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LUCAS v. SOUTH CAROLINA COASTAL COMMISSION: A NEW APPROACH TO THE TAKINGS ISSUE

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INTRODUCTION

Under the Fifth Amendment, private property cannot be taken for public use "without just compensation." [FN1] The "regulatory takings issue" concerns the extent to which governmental regulations can impact private property. As the use of regulations for land-use planning and environmental protection has increased, the takings issue has become even more important. [FN2] The principle question is how far can the government go in regulating usage before the regulation becomes an unconstitutional taking of the land. [FN3] *Lucas v. South Carolina Coastal Council* [FN4] is the latest Supreme Court case to address the takings issue.

The *Lucas* decision represents a departure from the traditional approach to takings by creating a categorical rule and a specific exception to the rule. The categorical rule is without precedent and the Court's justifications fail to clarify why it is necessary. The exception to the categorical rule is also without precedent and is much too narrow to deal with the complex problems faced by decisionmakers in a modern society.

FACTS

The Coastal Zone Management Act (CZMA) was passed by Congress in 1972. [FN5] The CZMA was designed to encourage the states to take actions to protect the United States coastal areas. [FN6] In 1980, Congress passed amendments to the federal CZMA which directed the states to strengthen their coastal protection programs by "preventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high- hazard areas." [FN7]

The South Carolina Coastal Zone Management Act (the Act), which limited development in "critical areas" of the coastal zone, was passed in 1977. [FN8] The critical areas included coastal waters, tidelines, beaches and primary oceanfront sand dunes. [FN9] Any development in these areas required a permit from the South Carolina Coastal Council (Council) [FN10] and construction of any habitable structure beyond the front row of dunes adjacent to the Atlantic

Ocean was prohibited. [FN11] The 1977 critical area was relatively narrow, and implementation of the Act did not stop shoreline erosion. [FN12]

In 1986, the Council appointed a Blue Ribbon Committee on Beachfront Management to study the continuing problems and to make recommendations. [FN13] Pursuant to the study, South Carolina passed the Beachfront Management Act in 1988. [FN14] The 1988 Act widened the area designated as critical but did not change uses permitted in critical areas. [FN15] The critical area was widened to "encompass the distance from the mean high watermark to a setback line established on the basis of the 'best scientific and historical data' available." [FN16]

David Lucas and others began developing a residential area on the Isle of Palms, a barrier island located just off the South Carolina mainland, in the late 1970s. [FN17] Lucas had lived on the island since 1978. [FN18] In 1986 Lucas purchased two of the last four vacant lots in the residential area and planned to build two houses, one for his family and one to sell. [FN19] The land which Lucas bought, although not in an original critical area, "is notoriously unstable." [FN20] Following the 1988 redesignation, all of Lucas' land fell within a designated critical area. [FN21] Under the 1988 Act, all "construction of occupiable improvements was prohibited." [FN22] Lucas' plans to build on the land were directly impacted by the 1988 Act.

Lucas filed suit in the South Carolina Court of Claims based on the takings clause of the Fifth Amendment. [FN23] He contended that the prohibition against building constituted a taking because it eliminated all of the value of his property and therefore compensation was required. [FN24] The validity of the Act was not at issue because Lucas claimed that "the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives." [FN25] The Court of Claims found that a taking had occurred and ordered just compensation to be paid in the amount of \$1,232,387.50. [FN26]

The South Carolina Supreme Court, relying on *Keystone Bituminous Coal Ass'n v. DeBenedictis*, [FN27] reversed the trial court and found that no taking had occurred. [FN28] Lucas' failure to question the validity of the Beachfront Management Act played a crucial role in the court's analysis. "By failing to contest [the] legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource . . . and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." [FN29] The Court found the Act to be a legitimate exercise of state police power. [FN30] Under *Keystone* and prior cases, no taking occurs when a state acts to prevent a serious public harm. [FN31] Therefore, the South Carolina Supreme Court reversed the lower court and found that Lucas was not entitled to compensation. [FN32]

Lucas appealed to the United States Supreme Court and certiorari was granted. The United States Supreme Court overturned the South Carolina Supreme Court and remanded the case. [FN33] Rejecting the state court's reliance on the harmful use/police power analysis, the Court held that when a regulation deprives a landowner of all beneficial or productive use of land, it falls into a discrete category of takings law which is not subject to the traditional case specific inquiry. [FN34] The Court then set forth a narrow exception to the categorical rule based on background principles of state property and nuisance law. [FN35]

BACKGROUND SECTION

Before taking a closer look at the Supreme Court opinion, the history of the takings issue must be understood. Starting with *Pennsylvania Coal Company v. Mahon* [FN36] through the 1987 "trilogy" cases [FN37], the United States Supreme Court struggled with the question of when the regulation of private property becomes a taking.

The Court first addressed the issue of regulatory takings in *Mahon*. [FN38] Justice Holmes acknowledged that, while "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," [FN39] there are limitations on the government's power to regulate private property. [FN40] The ability to regulate the uses to which private property may be put are an inherent part of the police power of the state. However, the police power is not unlimited and a regulation which goes "too far" will be recognized as a taking of private property and compensation will be required. [FN41]

Justice Holmes, while articulating the general rule, did not explain the extent to which a regulatory scheme can impact private property before it goes "too far." According to *Mahon*, a number of factors must be considered. Whether or not compensation is required depends on the facts of the particular case. [FN42] Great weight should be placed on the judgments of the legislature. [FN43] However, the validity of a regulation may be challenged if a property owner believes the regulation has transgressed the acceptable boundaries of the police powers. [FN44] For the property owner, the extent of diminution of the property values which occurs under the regulatory scheme in question is crucial to the takings issue. [FN45] *Mahon* stated that compensation is owed if the diminution in value is great enough, but the Court did not clarify how great the reduction in value must be. The relationship between legitimate state interests and diminution in property values was also not clarified.

The basic approach developed by the United States Supreme Court after *Mahon* reflects the same considerations put forth by Justice Holmes. Rather than developing a set formula for addressing the takings issue, the Supreme Court's decisions have identified several significant factors to be considered in each case. [FN46] The three most important factors are the nature of the state interest, the economic impact of the regulation on the property owner and the extent to which the challenged regulation interferes with distinct investment- backed expectations. [FN47] Prior to *Lucas*, the takings analysis required a weighing of private and public interests. [FN48]

In 1987, the Supreme Court revisited the takings issue in three important decisions. The first, *Keystone*, [FN49] expanded upon the basic approach to takings developed since *Mahon*. The second case, *First English*, [FN50] recognized that compensation could be due even for a temporary taking. Finally, *Nollan* [FN51] required a higher standard of review for certain regulatory takings cases.

Keystone, [FN52] involving a challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, [FN53] reiterated the basic approach to takings which had developed since *Mahon*. The Court reaffirmed that takings cases are decided by "engaging in essentially ad hoc, factual inquiries," [FN54] considering several factors, including the character

of the government's action, the economic impact of the regulation, and the interference with reasonable investment backed expectations. [FN55]

The first part of Keystone's regulatory takings analysis involved an inquiry into the nature of the governmental actions. In addressing the character of the government action, the Court stated that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required." [FN56] Regulations which are passed to protect the public are often not takings because there is a substantial public interest in preventing activities which are similar to public nuisances. [FN57] However, in acting to protect the public interest, the legislature is not constrained by the common law doctrine of nuisance. [FN58] Instead, under Keystone, the powers of the state are defined broadly. [FN59] States may exercise their police powers to protect "the public interest in health, the environment, and the fiscal integrity of [an] area." [FN60] These interests clearly go beyond nuisance doctrines.

One of the most important ways a state may protect the public interest is through restrictions on the ways individuals may use their property. [FN61] The regulations need not be limited to activities which would be nuisances under the common law. [FN62] Instead, land-use regulations have been upheld which adversely affected or even destroyed real property interests where the state legislature has reasonably concluded that the prohibition of certain activities would promote the health, safety, morals, or general welfare. [FN63] In other words, if the regulation substantially advances a legitimate state interest, the Court often found that a taking had not occurred. [FN64]

The nature of the state interest comprises half of the inquiry. The diminution of value and the impact on investment-backed expectations constitute the other half. A number of cases, beginning with *Agins v. Tiburon*, [FN65] have stated that a general zoning law which "denies an owner economically viable use of his land" [FN66] effects a taking. However, none of these cases were decided based on the economic questions, therefore the relationship of the state interest and denial of economic use was not clarified. Keystone also failed to clarify the relationship because the Court found that the petitioners failed to show any significant deprivation of their property rights. [FN67] Thus, once again, the question was left unanswered.

First English [FN68] addressed the issue of temporary regulatory takings and, in so doing, further restricted the power of the state to regulate land-use. The First English Evangelical Lutheran Church owned and operated a campground for handicapped children on a piece of property alongside a river which served as a drainage channel for a watershed area in Los Angeles County. [FN69] In 1978, severe flooding destroyed the campground. [FN70] After the flooding, Los Angeles County passed an ordinance which prohibited building in a designated flood protection area which included the campground. [FN71] The Church filed a complaint claiming that the ordinance denied them use of their property. [FN72]

The Court held that compensation may have to be made for a temporary taking even if an ordinance is later withdrawn. [FN73] Regulations which deny a landowner all use of the property, even if temporary, are not any different in their effect than a permanent taking. [FN74] Later withdrawal of such an ordinance is not a "sufficient remedy to meet the demands of the

Just Compensation Clause." [FN75] The holding in *First English* extended additional protections to the private property owner and further limited the police powers of the state. [FN76] A government entity may not simply withdraw the offending regulation; instead, compensation must be paid for the time during which the landowner was not able to use the property. [FN77]

The final case decided in 1987, *Nollan v. California Coastal Commission*, [FN78] requires that regulations which affect property rights through the police power must substantially advance a legitimate state interest. [FN79] The Nollans owned a piece of beachfront property and applied to the California Coastal Commission for a permit to replace a small, existing bungalow with a larger home. [FN80] The Commission granted the permit on the condition that the Nollans grant an easement allowing the public to pass across the beach portion of their property. [FN81] The Court found that the permit condition was not sufficiently related to a legitimate government purpose and, therefore, constituted a taking. [FN82]

In discussing the conditions attached to the permit, the Court looked closely at the connection between the state interest and the means used to promote that interest. An essential nexus must exist between the state interest and the regulation promulgated to advance the state interest. [FN83] The essential nexus requires that a prohibition on the use of property must further the ends advanced as justification for the prohibition. [FN84] If a condition on development is not clearly connected to the harm resulting from development, [FN85] then the regulation may be a taking. *Nollan* requires that regulations, at least in certain circumstances, be carefully drawn to meet the interests of the state.

In the *Lucas* decision, for the first time, the Supreme Court attempted to clarify the relationship between the interests of the government and the interests of the property owner when a total deprivation of economic value is claimed.

THE LUCAS DECISION

Justice Scalia's majority opinion in *Lucas* was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. [FN86] *Lucas* held that regulations which deprive a landowner of all beneficial or productive use of land are not subject to a case specific inquiry (the categorical rule). [FN87] The majority also set forth a narrow exception based on background principles of state property and nuisance law. [FN88] Justice Kennedy concurred in the majority opinion but questioned the categorical rule and the narrowness of the nuisance exception. [FN89] Justices Blackmun and Stevens wrote vigorous dissents, challenging both the categorical rule and the nuisance exception. [FN90] Justice Souter filed a separate statement questioning the wisdom of granting review because of unanswered questions as to whether *Lucas* was in fact deprived of all economic or beneficial use of his property. [FN91]

After briefly dealing with the ripeness of *Lucas*' claim, [FN92] the Court addressed the 5th Amendment issue. Looking back to *Mahon*, the Court acknowledged that takings claims are ad hoc, factual inquiries for which no set formulas have been derived. [FN93] The Court stated two discrete categories of takings claims exist which are compensable without the usual case-specific inquiry. [FN94] The first category deals with actual physical occupations of private property by the state. [FN95] The second category, into which *Lucas*' claim fell, includes those

instances in which a regulation denies all economically beneficial or productive use of land. [FN96]

Citing *Agins*, among other cases, the Court found that the categorical rule has often been put forth but the justification for the rule had never been explained. [FN97] The Court offered three possible reasons for departing from the traditional approach of weighing public and private interests. First, looking to Justice Brennan's dissenting opinion in *San Diego Gas and Electric v. San Diego*, [FN98] Justice Scalia stated that one reason for the categorical rule may be that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. [FN99] This justification equates regulations which deprive an owner of beneficial use with physical invasions. [FN100] Therefore, the analytical approach for both categories would be the same.

Secondly, the Court opined that if regulations leave a landowner with no productive or economically beneficial use of the land, it is much harder to assume that the legislature is simply "adjusting the benefits and burdens of economic life" in a way which leads to the benefit of everyone involved. [FN101] The Court assumed that in the relatively rare circumstances where the government action leaves the property with no value, the owner is not benefited. [FN102] The categorical rule would not undermine the functioning of the government because of the rarity of situations in which the rule can be invoked. [FN103]

Finally, the Court stated that regulations which leave property owners without economically beneficial or productive options for the use of their land pose a greater risk that the government is pressing private property into public service under the pretense of preventing public harm. [FN104] These regulations, according to Justice Scalia, typically require that land be left in its natural state. [FN105] The examples cited by the Court present a mix of purposes similar to those in the South Carolina statute. [FN106] *Lucas* stated that negative regulations and appropriations are equivalent because many states have eminent domain statutes which allow the state to either impose servitudes which prevent development of private scenic lands or allow the state to acquire the lands outright. [FN107] Justice Scalia made no distinction between statutes which protect scenic values and those passed for safety reasons. In fact, he seemed to view them as all as a way for the government to force private land to be left in a natural state. The majority opinion implied that the purposes of such statutes are suspect.

After setting forth the categorical rule, the Court delineated a narrow exception based on inherent restrictions which are either in the title to the land itself or which are part of the background principles of the state's law of property and nuisance. [FN108] The exception recognizes that a regulation can deprive an owner of all economic or beneficial use of property if the regulation duplicates the result the state or neighboring land-owners could have achieved in court by suing under state nuisance law. [FN109] Only in such circumstances will the Court find that compensation is not owed.

Justice Scalia mentioned background principles of state property law but the discussion focused only on nuisance law principles. Relying on the Restatement (Second) of Torts for guidance, Justice Scalia outlined what the 'total takings' inquiry would require. [FN110] The factors to consider are: 1) the degree of harm to public or other private property posed by the

anticipated activity; 2) the social value of the claimant's activities and the suitability of the activities to the location in question; 3) the relative ease with which the harm could be avoided by other measures taken by the government and the claimant; 4) a comparison of the proposed activity to others undertaken in the area (conceding that changed circumstances or new knowledge may allow the restriction of previously allowed activities); and 5) the review of whether such similarly situated landowners are allowed to continue the activity. [FN111]

Turning directly to the facts at hand, the Court remanded the case back to the South Carolina Supreme Court. [FN112] The Court noted that the Coastal Council cannot simply rely on legislative findings that the uses proposed by Lucas were inconsistent with the public interest. [FN113] Instead, the background principles of nuisance and property law which prohibit the proposed uses of the land in its present circumstances must be identified. [FN114] Only if the Council identified such principles, could the Council claim that the Beachfront Management Act did not constitute a taking of the Lucas property, even though all economically beneficial use of the property was prohibited. [FN115]

The categorical rule represents an important change in takings jurisprudence. In the past, the Court has always taken an ad hoc, factual inquiry approach. [FN116] The Court repeatedly refused to establish a set takings formula. While acknowledging the Court's historical reluctance to adopt a formalistic approach, [FN117] the Lucas majority parted with tradition by adopting the categorical rule. Both Justice Blackmun's and Justice Stevens' dissents pointed out the categorical rule is not supported by past precedent. [FN118]

In prior regulatory takings cases, the Court always looked first to the nature of the state's interest because the takings analysis ultimately requires a balancing of public and private concerns. [FN119] Justice Blackmun argued that the cases in which the state's interest outweighed the private interest depended not on whether some "residual valuable use" existed but on whether the government interest was sufficient, given the costs to the private landowner, to prohibit the activity. [FN120] Justice Blackmun emphasized that the state has full power to forbid property use if it is harmful to the public. [FN121] If this is the theory, then compensation cannot depend on a showing of economic loss only, for then the property owner would have a "constitutionally protected right to harm others." [FN122] The categorical rule in Lucas effectively eliminates any consideration of the state's interest in regulating the prohibited activity.

The majority cites several cases as authority for recognizing the categorical rule in Lucas. However, none of the cases actually applied such an approach. *Agins v. Tiburon*, cited by Justice Scalia, was the first case to explicitly state that a regulation which "denies an owner of economically viable use of his land" may be a taking. [FN123] The *Agins* Court also emphasized that, in the final analysis, the takings question required a weighing of public and private interests. [FN124]

As recently as 1987, the Court rejected a categorical rule in favor of the traditional ad hoc, balancing approach. [FN125] In his Lucas dissent, Justice Stevens argued that the Court has only stated in dicta that a regulation is a taking if it denies an owner of all economically viable use of his land. [FN126] Property values have been a relevant part of the takings analysis but have

never been conclusive. In *First English*, the Court implicitly rejected the idea that deprivation of all use automatically equals a taking by remanding the case for consideration of whether the ordinance in question, which prohibited the rebuilding of the camp, could be justified as a safety measure. [FN127] The economic impact of a regulation, before *Lucas*, has never been the sole focus of the takings analysis.

Justice Kennedy concurred in the judgment of the Court but disagreed with the categorical approach. [FN128] The state retains the ability to regulate the uses to which property can be put under the police power. [FN129] If total deprivation is claimed, then the focus should be on the reasonable expectation for the property. [FN130] Here again, a balancing or weighing of interests must be done. The purpose of the legislation and the fit between the means and the ends of the regulation must be examined to ensure that they accord with the property owners reasonable expectations. [FN131]

The Court's justifications for the categorical rule do not adequately explain why an ad hoc, balancing inquiry is not appropriate in the case of a property owner claiming total economic loss. If state regulations that create total economic loss are indeed like a physical invasion, then it would seem that such regulations could be analogized to the permit requirements addressed in *Nollan*. [FN132] The easement in *Nollan* was considered a type of invasion and the Court used a higher standard of judicial review. [FN133] The same test could be appropriate for regulations that deprive a landowner of beneficial or economic use.

The Court, while discussing the justifications for the categorical rule, expressed concern that land use regulations are being used to escape paying compensation when property is actually being pressed into public service. [FN134] The nexus test in *Nollan* would assure that governments were not using regulations to escape paying compensation by requiring a close fit between the stated purpose of the regulation and the means employed. A careful scrutiny of the justifications offered by the state would reveal if they were legitimate health and safety concerns or whether indeed they were something less. Justice Kennedy impliedly used this same approach when he stated that the purpose of the state must be looked at in connection with the reasonable expectations of the land owner. [FN135] "The Supreme Court of South Carolina erred . . . by reciting the general purposes for which the state regulations were enacted without a determination that they were . . . sufficient to support a severe restriction on specific parcels of property." [FN136]

The nexus test from *Nollan* would address the concerns expressed by the majority and also preserve the traditional approach of balancing the public and private interests. The balancing approach is important for two reasons. First, the courts can oversee the legislature to be sure the state meets the *Nollan* test. Second, the balancing approach also gives the legislature the flexibility to meet changing situations, especially in the environmental area. The development of a factual record about the public interest, i.e. health, safety and welfare concerns, and about the reasonableness of the owners expectations (as well as the value of the property), is not possible without the balancing test. As Justice Stevens observed, the interests of fairness and justice, which underlay the takings clause, are not serviced by categorical rules. [FN137]

The exception to the categorical rule, as set forth by the Court, is unsupported by past

precedent and is too narrow to meet the changing demands of a complex society. The use of common law nuisance as the basis of the state's power to regulate was rejected early in the 20th century. [FN138] The prevention of nuisance is an important part of the state power to regulate, but it is not, as Justice Kennedy points out, "the sole source of state authority to impose severe restrictions." [FN139] In the past, legislatures have not been bound by the narrow confines of nuisance law in determining what activities they can regulate. In fact, the Court has specifically rejected such an approach and all of the recent cases have identified a broad range of governmental powers under the general heading of health, safety and welfare. [FN140]

Traditionally, the regulatory takings analysis has been deferential to legislative decisions about the appropriate approach to land-use and zoning problems. [FN141] Over 88 years ago, the Court stated that if the validity of legislative decisions was "fairly debatable, the legislative judgment must be allowed to control." [FN142] The burden has always been on the plaintiffs challenging a regulation to establish that the regulation is unconstitutional. [FN143] In *Mahon*, Justice Holmes indicated that the burden rested on those challenging the ordinance when he stated that property owner has the right to challenge the validity of a regulation. [FN144] The presumption is in favor of validity. The challenger must prove otherwise. Deference to the legislature recognizes that legislative decision-makers are in the best position to develop workable solutions to local problems.

The categorical rule, on the other hand, shifts the burden to the government to prove that a taking has not occurred. [FN145] The exception also undermines the deference which is usually shown to legislative decisions in the area of land-use planning. If a total taking is claimed, the state cannot rely solely on legislative findings. [FN146] Instead the state must identify "background principles" of state law which support the action or regulation. [FN147] Justice Blackmun questioned the wisdom of shifting the burden to the state, asserting "[t]he Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could." [FN148]

Justice Blackmun also points out that the exception, on a practical level, makes little sense. [FN149] There is nothing magic about common law nuisance. [FN150] Nuisance law requires that a court determine what activities are harmful, exactly the approach that the majority rejects as unworkable under takings analysis. [FN151] "In 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." [FN152] Justice Blackmun asks, if "judges can distinguish harm from benefit, why not legislators?" [FN153]

The narrowness of the exception to the categorical rule is also troubling. Justices Kennedy, Stevens, and Blackmun all expressed concern that the exception would make it very difficult for government decision-makers to pass laws which will effectively address growing environmental and land-use problems. [FN154] Justice Kennedy believes that the dependence on nuisance law will make it very difficult to address fragile land system problems. [FN155] Takings law does not require a static body of law in order to protect private interests. [FN156] Rather, flexibility is needed to maintain a balance between public and private concerns. For example,

some lands, such as the coastal property regulated by South Carolina, present such "unique concerns . . . that the State can go further in regulating its development and use" than common law nuisance principles would allow. [FN157] The government will not be able to protect such areas if common law nuisance is the only remedy.

Justice Stevens viewed the nuisance exception as an unwise attempt to freeze state common law. [FN158] The state must have the flexibility to meet changing circumstances as the understanding of property rights evolves. [FN159] Statutes and regulations are frequently used to "remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." [FN160] The concept of property and property rights has continually evolved over the course of the country's history. [FN161] As Justice Stevens observed, slaves were once considered property, but the country came to realize that slavery was morally wrong and the law changed. [FN162] "On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species . . . ; the importance of wetlands . . . ; and the vulnerability of coastal lands . . . , shapes our evolving understandings of property rights." [FN163] While some changes in the law will create situations in which compensation must be paid, not all changes in the common law should lead to a requirement for compensation. [FN164] However, strict application of *Lucas* could require compensation for any common law change.

CONCLUSION

The long-term impact of the *Lucas* decision will ultimately depend upon how courts interpret the categorical rule and the narrow exception. If the holding in *Lucas* is indeed confined to those "exceptional" cases where all economic value or benefit has been taken away, then the effect of *Lucas* will be minimal. The majority opinion, on its face, clearly limits the situations in which the categorical rule will be applied. However, the *Lucas* case itself raises some factual issues as to whether or not all economic value was indeed lost. Furthermore, the opinion's footnotes could be used to broaden the application of the case, especially where almost all, but not quite all, value has been taken away. [FN165] Because of the ad hoc, and often confusing, nature of takings jurisprudence, the possibility of narrow holdings being applied in broader situations is a very real concern. [FN166]

At least one recent case, however, indicates that the Court will at least try to confine the holding of *Lucas*. In *Concrete Pipe and Products v. Construction Laborers Pension Trust*, [FN167] the Court rejected *Concrete Pipe's* dependence on *Lucas*. The Court stated that *Lucas* applied only to the "permanent physical occupation or destruction of economically beneficial use of real property." [FN168] In all other cases, such as *Concrete Pipe*, the traditional analysis applies. [FN169] *Concrete Pipe* may be a sign that the Court is unwilling to expand *Lucas* to cover other takings claims.

If the Court follows the course indicated by *Concrete Products*, then the ramifications of the *Lucas* decision will be limited. State legislators and decisionmakers will retain the flexibility needed to meet complex environmental, natural resource and land-use management problems. If the *Lucas* decision is read narrowly and a broader view of the takings issue prevails, then

legislatures and other decisionmakers will have the flexibility they need to meet the demands of a modern and complex society.

FN1. U.S. Const. amend. V.

FN2. 2 F. Grad, *Treatise on Environmental Law* s10.01, at 10-20 (1993).

FN3. *Id.*

FN4. 112 S.Ct. 2886 (1992).

FN5. 16 U.S.C. ss 1451-64 (1988).

FN6. *Id.* s 1452.

FN7. *Lucas*, 112 S.Ct. at 2904 (Blackmun, J., dissenting).

FN8. S.C. Code Ann. ss 48-39-10 to -220 (Law. Co-op. 1987).

FN9. *Id.* s 48-39-10(J).

FN10. *Id.* s 48-39-130.

FN11. *Id.*; see *id.* s 48-39-10(I) for definition of "ocean front sand dunes."

FN12. *Lucas*, 112 S.Ct. at 2905 (Blackmun, J., dissenting).

FN13. *Id.*

FN14. S.C. Code ss 48-39-250 to -360 (Law. Co-op. Supp. 1993).

FN15. *Lucas*, 112 S.Ct. at 2905.

FN16. *Id.* (quoting S.C. Code s 48-39-280 (Supp. 1991)).

FN17. *Lucas*, 112 S.Ct. at 2889.

FN18. *Id.* at 2905.

FN19. *Id.*

FN20. *Id.*

FN21. *Id.* at 2889-90.

FN22. *Id.* at 2889.

FN23. *Id.* at 2890.

FN24. *Id.*

FN25. *Id.*

FN26. *Id.*

FN27. 480 U.S. 470 (1987).

FN28. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

FN29. *Id.* at 898.

FN30. *Id.* at 902.

FN31. *Id.* at 901.

FN32. *Id.* at 902.

FN33. 112 S.Ct. at 2902.

FN34. *Id.* at 2893.

FN35. *Id.* at 2900.

FN36. 260 U.S. 393 (1922).

FN37. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) [hereinafter *Keystone*]; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) [hereinafter *First English*]; *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) [hereinafter *Nollan*].

FN38. 260 U.S. 393 (1922).

FN39. *Id.* at 413.

FN40. *Id.*

FN41. *Id.* at 415.

FN42. *Id.* at 413.

FN43. *Id.*

FN44. *Id.*

FN45. *Id.*

FN46. *Pennsylvania Cent. Transp. v. City of N.Y.*, 438 U.S. 104 (1978).

FN47. *Id.* at 124.

FN48. *Agins v. Tiburon*, 447 U.S. 255, 261 (1980).

FN49. 480 U.S. 470.

FN50. 482 U.S. 304.

FN51. 483 U.S. 825.

FN52. 480 U.S. 470.

FN53. The Bituminous Mine Subsidence and Land Conservation Act required that a portion of underground coal be left in place to prevent the surface above the mining activities from subsiding. The Coal Company challenged the Act as a facial taking. The Court held that the Act was a legitimate regulation and was therefore not a facial taking. *Id.* at 479.

FN54. 480 U.S. at 495 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

FN55. 480 U.S. at 495.

FN56. *Id.* at 488.

FN57. *Id.* at 492.

FN58. *Id.* at 490.

FN59. *Id.* at 489.

FN60. *Id.* at 488.

FN61. *Id.* at 491.

FN62. *Id.* at 490, (quoting *Miller v. Schoene*, 276 U.S. 272 (1928)).

FN63. *Pennsylvania Central*, 438 U.S. 104, 125 (1978).

FN64. *Agins*, 447 U.S. at 260-61; *Keystone*, 488 U.S. at 492.

FN65. 447 U.S. 255.

FN66. *Id.* at 260.

FN67. 480 U.S. at 493.

FN68. 482 U.S. 304.

FN69. *Id.* at 307.

FN70. *Id.*

FN71. *Id.*

FN72. *Id.* at 308.

FN73. *Id.* at 321.

FN74. *Id.* at 318.

FN75. *Id.* at 319.

FN76. *The Supreme Court-Leading Cases*, 101 Harv. L.Rev. 119, 245 (1987).

FN77. *Id.*

FN78. 483 U.S. 825.

FN79. *Id.* at 834.

FN80. *Id.* at 827-28.

FN81. *Id.* at 828.

FN82. *Id.* at 841.

FN83. *Id.* at 837.

FN84. *Id.*

FN85. *Id.*

FN86. 112 S.Ct. at 2888.

FN87. *Id.* at 2893.

FN88. *Id.* at 2900.

FN89. *Id.* at 2902.

FN90. *Id.* at 2904 (Justice Blackmun writing, "Today the Court launches a missile to kill a mouse."); *id.* at 2917.

FN91. While acknowledging that "the issue of what constitutes a total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation," Justice Souter argued that the issues should not be confronted indirectly in a case where the finding of total deprivation rests on questionable and unreviewed findings by the state trial court. *Id.* at 2925.

FN92. Because the Beachfront Management Act was amended to allow for special use permits in certain circumstances, the South Carolina Coastal Council argued that the case was not ripe for review. The amendments were passed after briefing and argument before the South Carolina Supreme Court, but before a decision was issued. Because the South Carolina Supreme Court did not address the issue of further administrative proceedings, but instead ruled on the merits of the case, the United States Supreme Court decided that the case was ripe for review. *Id.* at 2890.

FN93. *Id.* at 2893.

FN94. *Id.*

FN95. *Id.*

FN96. *Id.*

FN97. *Id.* at 2894.

FN98. 450 U.S. 621 (1981).

FN99. 112 S.Ct. at 2894.

FN100. *Id.*

FN101. *Id.*

FN102. *Id.*

FN103. *Id.*

FN104. *Id.* at 2895.

FN105. *Id.*

FN106. *Id.*

FN107. *Id.*

FN108. *Id.* at 2900.

FN109. *Id.*

FN110. *Id.* at 2901.

FN111. *Id.*

FN112. *Id.* at 2902.

FN113. *Id.* at 2901.

FN114. *Id.*

FN115. *Id.* at 2902.

FN116. See *supra* text accompanying notes 46-55.

FN117. 112 S.Ct. at 2893.

FN118. *Id.* at 2904, 2918.

FN119. See *supra* text accompanying notes 56-64.

FN120. 112 S.Ct. at 2912.

FN121. *Id.*

FN122. *Id.*

FN123. *Id.* at 2893; see also *supra* text accompanying notes 46-48.

FN124. *Id.*

FN125. See *supra* text accompanying note 56-64.

FN126. 112 S. Ct. at 2918.

FN127. 482 U.S. 304, 321-22.

FN128. 112 S.Ct. at 2886, 2903.

FN129. *Id.*

FN130. *Id.*

FN131. *Id.*

FN132. See *supra* text accompanying notes 78-85.

FN133. *Nollan*, 483 U.S. at 832.

FN134. *Lucas*, 112 S.Ct. at 2895.

FN135. *Id.* at 2903.

FN136. *Id.* at 2903-2904.

FN137. *Id.* at 2922

FN138. *Id.* at 2912-13.

FN139. *Id.* at 2903.

FN140. See *supra* text accompanying notes 56-64.

FN141. 112 S.Ct. at 2909.

FN142. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

FN143. 112 S.Ct. at 2909.

FN144. 260 U.S. at 413.

FN145. 112 S.Ct. at 2909.

FN146. *Id.* at 2909.

FN147. *Id.* at 2901-02.

FN148. *Id.*

FN149. *Id.* at 2913.

FN150. *Id.*

FN151. *Id.*

FN152. *Id.* at 2914.

FN153. *Id.*

FN154. *Id.* at 2903-04, 2909, 2921. Cf. R. Fischman, *Global Warming and Property Interests: Preserving Coastal Wetlands as Sea Levels Rise*, 19 *Hofstra L. Rev.* 565 (1991).

FN155. 112 S.Ct. at 2904.

FN156. *Id.*

FN157. *Id.*

FN158. *Id.* at 2921.

FN159. *Id.*

FN160. Id. (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)).

FN161. Id.

FN162. Id.

FN163. Id. at 2921-22.

FN164. Id. at 2922.

FN165. G. McClintock & E. Manning, *An Update on Regulatory Takings: Litigation and Administrative Practice*, Course Handbook Series, 445 PLI-LIT 723 (1992).

FN166. J. Nolon, *High Court's 'Lucas' Decision Leaves Shifting Sands in Regulatory Takings Law*, *New York L.J.*, July 8, 1992, at 1.

FN167. 113 S.Ct. 2264 (1993).

FN168. Id. at 2290.

FN169. Id.