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Lucas v. South Carolina Coastal Council: A Tremor on the Regulatory Takings Richter Scale

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LUCAS V. SOUTH CAROLINA COASTAL COUNCIL. A TREMOR ON THE REGULATORY TAKINGS RICHTER SCALE

I. INTRODUCTION

The Fifth Amendment states, in part, that private property may not be "taken" by the government for public use without the payment of just compensation. Unresolved by this clause, however, is exactly what type of governmental action is required to constitute a "taking". Perhaps the framers of the Constitution intended the just compensation requirement to apply only to actual physical seizures of private property by the government. However, it seems plausible that at some point, certain non-acquisitive governmental actions, such as extensive regulation of private property, may rise to the level of a physical seizure, and thus subject the government to the just compensation requirement.

The United States Supreme Court examined this argument, that certain governmental regulations may constitute takings, in Lucas v.
In that case, David Lucas contended that a South Carolina law, prohibiting the construction of any habitable structure on land which he owned on a barrier island, amounted to a taking. He argued that the legislative building prohibition completely destroyed the economic value of his beachfront property, and thus entitled him to compensation, despite the fact that regulation of the property was a valid exercise of the state's police power. In response, the Court expressly adopted, as a categorical rule, the notion that a government regulation which denies all economically beneficial or productive land use constitutes a taking unless the regulated use is considered a nuisance under state law.

At first glance, this ruling seems like an earthquake on the foundation of governmental regulatory power. For example, the categorical rule seemingly could enable many industries to claim that various environmental regulations have prohibited certain property uses thereby, rendering their property economically worthless. In such cases, the requirement of just compensation would arguably have a chilling effect on the further promulgation and enforcement of these environmental regulations and other types of land use regulation.

Upon closer inspection, however, the Lucas categorical rule is merely a tremor on the “takings Richter scale.” Standing alone, Lucas is unlikely to change the current state of land-use regulation. First, the Court left unresolved the question of what constitutes the “deprivation of all economically feasible use” required to invoke the categorical rule. As a result, in any future case, government regulators can forcefully argue that a particular regulation has not denied a property owner of all feasible economic use, and thus is not subject to the just compensation requirement. Therefore, the extent of the rule’s impact on land-use regulation will remain unclear until future cases develop “the deprivation of all economically feasible use” standard. Furthermore, as will be developed in this Comment, the rule, together with its nuisance exception, results in the consideration of the same factors analyzed in prior takings cases. Thus, the rule is merely a shorthand identification of those situations where government regulations would have been consid-

5. Id. at 2890.
6. Id. at 2899-2901.
7. Id. at 2894 n.7.
LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

ered a taking under prior takings law. In short, the existence of the categorical rule is unlikely to change the outcome in future takings cases from the outcome which would have resulted prior to Lucas. Lucas may, however, be a tremor because the mere adoption of a categorical rule could signal the beginning of a doctrinal shift in the continuing development of takings jurisprudence.

To fully understand the significance of Lucas and the categorical rule it sets forth, this Comment will first outline takings principles developed prior to Lucas. It will then discuss the facts and arguments of Lucas, as well as the Court's decision. Finally, this Comment will analyze the categorical rule, considering the prior takings principles, and will conclude that Lucas, by itself, will not be the earthquake which destroys the foundation of government regulatory powers.

II. BACKGROUND: TAKINGS LAW

Takings law has not been analyzed under a single framework or theory. In fact, Supreme Court rulings in the takings area have been described as a "crazy quilt pattern" of rulings. This description reflects the Court's difficulty in developing a formula for determining exactly what type of governmental actions constitute takings. This difficulty has resulted in the development of several factors to be weighed on a case-by-case basis to determine whether a challenged regulation is a taking.

A. Development of Regulatory Takings

Some scholars maintain that the original intent of the framers of the Constitution supports the position that only a physical seizure of private property by the government amounts to a taking.

8. See infra notes 11-95 and accompanying text.
9. See infra notes 96-179 and accompanying text.
10. See infra notes 180-201 and accompanying text.
11. E.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (internal citation omitted) (stating that the "Court has generally been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons").
13. See BOSSLERMAN, ET AL., supra note 2, at 104 (noting that the Fifth Amendment was adopted at a time when land-use regulation was standard practice, and that there "is no evidence that the founding fathers ever conceived that the taking clause could ever
For example, Justice Harlan viewed the "taking" requirement literally, and felt that compensation was not due without a physical appropriation of private property by the government. In *Mugler v. Kansas*, Justice Harlan ruled that Kansas legislation prohibiting the manufacture of liquor did not amount to a taking of the property of a beer manufacturer, despite the fact that the manufacturer's property was rendered nearly worthless as a result of the regulation. In other words, government action in the form of a regulation could not rise to the level of a Fifth Amendment taking.

However, Justice Harlan's view was rejected, and the door of regulatory takings was opened, by Justice Holmes' comments in the landmark case of *Pennsylvania Coal Co. v. Mahon*. In that case, which involved state regulation of coal mining, Justice Holmes recognized that a government could not function if it were required to pay for each decline in property value caused by regulation. However, he also stated that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Although Justice Holmes’ comments in *Pennsylvania Coal* were arguably advisory in nature, they have become "a cornerstone of the jurisprudence of the Fifth Amendment's Just Compensation
Clause,” and have resulted in certain governmental regulations being held to constitute a taking. Yet, although Justice Holmes set forth the general principle of regulatory takings, the articulation of a standard of precisely when a particular regulation goes too far was left for other courts.

B. Attempts to Define Regulatory Takings: The Balancing Tests

In the several decades after Justice Holmes’ comments in Pennsylvania Coal, the Court struggled, and failed, to articulate a clear standard for regulatory takings. Instead, the Court developed broad balancing tests, applied to the facts in each case, to determine when a challenged regulation constitutes a taking.

1. Penn Central Balancing Test

One example of such a test was articulated in Penn Central Transportation Co. v. New York City. In that case, the New York City Landmarks Preservation Commission had enacted a regulation which effectively prohibited the construction of a multi-story office building above the Grand Central Station Terminal. Penn Central, the owner of the Terminal, claimed that this regulation amounted to a taking. The Court declined to characterize the regulation as a taking based on its balancing of factors in a three-part test: (1) the character of the governmental action involved; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation upon the property owner.

a. Character of the Governmental Action

The first factor, the character of the governmental action, involves the determination of whether the type of alleged taking is characterized as a physical invasion or acquisition, or alternatively, simply as an accepted form of governmental regulation. A governmental action characterized as a physical invasion or acquisition of private property is more likely to be found to constitute a taking than an action characterized as a regulation “adjusting the benefits

25. Id. at 116-117.
26. Id. at 119.
27. Id. at 124.
and burdens of economic life to promote the common good."\textsuperscript{28} For example, this factor was applied in \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{29} where the Court characterized a New York law requiring landlords to permit cable television companies to install cable wires on their property, upon payment of a nominal fee, as a physical invasion/acquisition type of action, and therefore held the statute to constitute a taking.\textsuperscript{30} This decision is especially indicative of the weight given to the characterization of government actions as physical invasions or acquisitions since the property intrusion involved was trivial.

b. Investment Backed Regulations

Another factor in the balance is the extent of the deprivation of "distinct investment-backed expectations."\textsuperscript{31} This factor requires inquiry into the owner's contemplated use of, and thus expected gain from, the property. The governmental action may be considered a taking if the property owner demonstrates specific facts and circumstances that show significant interference with a reasonable expectation.\textsuperscript{32} In \textit{Penn Central}, for example, the Court rejected \textit{Penn Central}'s investment-backed expectations claim because it found that \textit{Penn Central}'s expectations were based on using the property as a railroad station, and that the enacted regulation did not interfere with this use of the property.\textsuperscript{33}

c. Economic Impact

The final factor considered in the \textit{Penn Central} balancing test is the size of the economic burden imposed on the property owner by the governmental action.\textsuperscript{34} This factor has also been packaged as a focus on the diminution in property value, or on whether the property owner is left with a reasonable economic use.\textsuperscript{35} The Court in \textit{Penn Central} noted the general principle that a diminution in property value alone will not cause a regulation reasonably related to the goal of promoting the general public welfare to consti-

\begin{itemize}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} 458 U.S. 419 (1982).
\item \textsuperscript{30} \textit{Id.} at 438.
\item \textsuperscript{31} \textit{Penn Central Transportation Co. v. New York City}, 438 U.S. 104, 124 (1978).
\item \textsuperscript{33} \textit{Penn Central}, 438 U.S. at 136.
\item \textsuperscript{34} \textit{Id.} at 124.
\item \textsuperscript{35} RODDEWIG & DUERKSEN, \textit{supra} note 23, at 2.
\end{itemize}
tute a taking. However, regulations that result in the complete destruction of the property owner's rights can result in a taking because of the economic severity of such an action.

For example, the *Penn Central* Court cited *Pennsylvania Coal*, as an instance where the severity of economic impact on the property owner resulted in a taking. In *Pennsylvania Coal*, a state regulation that prohibited coal mining on certain parcels of land was held to be a taking as to the individual who owned the rights to remove the coal from the land. In other words, the regulation destroyed the entire economic interest of the owner of the mining rights. Governmental actions which cause an economic impact this severe can rise to the level of a taking.

### 2. The *Agins* Two Factor Test

A more recent articulation of the relevant factors balanced in the takings analysis was advanced in *Agins v. City of Tiburon*. In that case, property owners challenged local ordinances which limited the number of residential dwellings that could be constructed on their five-acre tract of land. The property owners argued that such density restrictions foreclosed development of the land and thus destroyed the value of the property. The Court announced a two-part test and determined that the challenged regulation was not a taking. Under this test, a taking occurs if either (1) the regulation does not substantially advance a legitimate state interest, or (2) the regulation denies a property owner of the entire economically viable use of the land.

Although these two factors were expressed as an either/or test, most courts combine the state interest and economic use factors

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37. *Id.* at 127.
38. *Id.* at 127-128.
40. See, e.g., *Armstrong v. United States*, 364 U.S. 40 (1960) (government's complete destruction of a materialman's lien in certain property constituted a taking); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (stating, by way of illustration, that government height restrictions rendering property wholly useless constitute takings but holding that a state may insist its water supply not be diverted through private contract and that in such a case, no compensation is necessary).
42. *Id.* at 257.
43. *Id.* at 258.
44. *Id.* at 263.
45. *Id.* at 260.
into a single test, balancing the public benefit gained by the regulation against the private loss from the regulation of private property. For example, in Agins the Court found that the density restrictions conferred a public benefit by ensuring the orderly development of residential property. This public benefit was held to outweigh the property owner’s economic loss from restricted use because not all developmental opportunities had been foreclosed. In other words, the property still had economic value, despite the density restrictions.

C. Caveat to the Balancing Tests: The Nuisance Exception and the Harm/Benefit Test

As discussed, the determination of whether a particular regulation constitutes a taking involves the consideration and balancing of different factors. Thus, categories of certain types of regulations are not considered per se takings or not takings. Instead, the finding that a regulation constitutes a taking is the result of an ad hoc factual inquiry. However, the Supreme Court has consistently used nuisance law principles to prevent certain types of government action from being found to be a taking. Nuisance law has effectively created an exception to the application of the takings balancing tests. This exception has been referred to as the nuisance exception or the harm/benefit test.

1. Noxious Use Theory (the Nuisance Exception)

Noxious use theory is based on the premise that no one can obtain a property right to injure or endanger the public. There-
fore, government regulation of activities which create potential harm to the public will not constitute a taking, irrespective of the economic effect on the regulated property owner. Basically, the argument is that the government cannot "take" a right which the property owner does not possess.

2. The Harm/Benefit Test

The harm/benefit test is considered a derivative or a modern articulation of noxious use theory. Simply put, government regulation enacted to prevent a landowner from creating harm to others will not constitute a taking. In contrast, government regulation forcing a landowner to confer a benefit upon the public will be considered a taking. The rationale of the harm/benefit test, according to Professor Frank Michelman, "is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself."

D. 1986-1987 Term: Keystone and Nollan

In 1987, the Supreme Court issued two takings cases: Keystone Bituminous Coal Ass'n v. DeBenedicts, and Nollan v. Cal-
These cases are significant because they attempted to further clarify the relevant factors in the takings analysis, and, as a result, received special academic attention.

1. **Keystone Bituminous Coal Ass'n v. DeBenedictis**

The regulation challenged in *Keystone* was similar to the regulation at issue in *Pennsylvania Coal*. In each case, Pennsylvania enacted legislation prohibiting property owners from mining coal in certain situations. In *Pennsylvania Coal* the regulation was held to be an invalid exercise of the police power. In *Keystone*, however, the Court distinguished the facts from those in *Pennsylvania Coal*, and found the regulation to be a valid exercise of the police power, not a taking subject to the just compensation requirement.

The Court was able to make such a distinction by noting the differences in the purposes of each regulation. In *Pennsylvania Coal*, the regulations were considered to have been enacted to protect certain private landowners because there was no evidence that the mining prohibitions had been enacted for safety reasons or other purposes tending to protect the public welfare. The mining regulations in *Keystone*, however, were accompanied by specific legislative findings that the regulations provided for the protection and promotion of the health, safety and general welfare of the citizens of Pennsylvania. The Court deferred to the legislative findings and accepted the regulation's stated purpose of promoting the public welfare. Thus, the Court held that the legislation in *Keystone*, by aiming to protect the public welfare, advanced a legitimate public interest, and therefore was a legitimate exercise of the police power. Furthermore, the Court recognized that states have a substantial interest in prohibiting activities which are similar

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64. *Keystone*, 480 U.S. at 480.
65. Id. at 506.
66. Id. at 485.
69. Id. at 483, 505-06.
to nuisances. In making this statement, the Court signified its acceptance of the generally accepted nuisance exception.

However, the Court did not stop its analysis with the finding that the challenged regulation promoted a legitimate state interest. The Court went on to balance the advancement of the state interest against the diminution in value of the property and the investment-backed expectations of the property owners. Essentially, the Court conducted a balancing test using the factors from the Penn Central and Agins tests. The Court concluded that the public interest served by the regulation outweighed any economic harm to the property owners since the regulation, as enacted, did not deny the mine operators all "economically viable use" of their land.

This finding is significant because it raises the issue of what constitutes a relevant property unit for the economic harm factor analysis. In Keystone, the property owners asserted that the coal which they were prohibited from mining because of the regulation was a separate property unit. Thus, using this narrow definition of the relevant property unit, the regulation completely destroyed the value of that property unit. As a result, the property owners argued, the complete destruction of economic value of the property unit should outweigh the public purpose served, and thus the Court should be required to find the regulation to be a taking.

The Court, however, refused to accept this narrow definition of the relevant property unit. Instead, the Court adopted a broad definition of the relevant property unit, stating that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate

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70. Id. at 492.
71. Id.
72. Id. at 493.
73. Id. at 485, 493-502.
74. Id. at 499, 501 (as to unmined coal and the support estate, respectively).
75. The determination of the relevant property unit is significant because one factor in the takings analysis requires the comparison of the value that has been "taken" from the property with the value that remains after the regulation. Therefore, one of the critical questions in the takings analysis is the determination of how to define the unit of property "whose value is to furnish the denominator of the fraction." Id. at 497 (citing Michelman, supra note 57, at 1165, 1192). See also infra notes 156-159 (discussing Justice Blackmun's emphasis on the definition of property in his Lucas dissent).
76. Keystone, 480 U.S. at 496.
77. Id. at 497.
must be viewed in its entirety." Thus, under this definition, the complete destruction of one aspect of the property owner's rights will not constitute a destruction of all economically viable use.

In summary, Keystone reaffirmed the tests developed in prior takings cases such as Penn Central and Agins. In determining whether a particular regulation constitutes a taking, the Court will balance the public welfare advanced by the regulation against the economic harm factors, including the diminution in value and the interference with reasonable investment-backed expectations. In evaluating the economic harm suffered by the property owner, the Court will determine the economic harm caused to the aggregate property rights, not the harm caused to one unique strand. Furthermore, nuisance law principles continue to provide an escape from the balancing tests.

2. Nollan v. California Coastal Commission

In Nollan, the Court attempted to elaborate on the legitimate state interest factor expressed in prior takings balancing tests, and on the required nexus between the regulation and the goal of advancing the legitimate interest. The dispute in Nollan arose when the Nollans were required to apply for a permit from the California Coastal Commission for permission replace a beach cottage with a three-bedroom house. The Commission approved the permit subject to the condition that the Nollans grant the public an easement to pass across a portion of their property. The condition was imposed because the commission feared that the newly constructed house would contribute to "the development of 'a "wall" of residential structures' that would prevent the public 'psy-

78. Id.
79. Chief Justice Rehnquist dissented in Keystone based on his rejection of the majority's broad definition of property. Id. at 519 (Rehnquist, C.J., dissenting). He found it significant that Pennsylvania's law created a separate property interest in the type of coal at issue in the case. Id. Chief Justice Rehnquist based his definition of the relevant property interest upon the state law principles since "[p]roperty interests are not created by the Constitution" but "are defined by existing rules or understandings that stem from an independent source such as state law." Id. (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) and Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Since the challenged regulation rendered that particular state-created property right worthless, the Chief Justice asserted that it should constitute a taking. Id. at 520-521. Thus, Chief Justice Rehnquist would focus on unique strands of property rights, allowing the complete destruction of one strand to amount to a taking.
81. Id. at 828.
chologically from realizing a stretch of coastline exists nearby that they have every right to visit.\textsuperscript{82}

Justice Scalia, writing for the majority, held that the easement was a "permanent physical occupation" and therefore was a taking.\textsuperscript{83} The issue then became whether the taking determination could be avoided because the easement was only a condition of the development permit.\textsuperscript{84} The Court, recognizing that a broad range of objectives are considered legitimate state interests, assumed that protecting the public's ability to see the beach represented such a legitimate state interest.\textsuperscript{85} However, Justice Scalia held that the permit condition failed to substantially advance the legitimate state interest of protecting the visual view of the coastline, and thus constituted a taking.\textsuperscript{86}

The interesting portion of this decision is Justice Scalia's description of the standard for review— that the regulation must \textit{substantially} advance a legitimate state interest.\textsuperscript{87} As Justice Blackmun noted in his dissent, Justice Scalia's heightened or semi-strict scrutiny "creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more that rationally based.\textsuperscript{88}

Because of the divergence in standards, \textit{Nollan} could arguably be considered a revolutionary takings case. However, Professor Michelman has suggested that \textit{Nollan} may simply be "a further manifestation, albeit in somewhat surprising form, of the talismanic force of 'permanent physical occupation' in takings adjudication."\textsuperscript{89} In other words, the heightened scrutiny may only apply to those cases involving a permanent physical occupation.

Professor Kmiec disagrees with Michelman, and has pointed out that Justice Scalia's heightened scrutiny may actually be less protective of property rights than the law prior to \textit{Nollan}. Before \textit{Nollan}, as discussed above, it was generally accepted that a permanent physical occupation was a taking \textit{per se}.\textsuperscript{90} Under \textit{Nollan}, a

\begin{footnotes}
\item 82. \textit{Id.} at 828-29.
\item 83. \textit{Id.} at 832.
\item 84. \textit{Id.} at 834.
\item 85. \textit{Id.} at 834-35.
\item 86. \textit{Id.} at 839.
\item 87. \textit{Id.} at 834.
\item 88. \textit{Id.} at 865.
\item 89. Michelman, \textit{supra} note 61, at 1608.
\item 90. \textit{See supra} note 30 and accompanying text (discussing \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 485 U.S. 419, 433 (1982)).
\end{footnotes}
state could arguably obtain a permanent physical occupation, without being considered a taking, if the required nexus was established between the regulation and a legitimate state interest. 91

Kmiec explains this departure by suggesting that the heightened scrutiny applies not only to the fit between the regulatory means and ends, but also to the appropriateness of placing public burdens on a particular landowner. 92 He notes Justice Scalia's statement that "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" 93 Thus, according to Kmiec, Nollan signals an additional factor in the takings balance: concern over whether a public burden has been appropriately placed on a single landowner. 94 The significance of Michelman's and Kmiec's observations is that the impact of Nollan on the development of takings law is unclear. 95

III. LUCAS V SOUTH CAROLINA COASTAL COUNCIL
A. Facts

In 1977, South Carolina enacted the Coastal Zone Management Act following the lead of Congress' passage of the federal Coastal Zone Management Act of 1972. 96 South Carolina's law required owners of coastal land qualifying as "critical areas" to obtain permits from the Coastal Council if they desired to use the land in a way different from the way the land was used on the date of enactment. 97

During the late 1970's, David Lucas and others had begun extensive development of residential homes on the Isle of Palms, a barrier island near Charleston, South Carolina. 98 To this end, in 1986 David Lucas purchased two residential lots on the Isle of Palms for $975,000. 99 At the time of purchase, no portion of

91. Kmiec, supra note 61, at 1650.
92. Id. at 1651.
94. Kmiec, supra note 61, at 1651.
95. See ROEDDEWIG & DUERksen, supra note 23, at 8 (stating that Nollan "may end up being nothing more than a garden-variety exactions case").
97. Id.
98. Id.
99. Id.
these two lots qualified as a "critical area" under the 1977 Coastal Zone Management Act, and the surrounding lots had been developed for residential use. Thus, Lucas was not required to obtain a permit for residential development on his lots.

However, in 1988 South Carolina amended the Coastal Zone Management Act. The amendment prohibited construction of occupiable improvements in certain areas experiencing erosion. The lots purchased by Lucas in 1986 were included in these erosion areas. Therefore, as a result of the amendment, Lucas was unable to fulfill his intention of building residential structures on his lots.

In response to this construction bar, Lucas filed suit in the South Carolina Court of Common Pleas, contending that the prohibition constituted a taking of his property without just compensation. While Lucas did not challenge South Carolina's ability to regulate the beachfront property under the authority of the police power, he did argue that the Act completely destroyed the value of his property, and thus entitled him to compensation. The Court of Common Pleas agreed, stating that the "prohibition 'deprive[d] Lucas of any reasonable economic use of the lots, eliminated the unrestricted right of use, and render[ed] them valueless.'" As a result, the Court of Common Pleas held that the Act effected a taking, and ordered South Carolina to pay Lucas $1,232,387.50.

On appeal, however, the Supreme Court of South Carolina reversed, and held that the Act did not constitute a taking based on noxious use theory. The South Carolina Supreme Court stated, citing Mugler v. Kansas, that regulations enacted to "prevent serious public harm" are not takings, irrespective of the regulation's effect on property value. Because Lucas did not challenge the validity of the Act, the court felt bound to accept the "'uncontested findings' of the South Carolina legislature that new construction in the coastal zone — such as [Lucas] intended — threatened this public resource." Thus, because the Coastal Zone Management Act was enacted to prevent a public harm, the court concluded that it did not constitute a taking. The U.S. Supreme

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100. Id.
101. Id. at 2890.
102. Id. (citation omitted).
103. Id.
104. Id.
105. Id.
106. Id.
107. Notably, two South Carolina Supreme Court justices dissented. Although these
Court granted certiorari in an attempt to clarify the appropriate test for regulatory takings law.\textsuperscript{108}

B. The Majority Opinion — Justice Scalia

Writing for the majority, which included Chief Justice Rehnquist and Justices White, O'Connor and Thomas, Justice Scalia reversed the South Carolina Supreme Court and remanded the case for further proceedings.\textsuperscript{109} In so doing, Justice Scalia announced a categorical rule: a regulation that denies a landowner of all economically beneficial use will constitute a taking unless the regulation prohibits a use that was already impermissible under nuisance law.\textsuperscript{110}

In his articulation of the categorical rule, Justice Scalia first noted that, generally, the determination of whether a regulation is a taking depends on "ad hoc, factual inquiries" and not on any set formula.\textsuperscript{111} However, he identified two categories of regulatory action which have been deemed to constitute takings without fact-specific inquiries. First, he noted that regulations resulting in a "physical invasion," no matter how small the invasion or how great the public purpose, have been considered takings.\textsuperscript{112} Second, relying on Agins, he maintained that regulations denying the owner of "all economically beneficial or productive use of land" have been categorically treated as takings.\textsuperscript{113}

Justice Scalia then attempted to justify the position that regulations denying all economic use are takings. First, he borrowed former Justice Brennan's suggestion that total deprivation of economic use may be the equivalent of a physical taking, at least

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 2890.
\textsuperscript{110} Id. at 2899.
\textsuperscript{111} Id. at 2893.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
from the landowner's point of view. Secondly, Justice Scalia suggested that the functional argument against regulatory takings—that government could not go on if it were required to pay for all diminutions in property values caused by its regulation—is not applicable in the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses." Finally, Justice Scalia maintained that the compensation requirement for regulations rendering property economically worthless is justified because these regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

Essentially, Justice Scalia's concern in this third justification highlights problems with the established takings principles of noxious use theory and the harm/benefit test. Justice Scalia conceded that prior takings cases recognized that "'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation." However, he also pointed out the difficulty created by this standard by noting that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." For example, the construction ban on Lucas' beachfront property may have been enacted to prevent harm to South Carolina's ecological resources. Alternatively, however, the regulation may have been enacted to attain the benefits of an ecological preserve, including the promotion of tourism revenue or securing "a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being."

Because of this difficulty in determining whether a regulation is harm-preventing or benefit-conferring, Justice Scalia determined that the state court's reliance on the legislative pronouncement of a harm-preventing purpose was unjustified. Justice Scalia stated that "[a] fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule

114. Id. at 2894 (citing San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).
115. Id.
116. Id. at 2895.
117. Id. at 2897.
118. Id.
119. Id. at 2898 n.11.
120. Id. at 2899.
that total regulatory takings must be compensated."\textsuperscript{121} His rejection of the state court’s deference to the stated legislative purpose was based on a concern that such an approach would nullify the entire concept of regulatory takings created in Pennsylvania Coal Co. v. Mahon.\textsuperscript{122} If a legislature could simply avoid a takings challenge by declaring a harm-preventing purpose, there would be no limit to the state’s exercise of the police power.

As a result of this concern, Justice Scalia pronounced the categorical rule. He stated:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the prescribed use interests were not part of his title to begin with.\textsuperscript{123}

In other words, a government will avoid the just compensation requirement in cases of total economic destruction only if the regulation prohibits uses that were not part of the landowner’s title because of restrictions already imposed by nuisance principles. This framework is used because, historically, according to Justice Scalia, property owners have recognized that their property rights are held subject to an implied limitation imposed by legitimate exercises of the police power.\textsuperscript{124} However, Justice Scalia suggests that the notion that this implied limitation can be used by a government to “subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”\textsuperscript{125}

By way of illustration, Justice Scalia explained that the owner of a nuclear power plant could not claim a taking under the rule if told to remove the plant’s operations from its land because of a discovery that the plant was on an earthquake fault.\textsuperscript{126} Even though this regulation may eliminate all economic value in that property, the regulation does not prohibit a use that would have been otherwise permissible, since the existence of the nuclear plant
could have been challenged under nuisance law principles.

Justice Scalia did note, however that the judicial inquiry under the rule requires analyzing the factors normally considered in the application of nuisance law.\textsuperscript{127} Such factors include the degree of harm to public lands and resources posed by the owner's proposed activities; the social value of the owner's activities and their suitability to the locality in question; and the relative ease with which the potential harm could be eliminated through precautionary measures.\textsuperscript{128} Thus, Justice Scalia renders the inquiry for total regulatory takings essentially the inquiry required by state nuisance law.

As a result, the Court remanded the case for consideration of South Carolina nuisance law principles. Justice Scalia noted that on remand under the categorical rule, South Carolina will be required to demonstrate that construction of residential homes on Lucas' lots would have constituted a nuisance under state nuisance law.\textsuperscript{129} If the residential development on Lucas' lots is considered a nuisance, then the proposed property use is not a right to which Lucas is entitled as a property owner. Thus, if Lucas did not have the right to develop his property because of nuisance law principles, then the Beachfront Management Act did not prohibit a use to which he was entitled, and will not constitute a taking, regardless of the effect on the property's value.

C. Justice Kennedy's Concurrence

Justice Kennedy agreed with the framework of the majority's takings analysis in substance.\textsuperscript{130} However, Justice Kennedy added three observations which may become relevant on remand and in future takings cases. First, he expressed reservations as to the assumption that beachfront property loses all economic value because of a residential development restriction.\textsuperscript{131} Secondly, he added that the uniqueness of coastal property may present special concerns, and thus permit government regulation of land uses beyond what nuisance law might otherwise allow.\textsuperscript{132} Finally, Justice Kennedy added that a means-ends analysis should also be considered in addition to the categorical rule.\textsuperscript{133} Specifically, he noted that in

\textsuperscript{127} Id. at 2901.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 2901-02.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 2903.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 2904.
the case at bar the lots in question had originally been zoned for residential use, and that South Carolina did not regulate the property until most other lots on the island had been developed.\textsuperscript{134} Thus, the burden of the regulation rested almost entirely on the remaining lots, including those owned by Lucas. Justice Kennedy felt that this inequitable burden should be one of the factors weighed in the balance.\textsuperscript{135}

D. Justice Blackmun's Dissent

Justice Blackmun vigorously dissented from the majority opinion, stating, "Today the Court launches a missile to kill a mouse."\textsuperscript{136} According to Justice Blackmun, the Court unnecessarily created the sweeping categorical rule in order to decide a narrow case.\textsuperscript{137}

His disagreement with the majority starts with the decision to review the takings issue. First, he states that the issue was not ripe for decision in the absence of a final decision regarding the permitted uses of the property.\textsuperscript{138} Because the Beachfront Management Act was amended in 1990 to allow permits to build in certain circumstances, Justice Blackmun believes Lucas' takings claim will not be ripe until he has been denied use after pursuing this administrative remedy.\textsuperscript{139} Additionally, Justice Blackmun criticizes the Court's reliance on the assumption that the construction ban rendered Lucas' lots economically worthless.\textsuperscript{140} According to Justice Blackmun, Lucas still retains attributes of ownership, such as the right to exclude others, and therefore has not suffered a complete economic deprivation.\textsuperscript{141}

However, the substance of Justice Blackmun's dissent goes much deeper. First, Justice Blackmun criticizes Justice Scalia's lack of deference to the South Carolina legislature in the absence of a challenge by Lucas.\textsuperscript{142} He cites United States v. Carolene Products Co.\textsuperscript{143} for the proposition that "the existence of facts sup-

\textsuperscript{134.} Id.
\textsuperscript{135.} Id.
\textsuperscript{136.} Id.
\textsuperscript{137.} Id.
\textsuperscript{138.} Id. at 2906.
\textsuperscript{139.} Id. at 2907.
\textsuperscript{140.} Id. at 2908.
\textsuperscript{141.} Id.
\textsuperscript{142.} Id. at 2909.
\textsuperscript{143.} 304 U.S. 144 (1938).
porting the legislative judgment is to be presumed.” As a result, Justice Blackmun would accept the Legislature’s statements that the Act’s purpose was to prevent harm to life and property absent a challenge to that stated purpose. Thus, Justice Blackmun would permit the legislative distinction between harm-preventing and benefit-conferring regulations.

Secondly, Justice Blackmun objects to the adoption of a categorical rule. He notes that takings inquiries involve balancing several factors, and not decisions based on per se categories. He points out that although regulations which eliminate all economically viable uses of property weigh heavily in favor of a taking determination, the Court has never held that there is no public interest that would outweigh this substantial private harm. Thus, Justice Blackmun rejects Justice Scalia’s suggestion that Agins supports a per se rule for total regulatory takings.

Moreover, Justice Blackmun objects to the majority’s attempt to incorporate public interest factors into the takings analysis by permitting the destruction of all economic value without compensation only if the regulation prohibits uses that would have been prohibited by nuisance law. He notes that prior cases have rejected the notion that governmental regulatory power “turns on whether the prohibited activity is a common law nuisance.” Instead, the Court has permitted the legislature to determine what regulation is necessary for the protection of public health and safety. Thus, by making the takings analysis turn on whether the regulated activity constitutes a nuisance, the Court is putting the judiciary in the position of second-guessing legislatures. On this point, Justice Blackmun challenges Justice Scalia’s justification for the categorical rule based on the difficulty in distinguishing between harm-preventing and benefit-conferring legislation. Justice Blackmun notes Justice Scalia’s doubt that the legislative judgment can provide “the desired ‘objective, value-free basis’ for

144. Lucas, 112 S. Ct. at 2909 (citing Carolene Products, 304 U.S. at 152).
145. Id.
146. Id. at 2909-10.
147. Id. at 2910.
148. Id.
149. Id. at 2911 n.11.
150. Id. at 2912.
151. Id. at 2912-13.
152. Id. at 2913.
153. Id.
upholding a regulation.” 154 However, according to Justice Blackmun, “[i]n determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today— they determine whether the use is harmful.” 155

Additionally, Justice Blackmun points out that the key determination under the categorical rule is the definition of property 156 The standard of deprivation of all economic use cannot be ascertained without an understanding of the relevant property unit involved. He explains that “whether the owner has been deprived of all economic value of his property will depend on how ‘property’ is defined.” 157 Blackmun asserts that there is no objective way for the Court to make this determination. As an example, he refers to the different definitions of the relevant property unit put forth by different justices in Keystone. 158 He notes that “[w]e have long understood that any land-use regulation can be characterized as the ‘total’ deprivation of an aptly defined entitlement Alternately, the same regulation can always be characterized as a mere ‘partial’ withdrawal from full, unencumbered ownership of the landholding affected by the regulation.” 159 Thus, according to Justice Blackmun, the categorical rule is flawed because of the ability to manipulate the rule through differing definitions of property.

Finally, Justice Blackmun challenges Justice Scalia’s understanding of the historical understandings of the Takings Clause. 160 Justice Blackmun notes that the Takings Clause originally did not extend to regulations of property, regardless of the economic effect, 161 and that his reading of history does not “indicate any common law limit on the State’s power to regulate harmful uses even to the point of destroying all economic value.” 162 Thus, Justice Blackmun contests Justice Scalia’s assertion that the implied limitations on property rights, resulting from the police power, do not extend to the complete destruction of economic value.

154. Id.
155. Id. at 2914.
156. Id. at 2913.
157. Id.
158. Id. at 2913-14.
159. Id. at 2913.
160. Id. at 2914-17.
161. Id. at 2915.
162. Id. at 2916.
E. Justice Stevens’ Dissent

Justice Stevens’ dissent is similar to Justice Blackmun’s in that he questions the majority’s abandonment of the balancing tests in favor of a categorical rule. He claims that neither Pennsylvania Coal nor Agins supports the majority’s focus solely on the economic factor. Those cases, he asserts, emphasized that the economic factor is only one factor in the takings analysis.

Justice Stevens also notes problems with the categorical rule based on the definition of property. He expresses fear for the manipulation of the categorical rule because of the “elastic nature of property rights.” He notes that courts may define the property interest broadly so as to avoid the finding of a total regulatory taking. However, he also notes the possibility of developers and investors marketing special limited estates to take advantage of the categorical rule.

Furthermore, like Justice Blackmun, Justice Stevens criticizes the lack of deference given to the Legislature by the majority. Justice Stevens suggests that this approach is unwise because legislatures are equipped to deal with “the special exigencies of the moment.” For example, he notes the necessity of the legislative police power to deal with emergencies, such as Hurricane Hugo, which caused more than $6 billion in property damage in South Carolina. Thus, he maintains that the legislatures must have the ability to regulate and redefine property interests in order to implement the constant evolution of human experiences and understandings. For example, he asserts that legislatures are able to redefine property interests to take into account new societal concerns in areas such as endangered species, wetlands, and coastal lands. Justice Stevens argues that the categorical rule “freezes the State’s common law, denying the legislature much of its traditional power

163. Id. at 2918.
164. Id.
165. Id.
166. Id. at 2919.
167. Id.
168. Id.
169. Id.
170. Id. at 2922.
171. Id.
172. Id. at 2925.
173. Id. at 2921-22.
to revise the law governing the rights and uses of property.”

Finally, Justice Stevens disagrees with the majority’s failure to consider one of the factors in the traditional takings analysis, the character of the regulatory action.

Justice Stevens also notes that the character of the regulatory action factor takes into account the purpose of the Takings Clause, which “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” He notes that the cases finding physical invasions, no matter how minute, to constitute takings are consistent with this purpose since a “physical taking entails a certain amount of ‘singling out.’” However, Justice Stevens notes that in this case, the Beachfront Management Act did not single out Lucas, as the owner of undeveloped land, to bear the burden of developmental regulation. The Act also prohibited owners of developed land from reconstructing their structures if destroyed. Thus, because the Act inflicted burdens on both the owners of developed and undeveloped land, Justice Stevens asserted that the character of the regulation was not in the nature of an expropriation on a single class of owners, and therefore weighed against the finding of a taking.

IV ANALYSIS

A. Doctrinal Shifts

Viewed against the backdrop of prior takings cases, Lucas is seemingly a significant decision in takings jurisprudence because it signals the Court’s doctrinal shift. For example, the categorical rule, as noted in the dissenting opinions, is an aberration of the balancing tests developed in Pennsylvania Coal and Agins, and continued in Keystone. The categorical rule, then, could arguably signal the doctrinal shift from fact-specific balancing tests to the

174. Id. at 2921.
175. Id. at 2922-23. Justice Stevens does note, however, that the majority considered two of the traditional factors: the economic impact and the reasonable-investment backed expectations. “[T]he categorical rule addresses a regulation’s ‘economic impact, while the nuisance exception recognizes that ownership brings with it only certain ‘expectations.’” Id. at 2922.
176. Id. at 2923 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).
177. Id.
178. Id. at 2924.
179. Id.
development of per se categories. As Justice Blackmun’s dissenting opinion notes, this development may be on shaky ground, given that the entire concept of regulatory takings has a questionable foundation in Constitutional interpretation. However, accepting the validity of regulatory takings, as the Court has since Pennsylvania Coal, the real concern with the development of per se categories lies in the lack of deference to legislative judgment, and thus, the removal of a portion of the legislature’s regulatory power.

Both dissenting opinions in Lucas question this lack of traditional deference to legislative judgment regarding the purposes and goals of a challenged regulation. Justice Scalia attempts to justify the lack of deference on the ground that reliance on the Legislature’s announced purpose would nullify all regulatory takings claims since the government could draft the legislative history to fit under the nuisance exception simply by stating a harm-preventing purpose. Justice Blackmun, however, counters that the categorical rule with its nuisance exception merely puts the Court in the position to determine whether a particular use is harmful, since nuisance law is essentially a determination whether a certain use is harmful. Thus, he seems to assert that the Court is taking away legislative power to regulate what it determines to be a harmful use, and replacing it with the judicial power to permit total regulatory takings, provided the regulated use is harmful under nuisance law principles. As a result, the focus of governmental regulatory power shifts from the legislative judgment to the principles of nuisance law.

Given the separation of powers between the judicial and legislative branches, and the recognized broad scope of the legislative police power, this lack of deference gives rise to valid concerns and justifies Justice Stevens’ reference to a return to the era of Lochner v. New York. However, instead of indicating a return to “Lochnerizing,” Lucas may signal the Court’s explicit recognition of a residual federal category of property. While property rights are defined by state law, it may be that the Constitution,

180. Id. at 2914-17.
181. Id. at 2909 (Blackmun, J., dissenting); Id. at 2921 (Stevens, J., dissenting).
182. Id. at 2899.
183. Id. at 2914.
184. Id. at 2921 (citing Prune-Yard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., dissenting), which stated that refusals to defer to legislative determinations represents “a return to the era of Lochner when common-law rights were immune from revision by State or Federal Government”).
through the Takings Clause, creates a minimum federal standard below which state definitions may not fall.\textsuperscript{185}

The residual federal category of property may be consistent with the anti-majoritarian concerns implicit in the Takings Clause.\textsuperscript{186}

By consistent division of authority, the Founders sought to prevent concentration of governmental power against property rights. Under such division, the polity "will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." The very structure of government would ensure that the rights of property would not be nullified "by the superior force of an interested and overbearing majority." \textsuperscript{187}

In other words, the just compensation requirement may "counteract the majoritarian tendency to isolate individual citizens for disproportionate burdens." \textsuperscript{188}

Based on these anti-majoritarian concerns, the lack of deference to legislative judgment may be justifiable in those situations where legislative rule has caused complete economic destruction to a property interest. If a property owner is subject to unlimited governmental regulation, the requirement that the regulation be harm-preventing in order to avoid characterization as a taking is meaningless and subjects the individual property owner to the whim of the majority.\textsuperscript{189} However, by requiring complete economic destruction to invoke the categorical rule, \textit{Lucas} allows for the continued broad governmental regulatory powers which are implicit in the police power. Thus, Justice Scalia's lack of deference may be justifiable when a regulation has eliminated all economic value in a

\textsuperscript{185} See Knuec, supra note 61, at 1642.

\textsuperscript{186} Id. at 1641.

\textsuperscript{187} \textsc{B. Schwartz, The Rights of Property} 21 (1965) (quoting \textit{The Federalist} Nos. 51, 10 (James Madison)).

\textsuperscript{188} Knuec, supra note 61, at 1640.

\textsuperscript{189} In fact, Justice Scalia made this point in \textit{Lucas}, stating:

\textit{A fortiori} the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would always be allowed. The South Carolina Supreme Court's approach would essentially nullify \textit{[Pennsylvania Coal's]} affirmation of limits to the noncompensable exercise of the police power.

\textit{Lucas}, 112 S. Ct. at 2899.
property interest because of anti-majoritarian concerns, but may be unjustified when the regulation has only partially devalued a property interest given the broad police power. Because the rule’s lack of deference fits into this framework, it seems justified under a residual federal category of property rights theory.

Further evidence of the shift towards a recognition of minimum federal property rights comes to light when Lucas is considered with Nollan. In Nollan, Justice Scalia advanced the standard that a regulation must substantially advance a legitimate state interest to avoid characterization as a taking. Although Nollan may simply be a result of a physical invasion analysis, it may also signal the Court’s recognition of anti-majoritarian concerns in the Takings clause, leading to a residual federal category of property rights.

B. Practical Realities

While the doctrinal shifts are of scholastic note, the practical impact of Lucas on governmental regulatory power appears to be minor. For example, the categorical rule does not make clear the relevant property unit against which the decline in value is to be measured. Thus, the obvious defense to a total regulatory taking, as suggested by Justice Stevens, is the use of the broad definition of property and the denial of a complete economic destruction of that broad property right. Since Keystone provides support for a broad definition of the relevant property interest, it seems that few regulations will be found to constitute a taking because of a complete destruction of economic value. Under a broad property definition, the government should almost always be able to argue that at least one strand of property rights has not been destroyed by the challenged regulation.

As a result of the difficulty in alleging a complete destruction of economic value, Lucas is unlikely to set off a wave of challeng-

190. See supra notes 86-88 and accompanying text.
191. This is not to suggest that recent developments in takings law are insignificant. Takings law has come to the forefront in this era of environmental regulation. For example, U.S. Claims Court Chief Judge Loren Smith has been an aggressive user of the Takings Clause in an effort to put a brake on federal and state regulation of business and property. Tom Castleton, U.S. Claims Court Crusader Puts Property Rights Up Front, CONN. LAW TRIB., Aug. 31, 1992, at 22. Thus, cases like Lucas and developments like the categorical rule signal the beginnings of major developments in takings law.
192. Lucas, 112 S. Ct. at 2894 n.7 (opinion by Scalia, J.); Id. at 2913 (Blackmun, J., dissenting); Id. at 2919 (Stevens, J., dissenting).
193. Id. at 2919.
194. See supra notes 77-79 and accompanying text.
es to land use regulations. Thus, Justice Stevens' fears of *Lucas* inhibiting the government's ability to enact regulations to protect interests such as endangered species, wetlands, and coastal lands seems unfounded. Under a broad property definition, it will be a rare case when the entire bundle of property rights have been rendered economically worthless.

In fact, it is unclear whether even Lucas can claim on remand that his entire property interest has been rendered economically worthless. Although the Beachfront Management Act may prevent Lucas from building residential homes on his lots, as an owner he still maintains the essential property right — the right to exclude others. This right to exclude others could arguably have some value, and therefore could prevent Lucas from claiming complete destruction of economic value. Thus, on remand even Lucas may not be entitled to invoke the categorical rule.

Another practical reality is that the existence of the nuisance exception will cause courts to balance factors similar to those balanced in the traditional takings cases. This results from the analysis required under nuisance law. For example, according the Restatement Second of Torts, the determination of whether an activity is a nuisance entails a gravity/utility balance. In this analysis, the gravity of the harm resulting from the activity is balanced against the social utility of that use. Factors considered on the gravity side include the extent of harm involved, the character of the harm involved, the social value that the law attaches to that type of use or enjoyment, the suitability of the particular use or enjoyment to the character of the locality and the burden on the person harmed in avoiding the harm. Factors considered on the utility side of the balance include the social value that the law attaches to the primary purpose of the conduct, the suitability of the conduct to the character of the locality and the impracticability of preventing or avoiding the harm from the conduct.

These nuisance factors are similar to the traditional takings

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195. *See supra* note 172 and accompanying text.
196. The South Carolina Court of Common Pleas found that the Beachfront Management Act completely destroyed the value of Lucas' property interest. *Lucas*, 112 S. Ct. at 2894 n.7. However, on remand, the South Carolina Supreme Court need not be bound by this constraint. *Id.* at 2903, 2908 n.6.
197. *Id.* at 2908.
199. *Id.* § 822.
200. *Id.* § 828.
balancing factors developed in *Penn Central, Agins* and *Keystone*: balancing the public welfare advanced by a particular regulation against the economic harm suffered by the property owner. For example, David Lucas’ construction of residential homes on the Isle of Palms could, arguably, fall into the category of a nuisance based on the Restatement factors. Although the construction ban may cause severe harm to Lucas, and even though the law may place a high value on the development of residential homes, barrier islands may not be the appropriate location for this type of use in light of the environmental danger created, and as a result this particular development may constitute a nuisance. If this were analyzed under the traditional takings analysis, the court would consider whether the environmental safety advanced by the construction ban outweighs the economic harm suffered because of the prohibition. The difference between nuisance and takings law is that in nuisance cases the competition is between different property owners, whereas in takings cases the competition is between the property owner and the government. In the end, however, both the nuisance analysis and the traditional takings analysis evaluate competing uses and interests in property rights, and attempt to reach a compromise in this competition of interests.

Justice Scalia, in dictum, suggests that Lucas’ developmental activities are not likely to be considered a nuisance. However, the important point is that the factors considered in a nuisance analysis are similar to those evaluated in the traditional takings analysis. Recognition of this similarity is surprisingly absent from all the opinions in *Lucas*.

**V Conclusion**

The full impact that *Lucas*’ categorical rule will have on takings law is unclear. However, until future takings cases firmly clarify issues such as the relevant property definition, it seems that *Lucas* will have little impact on governmental regulatory power. Moreover, application of the nuisance exception will require courts to consider factors similar to those considered in traditional takings cases. The significance of *Lucas* is the Court’s doctrinal shift from balancing tests to a per se rule, and the lack of deference to legislative judgment that accompanies such a rule. Whether this lack of deference can be explained by some sort of residual federal proper-

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ty right, and what the ultimate effect of such a residual right on the police power will be, remains for consideration in future cases. Thus, *Lucas* will not, by itself, set off an "earthquake" on the foundation of governmental regulatory power, but it certainly can be called a "tremor."

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