The South Carolina Supreme Court, in reversing the case on the basis of the statute, declined to review a case for a temporary takings claim that Lucas had not made.[60]

III. THE DETERMINATION TO REVIEW

The posture of the case split the Supreme Court six to three on whether it should even be heard. Essentially, the majority, and Justice Kennedy in concurrence, held that the case must be heard under *First English* because the temporary takings claim could not otherwise be made.[61] It is important to note that the posture of the case places the Court in the same position it was in when deciding *First English*. Because the trial court's determination that the property was valueless had not been reviewed below, the

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[56] *Id.* at 2890.

[57] Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991), *rev'd*, 112 S.Ct. 2886 (1992).

[58] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (1989).

[59] S.C. CODE ANN. § 48-39-290(D)(1) (Law. Co-op. Supp. 1992).

[60] *See Lucas*, 404 S.E.2d at 898-99.

[61] *Lucas*, 112 S.Ct. at 2891; *see also First English*, 482 U.S. at 304 (holding that temporary deprivations of use are compensable under the Takings Clause).

Court could again enunciate a new test and remand the vital determinations to the state court. Thus, the majority opinion "leave[s] for decision on remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition."[62] Justice Kennedy, in his concurrence, was more explicit:

> The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach front lot loses all value because of a development restriction . . . . While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below.[63]

Because the decision assumed an injury-in-fact and the degree of that injury, the South Carolina courts were left in a similar position as the California courts in *First English*. They could have avoided applying the Supreme Court's new test by finding that the property was not rendered temporarily valueless, either because it still had value under the law or because Lucas could not prove specific losses resulting from the two-year imposition of the ban. Justice Kennedy clearly implied that the state courts had a basis to find that no taking occurred. Regarding the temporary taking, Justice Blackmun commented that "[a]lmost certainly it did not happen in this case,"[64] and Justice Stevens suggested that "on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit."[65]

The posture of this case and the differentiation in *First English* between a temporary regulatory taking and "normal delays in obtaining building permits . . . and the like"[66] suggest a possible method by which local and state governments, contemplating construction bans, may avoid the finding of a taking requiring compensation, even if a narrow reading of *Lucas* is applied. Following *First English*, temporary moratoria have been upheld if

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[62] *Lucas*, 112 S.Ct. at 2892.

[63] *Id.* at 2903 (Kennedy, J., concurring).

[64] *Id.* at 2904 (Blackmun, J., dissenting).

[65] *Id.* at 2917-18 (Stevens, J. dissenting).

[66] 482 U.S. 304, 321 (1987).

they are reasonable and exist for a reasonable period of time.[67] If construction bans in or along such areas as the coast, floodways, wetlands, etc. are initially labelled as temporary moratoria pending further study, it would be very difficult for a plaintiff to prove a temporary regulatory taking even if the regulation was held to have gone too far. On the other hand, we may be moving into a period of review in which the determinations of the legislature receive little weight.

The majority determined to hear the case because the South Carolina Supreme Court reached the merits and denied review of the temporary takings claim.[68] Apparently, a remand to reconsider the trial court's determination of total deprivation of value was not considered. Justices Blackmun and Stevens both opined that the case should not have been heard because there had not been the necessary final determination below.[69] Justice Souter, in a strongly-worded statement, indicated the confusion that the posture of the case is likely to engender:

> Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests . . . . Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize.[70]

In addition to the confusion likely to be created by a decision that establishes a test but does not directly apply it, the decision may also encourage new forms of litigation. Prior to *First English* and *Lucas*, plaintiffs normally had to exhaust administrative remedies before challenging regulations, and this procedure normally included applications for permits or variances.[71] Lucas appears to

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[67] *See First English*, 258 Cal.Rptr. 893, 906 (1989); Linda Bozung & Deborah J. Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners*, 20 URB. LAW. 969, 970 (1988).

[68] *Lucas*, 112 S.Ct. at 2891-92. "We think these considerations would be precluded from review had the South Carolina Supreme Court rested its judgment on ripeness." *Id.* at 2891.

[69] *Id.* at 2906, 2917; *see* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[70] *Lucas*, 112 S.Ct. at 2925.

[71] The Supreme Court was, in fact, quite insistent on this point between Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 636 (1980), which prompted the interest in compensable regulatory takings, and First English

have been rewarded in this decision for his failure to challenge the new setbacks, apply for permits, or challenge the legislative findings. Justices Blackmun, Stevens, and Souter all noted the apparent eagerness of the majority to hear the case. On remand, Lucas was rewarded not only for failing to apply for permits initially, but also for failing to apply for permits following the 1990 amendments to the statute. The result is not in line with past prudence in addressing the underlying constitutional issues and may encourage facial challenges to regulations that give rise to compensation without administrative hearings or record.

IV. THE NEW CATEGORICAL RULE

After disposing of the review issue, Justice Scalia acknowledged that following Justice Holmes' decision in *Mahon*, in "70-odd years of succeeding regulatory takings jurisprudence, we have generally eschewed any set formula for determining how far is too far, preferring to engage in . . . essentially ad hoc inquiries."[72] He then declared that physical invasions and regulation which deny all economically-beneficial or productive use of land are two exceptions:[73]

> As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests OR DENIES AN OWNER ECONOMICALLY VIABLE USE OF HIS LAND.[74]

It is important to note that Justice Scalia gave only the second part of the *Agins* two-part test emphasis and effect as a categorical rule. The test was enunciated before regulatory takings were held to be compensable, and the first part of the test has been generally seen as equivalent to the due process standard for governmental regulations. Thus, to give both parts effect in this new context would require the anomalous result that failure to advance

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Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987); *see also, Williamson County*, 473 U.S. 172; *MacDonald*, 477 U.S. 340.

[72] *Lucas*, 112 S.Ct. at 2893 (quoting Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[73] *Id.*

[74] *Id.* at 2893-94. Justice Scalia cites *Agins v. City of Tiburon*, 447 U.S. 855 (1980), as the basis for this position.

a legitimate state interest would lead categorically to compensating a plaintiff.[75]

Justices Blackmun and Stevens attacked the categorical rule as contradicting the history of takings jurisprudence, which has always required factual inquiry in the case of regulations.[76] For this point, they could have cited Justice O'Connor's opinion for the Court in *Yee v. City of Escondido*,[77] delivered just two months prior to *Lucas*:

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation . . . . But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owners to bear a burden that should be borne by the public as a whole . . . . The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.[78]

The decision in *Yee* would seem to support the dissenting positions by Blackmun and Stevens that regulatory takings jurisprudence has always required specific factual inquiries, weighing, and the findings that non-noxious uses have been banned by legislative determinations. The careful weighing of interests in April seems to have become a categorical rule in June.

The majority opinion proposed several justifications for the categorical rule. The first was based on Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*[79] that suggested, from a landowner's point of view, that total deprivation is the equivalent of a physical appropriation.[80] Justice Steven's dissent suggested one problem with this justification: the regulatory diminution of fifty percent is, from the landowner's perspective, the equivalent of a fifty-percent physical condemnation, but we

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[75] See Kayden *supra* note 39 for the history of this part of the *Agins* formulation and difficulties in applying *Nollan* as a result.

[76] *Lucas*, 112 S.Ct. at 2904-25.

[77] 112 S.Ct. 1522 (1992).

[78] *Id.* at 1526.

[79] 450 U.S. 621, 636 (1980).

[80] *Lucas*, 112 S.Ct. at 2894.

have never required compensation for regulatory diminution of value.[81] This problem of equating regulatory takings and physical takings derives from the flawed analysis in *First English*. Rationally, if the Takings Clause is to have meaning, partial physical takings must be covered. However, if regulation in the public interest is to be possible, partial regulatory takings cannot be compensated.

The majority opinion addressed the functional concern that the government could not go on diminishing values in property without compensation, noting that the concern "does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."[82] It is certainly true that the categorical rule may not widely affect the power of government to regulate land use, and this proposition is the one aspect of the case that many commentators have cited to indicate that *Lucas* may not have overly-detrimental effects on environmental and land use regulations.[83] But the fact that the case may not have broad application does not answer the question of whether this class of regulations should be seen as violating the Takings Clause or the question of the potential long-term effect of holding any regulations to be per se compensable takings of property.

In perhaps the strongest argument for the rule, the Court asserted that in cases where the owner is left without economically-beneficial use, a heightened risk exists that private property is being pressed into public service.[84] Justice Stevens would look to the generality of application to determine if property owners are being singled out.[85] Additionally, it would seem unnecessary to add a categorical rule to *ad hoc* factual inquiries to test the heightened risk.

Perhaps the most important immediate result of this case is the development of this categorical rule to be applied to the rare cases of regulations that deprive owners of an economically-beneficial use. The possible expansion of this rule depends on the defini-

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[81] *Id.* at 2920.

[82] *Id.* at 2894.

[83] Plan. & L. Newsl. (Am. Plan. Ass'n), Oct. 1992; Q. Newsl. Envtl. L. (Sierra Club Legal Defense Fund), Summer 1992.

[84] *Lucas*, 112 S.Ct. at 2895.

[85] *Id.* at 2920.

tion of the property being considered in determining such deprivation and is considered below.

V. PARTIAL REGULATORY TAKINGS

As he did in *Nollan*,[86] Justice Scalia sets out a critical observation in footnote seven, placed immediately after the enunciation of the categorical rule, with the potential to greatly expand the Court's opinion:

> Regrettably, the rhetorical force of our deprivation of all economically feasible use rule is greater than its precision, since the rule does not make clear the property interest against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[87]

In the remainder of the footnote, Justice Scalia criticizes *Penn Central*[88] and *Keystone*.[89] Prior to the footnote, it would have appeared settled that, regarding regulations, one looked to the entire parcel; cases of total deprivation of economically beneficial use would, therefore, be rare. A wetlands regulation might provide, for example, for ninety percent to be set aside and allow some development of the remaining ten percent. If the Court breaks the parcel into parts, then any regulation can become a compensable taking through some ingenuity of the landowner. One could, for example, sell off parcels for several years, buy a remaining two lots, and argue that any regulation that bans development of structures on them is a compensable taking.

It is difficult to escape the conclusion that such scenarios seem to be the intent of the footnote. It is hard to tell in what direction the Court will go if such cases reach it. On the one hand, the Court has changed since *Keystone*, and that case would probably not be decided the same today. On the other hand, the interest in the coal would seem more capable of meaningful separation,

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[86] *See supra* text accompanying notes 37-40.

[87] *Lucas*, 112 S.Ct. at 2894.

[88] *See supra* text accompanying note 26.

[89] *See supra* text accompanying note 23.

given the context of the case, than wetlands or beach area of a larger parcel. This aspect of the case might best be approached through consideration of investment backed expectations,[90] a concept that Justice Kennedy relies on in place of the categorical rule and exception of the majority and which is peripherally discussed throughout the decision.

In *Nollan*, Justice Scalia was just plain wrong to assert that the Takings Clause required a higher level of scrutiny than the Due Process or Equal Protection Clauses.[91] The footnote was contained in the majority opinion in *Nollan* and has created confusion for the courts that have taken it seriously. It is important to think through the implications of footnote seven and to argue for its rejection as a basis for rationally reviewing governmental regulations.

VI. THE EXCEPTION TO THE CATEGORICAL RULE

In the discussion of the South Carolina Supreme Court's affirmation of the Beachfront Management Act, Justice Scalia noted their reliance on a long line of Supreme Court decisions enjoining property owners from activities akin to public nuisances.[92] An interesting shift toward a new Lochnerian[93] review then ensued. First, the majority opinion noted that the use of the "harm-

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[90] In Penn. Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), Justice Brennan cites investment-backed expectations as one factor that must be weighed. These expectations mean something less than vested rights under which a landowner may proceed if there have been substantial expenditures in good faith reliance on an act or omission of government, but more than the subjective expectation of profit. Thus, in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), there is no taking through a violation of investment-backed expectations if the property owner is put on constructive notice of the regulations. *See also.* Daniel Mandelker, *Investment Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3 (1987) (discussing and recommending that Takings Clause protection be denied to a purchaser who enters a land market in which gain is dependent on permission from a land use agency); *see also* Reahard v. Lee County, 978 F.2d 1131 (11th Cir. 1992) (a post-*Lucas* decision that endorses the same type of review).

[91] *See* Kayden, *supra* note 40.

[92] *Lucas*, 112 S.Ct. at 2897.

[93] Lochner v. New York, 198 U.S. 45 (1905), which struck down New York's minimum hours legislation for bakery employees, gave the era its name. Until the mid-1930s, the Supreme Court struck down many state and federal statutes based on a substantive due process view that stressed the fundamental right of property, a lack of deference to legislative findings, and the discovery of limits on government in principles of the common law. *See also* GERALD GUNTHER. CONSTITUTIONAL LAW 511-527 (10th ed. 1980). *Contra* United States v. Carolene Products Co., 304 U.S. 144 (1938) (repudiating the Lochnerian review); Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

ful or noxious uses" principle was merely an early attempt to describe why government may, without compensation, affect property values—"a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power."[94]

The Court then shifted the discussion to the difficulty of determining whether a regulation prevents a harm or confers a benefit. Since most situations can be seen either way, the harm/benefit analysis could not provide a basis for determining which regulations must lead to compensation and which may not.[95] In searching for such an objective, value-free basis, the Court quickly found it in common law nuisance and held that only those regulations that find a basis in the pre-existing state law of nuisance may be exempt from the categorical rule.[96] Thus, two categories of regulations were established. If a regulation deprives an owner of all economically-beneficial use, it may only be justified by common law concepts of public nuisance. In this sense at least, the ghost of *Lochner* has been revived. If a regulation does not result in a total deprivation, it would apparently still be open to the former rules on regulatory takings. Preparation of a defense, at the very least, has just become more difficult.

The re-emergence of *Lochner* in the development of the exception was unacceptable to four of the justices. Justice Kennedy rejected it outright and would open the basis for acceptable regulations to the full scope of legislative power.[97] Justice Souter pointed out that the nuisance inquiry focuses on conduct rather than the character of the property interest, rendering it difficult to perceive common law nuisance as a basis for noncompensable takings.[98] Justices Blackmun and Stevens strongly dissented on this final point, noting that many of the cases did not uphold the regulations based on nuisance, but rather on legislative determinations of the public welfare.[99] The retirement of Justice White and the appointment of Justice Ginsberg in his place would seem to make the full re-emergence of Lochnerian review unlikely.

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[94] *Lucas*, 112 S.Ct. at 2897.

[95] *Id.* at 2898.

[96] *Id.* at 2899.

[97] *Id.* at 2902-04.

[98] *Id.* at 2925-26.

[99] *Id.* at 2904-25.

VII. *LUCAS* ONE YEAR LATER

Although the Supreme Court decision later led to a $1,575,000 settlement for David Lucas[100] and a great deal of law review discussion,[101] it has not dramatically affected takings law at the federal or state level.[102] Dwight Merriam's exhaustive review of cases citing *Lucas*[103] indicates that of forty-five federal decisions, thirty-two rejected a takings claim, eleven did not directly involve a taking, one was remanded, and only one—involving former President Nixon's presidential papers—found a taking.[104] Of the thirty-five state cases, twenty-seven rejected the takings claim, four did not directly involve a takings claim, one cited *Lucas* on the ripeness issue, one was remanded, and two found takings.[105] Only one case held that the Supreme Court had elevated the standard by which courts should examine whether a regulation goes too far.[106] In most cases, *Lucas* has been cited as one of a string of cases on well-established takings law.

Two decisions, one federal and one state, specifically held that the parcel in question is the whole parcel and refused to fol-

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[100] H. Jane Lehman, *Accord Ends Fight Over Use of Land: Property Rights Activists Gain in S.C. Case*, WASH. POST, July 17, 1993, at E1.

[101] Michael Berger, *Planning Staffs "Outed" by Lucas Opinion*, 44 LAND USE L. & ZONING DIG. 3 (1992); Kenneth Berlin, *Just Compensation Doctrine and the Workings of Government: The Threat from the Supreme Court and Possible Responses*, 17 HARV. ENVTL. L. REV. 97 (1993); Michael C. Blumm et al., *Viewpoints: Takings—Lucas v. South Carolina Coastal Council*, 4 NAT. RESOURCES L. INST. NEWS 6 (1993); David Callies, *The Lucas Case: Regulatory Takings Past, Present and Future*, 44 LAND USE L. & ZONING DIG. 3 (1992); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993); William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393 (1993); Jerold S. Kayden, *The Lucas Case: Old Wine in Old Bottles*, 44 LAND USE L. & ZONING DIG. 3; Richard J. Lazarus, *Putting the Correct Spin on Lucas*, 45 STAN. L. REV. 1411 (1993); Daniel R. Mandelker, *Of Mice and Missiles*, 8 J. LAND USE & ENVTL. L. 285 (1993); Daniel R. Mandelker, *Takings '92: The Case of the Curious Case*, 44 LAND USE L. & ZONING DIG. 3 (1992); Patti Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343 (1993); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

[102] Dwight Merriam, *No, Norman, The Sky Is Not Falling*, 16 ZONING & PLAN. L. REP. 137 (1993).

[103] *Id.*

[104] Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).

[105] Merriam, supra note 102.

[106] *In re* William F. Gingerella, 148 B.R. 157 (D. R.I. 1992).

low Scalia's footnote seven suggestion.[107] In *Woodbury Place Partners v. City of Woodbury*,[108] a Minnesota Court of Appeals upheld a two-year moratorium, holding that the value of the property was delayed rather than destroyed. And in *Bernardsville Quarry, Inc. v. Borough of Bernardsville*,[109] the New Jersey Supreme Court upheld local regulations on how deep an area could be quarried, finding that there was harm to public welfare without discussion of nuisance and refusing to set the unmined part aside for takings consideration.

Generally, *Lucas* may be seen as adding some confusion to takings law while providing possible avenues for state courts to protect private property against regulations that these courts have not yet utilized. The majority clearly meant *Lucas* to be an important case, but the categorical rule and exception do not as yet appear to be changing the law in any dramatic way. Joseph Sax may be right in suggesting that:

> I suspect the Court is frustrated with the takings issue. It wants to affirm the importance of property, but it cannot find a standard that will control regulatory excess without threatening to bring down the whole regulatory apparatus of the modern state.[110]

The impact of *Lucas* may be somewhat delayed, and its impact on certain types of regulations may be more subtle presently. *Lucas* involved an attempt to maintain property in a natural state in the public interest. In the Beachfront Management Act, South Carolina had, in effect, attempted to establish a public right to ecological integrity. That concept and the emerging view of land as part of an ecosystem rather than as private, undifferentiated space were rejected in *Lucas* when the result is deprivation of productive profit. Cases on the new ecological meaning of property and the public right to ecological integrity that are implicit in federal and state regulatory schemes have yet to emerge. Regulators may be largely avoiding takings claims by providing for some development on all land, regardless of conditions. The extensive attention paid to *Lucas* indicates that it may yet have impact on the

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[107] Naegele Outdoor Advertising Inc. v. City of Durham, 803 F. Supp. 1068 (M.D. N.C. 1992); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992).

[108] 492 N.W.2d 258 (Minn. 1992)

[109] 608 A.2d 1377 (N.J. 1992)

[110] Sax, *supra* note 101, at 1437.

law and that, at least philosophically, it is a challenge to the advancement of modern ecological concepts of property. The challenge might best be met through the development of explicit and sustainable legal rationales for the preservation of ecological integrity.