Constitutional Law - Fifth Amendment - Eminent Domain - Regulatory Taking

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CONSTITUTIONAL LAW—FIFTH AMENDMENT—EMINENT DOMAIN—REGULATORY TAKING—The United States Supreme Court held that land use regulations that deprive a landowner of all economically viable use of property categorically require compensation.


In December 1986, David H. Lucas ("Lucas") purchased two oceanfront lots ("lots") on the Isle of Palms, South Carolina. Lucas paid $975,000.00 for the two lots, on which he intended to build single family homes.

On July 1, 1988, the South Carolina Legislature amended the 1977 Coastal Zone Management Act by enacting the 1988 Beachfront Management Act ("Act"). The Coastal Zone Management Act created the South Carolina Coastal Council ("Council") to enforce the provisions of the Coastal Zone Management Act. The Act prohibits the construction of any permanent structure on Lucas' lots. Lucas filed suit in the South Carolina Court of Common

2. _Lucas_, 112 S Ct at 2889. The lots are situated approximately 300 feet from the ocean. Lucas' lots are separated by a lot on which a house had been built in the early 1980's. There were also houses on the properties on either side of the Lucas lots. Id.
[any] new construction or reconstruction . . . seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;
(2) small wooden decks no larger than one hundred forty-four square feet;

Id.
Pleas, alleging that the restriction constituted a taking without just compensation in violation of the United States and South Carolina Constitutions. The Court of Common Pleas held that the restriction was a regulatory taking and awarded Lucas $1,232,387.50 as just compensation. The Council appealed the decision to the South Carolina Supreme Court. The South Carolina Supreme Court reversed the decision of the lower court. The court held that when the state exercises its police power to prevent serious public harm, it owes no compensation for any resulting property deprivation. The South Carolina court held that Lucas' concession of the validity of the Act included a concession that construction would cause serious public harm, warranting the application of the Mugler test and a finding that the regulation was not a taking. The South Carolina court rejected Lucas' argument that, regardless of the purpose of the regulation, the test for a regulatory taking is the deprivation of all economically viable use of the property. Lucas appealed and the United States Supreme Court granted certiorari.

The Court reversed the South Carolina Supreme Court and remanded the case. The Court began its analysis by pointing out that, prior to Pennsylvania Coal Co v Mahon, a taking was only

7. Lucas, 112 S Ct at 2890.
10. Lucas, 404 SE2d at 896.
11. Id.
12. Lucas, 404 SE2d at 901 (citations omitted).
13. Lucas, 404 SE2d at 896.
14. Id at 900.
15. Id, citing Mugler v Kansas, 123 US 623 (1887). Mugler held that there is no taking when the state exercises its police power to prevent a serious public harm. See notes 74-76 and accompanying text.
16. Lucas, 404 SE2d at 902.
17. Id at 898:
19. Lucas, 112 S Ct at 2902.
20. Justice Scalia writing for the majority was joined by Chief Justice Rehnquist, and Justices White, O'Connor, and Thomas.
21. 260 US 393 (1922). The Mahon court held that a regulation that goes too far results in a taking of private property. See notes 81-86 and accompanying text.
found in cases of physical occupation of property. However, the Mahon court recognized that a regulation that limits the use of property may effect a taking of property if it goes "too far." The Court noted that it had never set a definitive test, deciding instead on a case by case basis whether a regulation goes too far.

However, the Court noted that two categories of regulation require compensation without specific inquiry. The first category includes regulations that accomplish a physical occupation of property. The second category includes regulations that deny all economically beneficial use of the land. The majority noted that the Court has never justified the total deprivation of use rule, but it maintains that such deprivation is a taking.

The majority agreed that the South Carolina court was correct in finding that the Supreme Court had held that regulations proscribing nuisances do not require compensation, but that this nuisance exception is no longer determinative. It explained that the nuisance exception to compensation was the Court's first attempt to justify the States' exercise of the police power and cited Agins et Ux v City of Tiburon as the refined standard. The Court said that it is illogical to allow the nuisance exception to determine whether compensation is required because application of that test would always mean that the police power is unlimited.

The Court said that if a state regulation deprives a property owner of all economically beneficial use of his property, the state may escape the requirement of paying compensation only if it can show that the proscribed use was not included in the owner's title. A suspect regulation could only withstand the challenge if it

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22. Lucas, 112 S Ct at 2892.
23. Id at 2893. See note 84.
25. Lucas, 112 S Ct at 2893.
26. Id (citations omitted).
27. Id (citations omitted).
28. Lucas, 112 S Ct at 2894.
29. Id at 2893.
30. Id at 2897.
31. Id.
32. Id.
34. Lucas, 112 S Ct at 2897. The Agins standard succinctly stated, provides that a regulation does not work a taking if it substantially advances state interests. See notes 121-123 and accompanying text.
35. Lucas, 112 S Ct at 2899.
36. Id.
deprives the owner only to the degree allowable by the state's private or public nuisance laws.\textsuperscript{37} Any use that may be prevented under nuisance law is by definition unlawful and therefore the regulation has taken nothing.\textsuperscript{38} If a regulation seeks to prohibit a use beyond what the state nuisance law could prohibit; the regulation effects a taking for which compensation must be paid.\textsuperscript{39} The Court characterized this as a “total taking” standard,\textsuperscript{40} that requires the same analysis as any application of state law.\textsuperscript{41}

Justice Kennedy concurred in the decision,\textsuperscript{42} emphasizing that the Court did not decide whether a taking had occurred, but had merely set up a decisional framework.\textsuperscript{43} Although he voiced some doubt over the finding of the South Carolina Court of Common Pleas that the regulation left Lucas' property completely without value,\textsuperscript{44} he acknowledged that such a finding enables Lucas to rely on the line of cases that developed the loss of value approach to takings questions.\textsuperscript{45}

Justice Kennedy then explained that the regulation must contradict the property owner's reasonable investment-backed expectations in order for the Court to find that the regulation deprives the property of all value.\textsuperscript{46} He said the reasonable expectations must be viewed in light of our legal tradition,\textsuperscript{47} not limited to nuisance law.\textsuperscript{48} He went on to explain that the purpose of the Takings Clause is to protect private expectations to ensure private investment.\textsuperscript{49} He thought that the South Carolina Supreme Court erred

\begin{itemize}
\item \textsuperscript{37} Id at 2900.
\item \textsuperscript{38} Id at 2900-01.
\item \textsuperscript{39} Id at 2901.
\item \textsuperscript{40} Id at 2901.
\item \textsuperscript{41} Id. The inquiry will include:
\begin{itemize}
\item [An] analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, ....
\item the social value of the claimant's activities and their suitability to the locality in question, ....
\item and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, ....
\end{itemize}
\item \textsuperscript{42} Lucas, 112 S Ct at 2902 (Kennedy concurring).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id at 2903 (Kennedy concurring).
\item \textsuperscript{45} Id citing Agins, 447 US at 255. See notes 121-123 and accompanying text.
\item \textsuperscript{47} Lucas, 112 S Ct at 2903.
\item \textsuperscript{48} Id citing Goldblatt v Town of Hempstead, 369 US 590 (1962). See notes 92-95 and text.
\item \textsuperscript{49} Lucas, 112 S Ct at 2903 (Kennedy concurring).
\end{itemize}
by failing to analyze whether the Act was within the property owner's reasonable expectations.  

Justice Blackmun's dissent\(^5\) accused the Court of overkill in what he saw as a narrow question.\(^6\) He argued first that the South Carolina Supreme Court was correct to presume the validity of the Act, especially in the face of Lucas' failure to challenge the Act's validity.\(^7\) Blackmun also took issue with the Court's elimination of the case-by-case inquiry when a challenged regulation renders the property valueless.\(^8\) He argued that the Court's takings jurisprudence requires a weighing of the economic impact to the owner in light of the public intent behind the regulation.\(^9\) He cited the Mugler\(^10\) line of cases to illustrate that states can prohibit all injurious uses of private property, without regard to the diminution of property values.\(^11\) 

Justice Stevens' dissent decried the majority's abandonment of precedent in the expansion of regulatory takings analysis.\(^12\) He faulted the rule\(^13\) expounded by the majority as being without supporting precedent, too narrow, and rigid.\(^14\) He argued that the total deprivation requirement was arbitrary.\(^15\) Stevens believed that the focus of the Court's rule was too narrow.\(^16\) He argued that the most important consideration in a takings equation is the character of the regulation.\(^17\) He admitted that the regulation had a substantial impact on Lucas' investment-backed expectations and substantially diminished the value of his property.\(^18\) However, Stevens found the character of the Act was

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50. Id at 2903-04 (Kennedy concurring).
51. Id at 2904 (Blackmun dissenting).
52. Id. Blackmun said the Court "lau[n]ch[e[d] a missile to kill a mouse." Id.
53. Id at 2909 (Blackmun dissenting).
54. Id at 2910 (Blackmun dissenting).
55. Id citing Agins, 447 US at 255. See notes 121-123.
57. Lucas, 112 S Ct at 2910 (Blackmun dissenting) citing Mugler, 123 US at 623. See notes 74-76.
58. Lucas, 112 S Ct at 2917 (Stevens dissenting).
59. Id at 2918 (Stevens dissenting).
60. Id. Stevens cited Mugler, 123 US 623, and its progeny to show there was no precedent and reasoned that the Agins-rule was merely dicta.
61. Lucas; 112 S Ct at 2919 (Stevens dissenting) (application of the majority's rule would mean that a landowner who loses 100% of the value of his property would be compensated while a landowner who loses 95% would not) Id.
62. Id at 2922 (Stevens dissenting).
63. Id at 2922-23 (Stevens dissenting).
64. Id at 2924 (Stevens dissenting).
general, not specific. He also found the legislative purpose to be “compelling.” He balanced these factors and found that the Act did not effect a taking.

In a separate statement, Justice Souter said he would dismiss the writ of certiorari. He voiced his belief that it was imprudent for the Court to reach the merits of this case, because the case was based on the conclusion of the trial court that Lucas was deprived of all economic value of his property. Souter characterized this finding as “highly questionable,” and said that accepting this finding precluded the Court from establishing the definition of a total taking. He argued that the Court should wait for an opportunity to define a total taking deprivation and then deal with the takings aspect of such deprivation.

Over one hundred years ago, in Mugler v Kansas, the Supreme Court distinguished regulations restricting the use of private property from the process of eminent domain, whereby the state physically takes private property for public use. The Court proclaimed that a valid exercise of a state’s police power did not constitute a taking requiring compensation.

In Hadacheck v Los Angeles, the Court declined the opportunity to decide whether a regulation to prohibit a nuisance effectuated a deprivation of property, focusing instead on whether the

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65. Id. Stevens defined the statute as general because it regulated the entire state, not specific property owners. Id.
66. Id at 2925 (Stevens dissenting).
67. Id.
68. Id at 2925 (Souter’s statement).
69. Id.
70. Id. Souter objected because the South Carolina Supreme Court had not reviewed the finding of the Common Pleas Court that Lucas had been completely deprived of all value of his property. Id.
71. Id.
72. Id.
73. Id at 2926 (Souter’s statement).
74. 123 US 623 (1887). Petitioner challenged his prosecution under a Kansas law that prohibited the manufacture and sale of alcoholic beverages, alleging that it worked a taking of his distillery. The Court held that the legislature may determine that a use is injurious to the community and that the prohibition of such a use does not effect a taking.
75. Mugler, 123 US at 668-69.
76. Id.
77. 239 US 394 (1915).
78. Hadacheck, 239 US at 394. Petitioner challenged a Los Angeles ordinance that prohibited the operation of a brickyard within a prescribed area. Among other grounds, petitioner alleged that the ordinance deprived him of the value of his property since the clay on his property was particularly well suited for brick manufacture. Id.
regulation was a legitimate exercise of the police power.\textsuperscript{79} The Court held that the regulation was a valid exercise of the police power.\textsuperscript{80}

In \textit{Pennsylvania Coal Co. v Mahon},\textsuperscript{81} the Supreme Court took a different approach to a regulatory taking case.\textsuperscript{82} Rather than focusing their discussion on the validity of the regulation as an exercise of the police power, the Court questioned how far the police power may be extended.\textsuperscript{83} The Court enunciated an indistinct "too far" standard.\textsuperscript{84} The Court warned against disregarding constitutional protections in an effort to protect public health, safety, and welfare.\textsuperscript{85} Justice Brandeis, the sole dissenter, decried the majority's analysis, echoing the argument that a valid exercise of the police power does not work a taking.\textsuperscript{86}

In 1926, and again in 1927, the Supreme Court, relying on its earlier methodology, upheld zoning ordinances as valid exercises of the police power and declined an analysis of the regulatory takings question.\textsuperscript{87} The Supreme Court also relied on the authority of the state to protect the public interest in deciding that a Virginia statute which required that certain trees be destroyed did not constitute a taking of property.\textsuperscript{88}

In \textit{United States v Central Eureka Mining Co.}\textsuperscript{89}, the Court reaf-
firmed the *Mahon* holding, but declined to find that a compensable taking resulted from a wartime regulation. In *Goldblatt v Hempstead*, the Court analyzed the takings issue using both standards that the Court had previously employed separately. The Court determined that the regulation did not effect a taking because it did not reduce the value of the lot and because it was a valid exercise of the police power.

The *Goldblatt* court’s blending of the two discrete approaches into one test was further refined in *Penn Central Transportation Co.* In rejecting Petitioner’s takings claim, the Court recognized a two-part test, which concentrated on the nature of the suspect governmental action and the degree to which the action interfered with property rights. Applying its test, the Court found that the law was not a taking because the law was a valid exercise of the police power, and because the law did not extinguish all of the owners’ rights to use the property.

The dissenting opinion, while conceding that a state does not take private property when it prohibits a nuisance, maintained that this nuisance exception does not extend to every exercise of the police power. For an illustration of when a regulation may constitute a taking if it goes too far, see notes 81-86 and accompanying text.

90. For an illustration of when a regulation may constitute a taking if it goes too far, see notes 81-86 and accompanying text.

91. *Eureka*, 357 US at 155. Respondents contended that an order of the War Powers Board requiring the temporary shutdown of non-essential gold mines was a taking of property for which they were owed compensation. The Court held that a regulation that would otherwise require compensation would not be deemed a taking in time of war.

92. *Goldblatt v Town of Hempstead*, 369 US 590 (1962). Appellant challenged a local ordinance which prohibited excavation below the level of water table. Enforcement of the regulation forbade the operation of a sand and gravel quarry on Goldblatt’s lot.

93. In other words, whether the regulation went too far (as used in *Mahon*) and whether the regulation was a valid exercise of the police power (as used in *Mugler*).


95. Id at 596.


97. *Penn Central*, 438 US at 104. Petitioners, owners of Grand Central Terminal, alleged that the New York Landmarks Preservation Law, as applied to prevent construction of an office building atop the Terminal, worked a taking of their property rights without just compensation. Id.

98. Id at 130-31.

99. Id at 138.

100. “[S]ubstantially related to the promotion of the general welfare . . . .” Id at 138.

101. “[P]ermit[s] reasonable beneficial use of the . . . site . . . .” Id.

102. Justice Rehnquist dissented; Chief Justice Burger and Justice Stevens joined in the dissent.


those exercises which seek to prohibit a public danger.\textsuperscript{105} Here, the law did not prohibit a nuisance because the construction would have complied with safety and health requirements.\textsuperscript{106} The dissent conceded that the state may forbid a use that falls short of a nuisance without effecting a taking if the prohibition applies to all and works to the advantage of all.\textsuperscript{107} Here, the dissent found Penn Central uniquely burdened and not reciprocally benefitted.\textsuperscript{108}

In 1979, the Court decided two takings cases,\textsuperscript{109} virtually ignoring the two part test set out in Penn Central. In Andrus, the Court unanimously\textsuperscript{110} held that a law prohibiting the sale of lawfully acquired property\textsuperscript{111} did not effect a taking.\textsuperscript{112} The Court said that the loss of one property right is not a taking because the "bundle" of property rights must be analyzed as a whole.\textsuperscript{113} The Court held that appellants had only been deprived of the most profitable use of their property,\textsuperscript{114} and that the loss of future profit without any physical restriction on the use of property is not a taking.\textsuperscript{115} In Kaiser Aetna\textsuperscript{116}, the Court merely cited Penn Central,\textsuperscript{117} and used the "too far" standard from Mahon.\textsuperscript{118} The dissent, comprised of three members of the Penn Central majority,\textsuperscript{119} also failed to cite

\textsuperscript{105} Id.
\textsuperscript{106} Id at 146 (Rehnquist dissenting).
\textsuperscript{107} Id at 147 citing Mahon, 260 US at 393.
\textsuperscript{108} \textit{Penn Central}, 438 US at 147.
\textsuperscript{110} Justice Brennan authored the opinion, joined by Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens. Justice Burger concurred.
\textsuperscript{111} \textit{Andrus}, 444 US at 54-5. Respondents challenged their prosecution for violations of the Eagle Protection Act and the Migratory Bird Treaty Act, arguing that in prohibiting the sale of various bird parts, the Acts deprived them of property.
\textsuperscript{112} Id at 68.
\textsuperscript{113} Id at 66.
\textsuperscript{114} Id.
\textsuperscript{115} Id. The Court distinguished Mahon, 260 US at 393, because the law challenged therein resulted in a loss of future profit as well as a physical restriction. Id.
\textsuperscript{116} \textit{Kaiser Aetna v US}, 444 US 164 (1979). Petitioners had created a marina by dredging a privately owned lagoon and connected the marina to a bay that belonged to the United States. The United States filed suit alleging that the petitioners could not deny public access to the marina because it had been converted into a public waterway. Kaiser Aetna, 444 US at 164.
\textsuperscript{117} Id at 174-75 citing Penn Central to support statement that the Court has no definite standard to determine when compensation is required.
\textsuperscript{118} Id at 178. "Here, the Government's attempt to create a public right of access . . . goes so far beyond ordinary regulation . . . as to amount to a taking . . . ." Id citing Mahon, 260 US at 393.
\textsuperscript{119} \textit{Kaiser Aetna}, 444 US at 180 (Blackmun dissenting joined by Brennan and Marshall).
the *Penn Central* test.\(^{120}\)

The Court revived the two-part takings test in *Agins v Tiburon*.\(^{121}\) Although the Court concluded that the takings claim was not ripe,\(^{122}\) the Court said that a regulation effects a taking when the suspect regulation "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."\(^{123}\)

The following year the Supreme Court foreshortened the *Agins* test in *Hodel v Virginia Surface Mining & Reclamation Ass'n*.\(^{124}\) The Court upheld the Surface Mining Act because it did not deny the economically viable use of the property.\(^{125}\) In *Williamson Planning Commission v Hamilton Bank*,\(^{126}\) the Court held that the takings claim was not ripe,\(^{127}\) but said that a taking results when a property owner is denied all reasonably beneficial use of its property.\(^{128}\) In 1985 the Court held that a taking occurs when an owner is denied all "economically viable" use of its property.\(^{129}\)

In 1987, the Supreme Court decided three takings cases: *Keystone Bituminous Coal Association v DeBenedictis*,\(^{130}\) *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*,\(^{131}\) and *Nollan et ux v California Coastal Com-

\(^{120}\) The dissent argued that "navigational servitude" was not a taking by definition. *Kaiser Aetna*, 444 US at 188 citing *United States v Kansas City*, 339 US 799 (1950); *United States v Willow River Co.*, 324 US 499 (1945); *Lewis Point Oyster Co v Briggs*, 299 US 82 (1913); and *Gibson v United States*, 166 US 269 (1897).

\(^{121}\) *Agins et Ux v City of Tiburon*, 447 US 255 (1980). Landowners sought ruling that zoning ordinance was facially unconstitutional. The landowners alleged that by restricting the property to residential use, the ordinance diminished its commercial value.

\(^{122}\) *Agins*, 447 US at 260.

\(^{123}\) Id (citations omitted).


\(^{125}\) *Hodel*, 452 US at 297 citing *Agins* and *Penn Central*.


\(^{127}\) *Williamson*, 473 US at 185.

\(^{128}\) Id.

\(^{129}\) *United States v Riverside Bayview Homes, Inc.*, 474 US 121, 127 (1985) (quotations in original). The property owner argued that the Corps of Engineers took his property by requiring him to obtain a wetlands permit.

\(^{130}\) 480 US 470 (1987). Coal companies alleged that the Pennsylvania Subsidence Act which required that 50% of the coal beneath certain structures be left in place to prevent subsidence was unconstitutional on its face.

\(^{131}\) 482 US 304 (1987). Church alleged that County ordinance prohibiting construction or reconstruction in an interim flood protection area temporarily denied the Church the use of its land.
mission. The Court held that the law in Keystone did not effect a taking, citing the two part Agins test. The Court distinguished this case from Mahon because the law served important public interests, and because a comparison of the value remaining in the property to the value taken by the restriction did not show any diminution in value. In First Lutheran, the Court held that, regardless of the temporary nature of a regulation, if a regulation takes all use of property, compensation is due. The Court did not decide whether in fact the challenged regulation actually did deny all use of the property. In Nollan, the Supreme Court cited the two part Agins test as the standard to determine whether the permit condition effected a taking. The Court found that the regulation worked a taking because the condition did not substantially advance a legitimate state interest.

Earlier in the 1991 term, the Court decided Yee v City of Escondido, California. Although the Court cited the Nollan nexus test with approval, the Court declined to address the issue of a

132. 483 US 825 (1987). The Commission granted a coastal development permit to the Nollans subject to a condition that they allow an easement for the public to pass through their property to reach a public beach. The Nollans alleged that the access condition was a taking that required compensation.
134. Id at 485.
135. Id.
136. Id. The Court accepted the legislative intent that the act would protect the public health, safety and welfare.
137. Id at 497.
138. Id at 499.
140. First Lutheran, 482 US at 321.
141. Id at 312. The Court held itself bound by the California Supreme Court's determination that the ordinance temporarily deprived all use and as such worked a taking. The issue presented to the Supreme Court was whether Agins limited the remedy for a temporary taking to nonmonetary relief. Id at 311.
143. Nollan, 483 US at 834 citing Agins, 447 US at 260 which noted that a "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Id.
144. Nollan, 483 US at 843.
145. Id at 841. The Court found that there was no "essential nexus" between the condition and the original building restriction. Id at 837.
146. 112 S Ct 1522 (1992). Mobile home park owners claimed that a rent control ordinance amounted to a physical occupation, requiring compensation. The Court held that Petitioners asked the Court to decide whether the regulation worked a physical occupation and so the question of a regulatory taking was not properly before the Court.
147. See note 143 and accompanying text.
148. Yee, 112 S Ct at 1530.
On the same day that the Court announced its decision in *Lucas*, it denied review of a Fourth Circuit decision that the Beachfront Management Act did not work a taking. In *Esposito*, the court of appeals dismissed the takings challenge because it found that the Act provided a reasonable means to protect a legitimate state interest and because the property owners did not establish that the law had deprived them of all economically viable use of their property. In just over one hundred years, the Court has moved from a nearly complete acceptance of the validity of the states’ police power to defeat a takings claim to today’s rule that a denial of all economically viable use effects a taking.

As we move into the twenty-first century, environmental consciousness has become a national, even global requirement. As this environmental bandwagon picked up speed, it left in its wake an ideological chasm between those who seek to protect and preserve the environment and those who seek to protect and preserve the sanctity of private property ownership. The *Lucas* decision was greatly anticipated by both sides. Once the decision was rendered, both sides rushed to either hail, decry, or dismiss the decision as being of little importance.

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149. Id at 1531.
152. That interest being to “protect, preserve, restore, and enhance the beach/dune system.” *Esposito*, 939 F2d at 167 quoting the Act.
153. Id at 168.
How useful will the *Lucas* decision be in the battle between regulators and landowners? Although the *Lucas* decision is being credited with developing a "bright line test," it may engender more litigation than it precludes. The majority called its decision a narrow one, applicable only in cases of total deprivation of economic value. Since the Court accepted the lower court's finding that the Act did indeed render Lucas' property valueless, the Supreme Court did not (rightly so) provide a framework to determine when a regulation takes all economic use from property. Justice Kennedy suggested that the equation must weigh the owner's investment backed expectations. This is a subjective standard and is difficult to quantify. It seems destined to be slugged out in the courts and answered on a case by case basis.

The other amorphous bright line is the Court's reliance on state nuisance law as a standard for determining whether a regulation works a taking. This will require the state (or other regulatory entity) to support its action by first analyzing its state nuisance law. This would seem to shackle regulators to the past when they must necessarily approach their duties with a prospective eye.

The Court's rejection of legislative determination as to the nuisance prevention of land use regulation is destined to provoke litigation. By definition, the courts must make each determination anew.

Although *Lucas* is the logical evolutionary step in the Court's takings jurisprudence, it is definitely not the final answer to the question of when land-use regulations take property. Mr. Lucas will almost assuredly win his case on remand to South Carolina Supreme Court. But after that decision, resolution of the next takings case is anyone's guess. The only sure bet is that the litigation will continue.

*Linda S. Somerville*

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158. *Lucas*, 112 S Ct at 2893.
159. Id at 2896.
160. Id at 2903 (Kennedy concurring).
161. Id at 2901.
162. Id.
163. Id.
164. Id. The Court strongly suggests that the South Carolina court will not find any common law prohibition for Lucas' use, especially in light of the fact that the lots surrounding Lucas' lots contain houses. Id.