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Evolving Thresholds of Nuisance and the Takings Clause

John A. Humbach*

I. INTRODUCTION

“[C]hanged circumstances or new knowledge may make what was previously permissible no longer so.”¹ For hundreds of years, as new needs have emerged, the thresholds of nuisance have evolved. The law of nuisance has been able to evolve, not just through private initiatives of litigants in court, but also through the democracy-driven processes of elected state legislatures. In order to protect a land developer’s investment, however, the Supreme Court decided to trim back this centuries-old legislative authority in *Lucas v. South Carolina Coastal Council*.²

The Supreme Court decided *Lucas* under the “Takings Clause” of the United States Constitution.³ Specifically, it held that the Takings Clause denies state legislatures the power to augment the common law of nuisance if barring undesirable uses of land would strip the land of “all economically beneficial use.”⁴ In other words, if a piece of land has no current market value except in uses that the legislature has found too harmful to allow, the state must now buy the land if it wants to prevent the harmful uses.

The Court acknowledged only one exception to this “categorical rule”⁵ of compensation for such “total takings.”⁶ The excep-

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1. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

2. *Id.* The factual background of the case is set forth *infra* text accompanying notes 17-22.

3. The Takings Clause of the Fifth Amendment reads: “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

4. *Lucas*, 112 S. Ct. at 2900.

5. *Id.* at 2899. The Court described this “categorical treatment” of total-value regulatory takings as one of “at least two discrete categories of regulatory action [recognized] as compensable without case-specific inquiry into the public interest advanced in support of the restraint.” The other category consists of regulations that force an “owner to suffer a physical ‘invasion’ of his property.” *Id.* at 2893.

6. I.e., takings in which a regulation deprives an owner of “all economically beneficial or productive use of land.” *See id.* at 2893, 2901.

tion applies to use restrictions that merely mimic common law limits on land use that already "inhere in the title itself."⁷ The Court reasoned that such inherent limits on landowner autonomy, imposed under "background principles of the State's law of property and nuisance,"⁸ are "proscribed use interests [that] were not a part of . . . title to begin with."⁹ Therefore, state legislatures can still forbid such deleterious uses, even to the point of total takings, but only if they "do no more than duplicate the result that could have been achieved in the courts."¹⁰ The constitutional scope of the legislative power has become, at least for total takings of land,¹¹ a matter of state common law.

7. *Id.* at 2900.

8. *Id.*

9. *Id.* at 2899.

10. *Id.* at 2900.

11. The *Lucas* opinion suggests in dicta that the Takings Clause does not necessarily protect personal property to the same degree that it protects real property. The Court explained that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 2899.

The Court in *Lucas* had, of course, little choice but to distinguish personal property from real property: if it applied the *Lucas* rule to both, it would virtually overrule the whole body of constitutional law upholding statutory forfeiture as a means to prevent "undesirable" uses of chattels. *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926) (upholding forfeiture of automobile used in unlawful transportation of liquor). *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688, 690 (1974) (upholding forfeiture of an innocent owner's yacht used in drug transport); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (upholding forfeiture of innocent owner's automobile used in aid of tax evasion). The Supreme Court admits "the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment." *United States v. U.S. Coin & Currency*, 401 U.S. 715, 721 (1971). In fact, "legitimate governmental interests" or "legitimate purposes" can justify total takings of private property, with no requirement whatever that the undesirable uses being attacked be nuisances, noxious, or *malum in se*. *Calero-Toledo*, 416 U.S. at 688, 690 (1974). *See also United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983) ("important governmental purposes").

The Supreme Court justifies the constitutionality of statutory forfeiture on the basis, simply, that "state lawmakers, in the exercise of the police power, [are] free to determine that certain uses of property [are] undesirable" and then adopt confiscation as a "secondary defense against a forbidden use." *Calero-Toledo*, 416 U.S. at 686 (quoting *Van Oster*, 272 U.S. at 467). *Accord, Goldsmith-Grant*, 254 U.S. at 513 ("It is the illegal use that is the material consideration, . . . the guilt or innocence of its owner being accidental."). Statutory forfeiture is a clear modern example of the public interest justifying total takings of innocent owners' property irrespective of fault, breach of duty, wrongdoing, or illegality on the owners' part.

Before *Lucas* the Supreme Court had not suggested that the Takings Clause afforded any less protection to personal property than to real property. Thus, the *Lucas* dictum to that effect, if it endures, is another significant innovation for takings law. With this new distinction, the Supreme Court has made it easier for litigants to challenge environmental,

The Supreme Court's new common law test of legislative validity is a major analytical innovation. Historically, it was "the great office of statutes . . . to remedy defects in the common law," adapting the common law "to the changes of time and circumstances."¹² After *Lucas*, however, remedial statutes to improve the common law will now be subject to preemption by the common law. Such preemption is effectively mandated whenever the case is one of total taking and the reviewing judge disagrees with the legislature's balancing of the values and interests that bear on determinations of nuisance. Ironically, future legislative efforts to remedy deficiencies in the common law of nuisance can now be overturned precisely *because* the common law fails to protect people from the particular harm in question.

In decreeing this extraordinary reversal of centuries-old roles, the Supreme Court has reassigned a significant piece of the nation's ultimate land-use law authority from elected state legislatures to the judiciary. The courts, under the pretext of "regulatory takings" review,¹³ will now have the final say on substantive questions of right and wrong when it comes to the uses of land. Given the potential liabilities involved,¹⁴ one possible effect of *Lucas* may be to stunt, if not arrest, the evolution of statutory protections from nuisance-like and other detrimental uses of land. As the author of *Lucas* declared in a dissent to another opinion handed down on the same day as *Lucas*, the "more natural direction" of the Supreme Court's temptation is "towards systematically eliminating checks upon its own power; and it succumbs. . . . The Imperial Judiciary lives."¹⁵

growth management, and historic preservation laws without casting the least shadow of "takings" doubt on chattel forfeiture as a law-and-order weapon in the war against crime.

12. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

13. A so-called "regulatory taking" may occur when a law or regulation effectively takes away property rights by, for example, restricting the uses that owners may make of their land. Since 1922, all laws and regulations have been subject to regulatory takings review in the courts. See *infra* text accompanying notes 96-128. The criteria used in this judicial supervision of the legislative function have been notoriously vague, making the reviews "essentially ad hoc, factual inquiries." *Lucas*, 112 S. Ct. at 2893 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

14. If a statute is adopted in good faith and a court later decides that the statute goes further than the common law of nuisance and effects a total taking as well, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 2901 n.17 (quoting *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321 (1987)).

15. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2874, 2882 (1992) (Scalia, J., dissenting).

Although the *Lucas* majority opinion revealed no similar sharp concern about judicial trenching on the legislative branch, the most important question decided in *Lucas* was the institutional one: which governmental forum should ultimately determine whether, weighing the public interest against competing private interests, the negative effects of a given land use are too socially intolerable to allow? This institutional question is arguably the only truly *general* question of the entire “regulatory takings” debate, the myriad specific disputes over particular kinds of regulations and properties being, in the end, merely “ad hoc, factual inquiries.”¹⁶

This article reviews the historical tradition in which the common law core of nuisance has been the frequent subject of statutory additions and refinements, providing most of our modern law of land use and environmental protection. Until *Lucas*, the Takings Clause had not been treated as a charter establishing the courts as boards of revision to rethink and selectively veto legislative determinations in the land use field. Within the scope of “total takings,” however, *Lucas* has converted the Takings Clause from its original meaning and made it exactly that.

II. FACTUAL BACKGROUND OF *LUCAS*

The *Lucas* case arose when the owner of beachfront property challenged the constitutionality of the South Carolina Beachfront Management Act (“the Act”).¹⁷ The South Carolina Legislature adopted the Act to prevent a number of negative impacts — safety, economic, and environmental — that may result from building on beaches and dunes.¹⁸ The specific provision in con-

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

17. S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1992).

18. The Legislature’s key findings in support of the Act are set forth in *Lucas*, 112 S. Ct. at 2896 n.10. Building houses on eroding beaches is not just personal folly; such houses can have harmful impacts on other people as well. Structures at the ocean’s edge interrupt the natural protection that migrating dunes otherwise provide to communities farther inland. The houses themselves can disintegrate in major storms, their debris becoming windborne missiles that endanger the lives and property of others. In addition, every major coastal hurricane seems to bring still another call on the taxpayers to furnish disaster relief to owners wiped out at the shore. See generally Natasha Zalkin, Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court’s Changing Takings Doctrine and South Carolina’s Coastal Zone Statute*, 79 CAL. L. REV. 205, 211-16 (1991); Frank E. Maloney & Anthony J. O’Donnell, Jr., *Drawing the Line at the Oceanfront: The Role of Coastal Construction Setback Lines in Regulating Development of the Coastal Zone*, 30 FLA. L. REV. 383, 389-91 (1978).

troversey prohibited owners from constructing new houses seaward of a defined setback line. Approximately two years before this building prohibition was adopted, Mr. Lucas had paid nearly one million dollars for two beachfront lots, both of which were entirely within the new “no-build” zone.

The South Carolina Supreme Court rejected Mr. Lucas’s takings claim, pointing out that the Legislature’s objectives (the soundness of which were not contested) fell well within longstanding legislative authority to forbid conduct that may cause serious public harm.¹⁹ Mr. Lucas took his case to the United States Supreme Court, arguing that the Takings Clause requires compensation to be paid when a land-use regulation “totally eliminates the value of private property.”²⁰ The Court agreed — except when “background principles of the State’s law of property and nuisance”²¹ would provide a basis for banning the land use anyway. The Court remanded the case for a determination of whether the South Carolina building ban came within such “background principles.”²²

III. PROPERTY RIGHTS, THE POLICE POWER, AND COMMON LAW NUISANCE

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded The limits set to property by other public interests present themselves as a branch of what is called the police power of the State.²³

19. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *rev’d and remanded*, 112 S. Ct. 2886 (1992).

20. Brief for Petitioner on the Merits at i, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (No. 91-453).

21. *Lucas*, 112 S. Ct. at 2900.

22. *Id.* at 2901-02. On remand, the South Carolina Supreme Court held that Mr. Lucas had “suffered a temporary taking deserving of compensation.” *Lucas v. South Carolina Coastal Council*, No. 91-453, at 5 (S.C. Nov. 20, 1992) (order on remand). On the issue of “background principles” the court simply concluded, without elaboration, that the “Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas’s desired use of his land; nor has our research uncovered any such common law principle.” *Id.* at 4. It further remanded the case to the trial court where, it held, the “sole issue . . . is a determination of the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property.” *Id.*

23. *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

Restricting the uses of private property under the police power is one of the primary ways that the government carries out its essential purpose of preserving the general welfare.²⁴ The government has "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use."²⁵

Every time a legislative body exercises the police power to add or remove a restriction on property use, it redefines property rights.²⁶ When new restrictions narrow the scope of private land-use autonomy, incidental impacts on private wealth are likely to result. The people whose wealth is affected naturally tend to ask why. On what grounds does the government tell people they cannot fill in their own wetlands, kill snails on their own land, or move the mirrors in their own theaters?²⁷ What objectives, in other words, qualify as legitimate police power objectives authorizing the legislature to redefine private property rights?²⁸

24. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987).

25. *Keystone*, 480 U.S. at 511 (Rehnquist, C.J., dissenting). See also *infra* note 43 (quoting Justice Stevens's opinion for the *Keystone* majority).

Even John Locke, for whom the "great and chief end" of government was "the preservation of . . . property," agreed that "[p]olitical power . . . [is] a right of making laws [with penalties] for the *regulating* and preserving of property" 2 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* §§ 3, 124 (Everyman's Library 1991) (1690) (emphasis added). Locke observed that "it would be a direct contradiction for any one to enter into society with others for the securing and *regulating* of property, and yet to suppose his land . . . should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is a subject." 2 *Id.* § 120 (emphasis added).

26. See *supra* text accompanying note 23.

27. See *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (wetlands); Catherine Yang with Peter Hong, *The Grass is Looking Greener for Landowners*, *BUS. WK.*, July 13, 1992, at 31 (endangered Kanab amber snails); *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 595 A.2d 6 (Pa. 1991) (theater mirrors).

28. A major factor in the current "property rights" debate is many people's honest belief that there is no real social harm in doing such things as destroying wetlands, exterminating entire species, or wrecking our nation's cultural legacy. Not so long ago, after all, wetlands were just swamps, wildlife was mainly an annoyance, and old buildings were merely in the way. People who form expectations and make investments based on views that are becoming outmoded can, when brought up short by new social values, feel greatly disappointed. The problem is one of transition, though being merely transitional does not make the problem less real.

For a good Legal Realist analysis of how judges behave in deciding takings cases implicating social values that are in transition, see John R. Nolon, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 1, 16-19 *passim* (1992).

A. *Proper Legislative Objectives for Redefining Property Rights:
Nuisance vs. Other Undesirable Conduct*

The common law of nuisance has long been relevant to takings analysis because, by definition, property ownership does not include the right to create unlawful nuisances. The Supreme Court applied this principle in *Lucas* when it acknowledged that its “categorical rule” for “total takings” does not apply to restrictions merely mimicking those that already “inhere in the title itself.”²⁹ The principle’s application is, however, broader. Because “background principles of the State’s law of property and nuisance”³⁰ shape the contours of constitutional “title,” the question whether a statutorily restricted use could be banned as a common law nuisance is a “logically antecedent inquiry”³¹ for every regulatory takings case. In essence, the law of nuisance provides a common law immunity from takings challenges.

Far more importantly, the common law of nuisance has long given “a fairly helpful clew” on the validity of statutory land-use restrictions that augment existing common law.³² The common law of nuisance has historically been consulted, however, “not for the purpose of controlling” the question of validity, but only “for the helpful aid of its analogies.”³³ Indeed, if legislative restrictions on land use were only valid if based on some specific common law nuisance precedent, the legislated evolution of nuisance thresholds could not occur at all. Such a requirement would disrupt the vital legislative function of modifying and supplementing the common law when the latter proves inadequate to meet changing needs.³⁴

Nevertheless, the very breadth of the “multifaceted health, wel-

29. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992). See *supra* text accompanying notes 5-11.

30. *Id.* at 2900.

31. *Id.* at 2899.

32. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

33. *Id.*

34. The very existence of extensive legislated land use restrictions is strong evidence of the common law’s inadequacy to meet changing needs. In their thorough national review of zoning developments since *Euclid*, Beuscher and Morrison found little basis for concluding that nuisance law is adequate to protect property owners in unzoned areas, noting that, “[o]n the whole one who moves to the open unzoned country is certainly taking his chances.” Jacob H. Beuscher & Jerry W. Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440, 447, 457. See *infra* note 131 for related discussion.

fare and safety” aspects of the police power³⁵ suggests to some that legislatures’ power to reduce property values cannot be “co-terminous with the police power itself.”³⁶ Chief Justice Rehnquist, for example, has seemed inclined to confine non-compensatory use restrictions to a “nuisance exception” resting on “discrete and narrow purposes”³⁷ and only allowing government to prevent “misuse or illegal use” of property.³⁸

In *Lucas*, however, the Supreme Court rejected any such narrow version of the legislative power to regulate uses of land³⁹ (except for cases of “total takings”). It explained that references in earlier cases to “some objective conception of ‘noxiousness’” were “simply the progenitor of our more contemporary statements that ‘land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’’ ”⁴⁰ The Court noted that its cases “have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements.”⁴¹

35. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting). The police power is “one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.” *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909). “Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application.” *Berman v. Parker*, 349 U.S. 26, 32 (1954).

36. *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting)). See also *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 906 (S.C. 1991) (Harwell, J., dissenting) (contending that regulation of land-use activities may require compensation unless the prohibited activities are “similar to public nuisances”); *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 167 (1990) (requiring compensation for diminished land value caused by a ban on rock mining because rock mining “is not considered a nuisance in this area”); William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulations to Obey the Bill of Rights*, 173 HERITAGE FOUND. REP. ISSUE BULL. 1, 3 (Apr. 3, 1992) (stating that landowners have the right to engage in particular land-use activities unless the activities are defined as “trespass or nuisance” under the common law).

37. *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

38. *Id.* at 512. The Chief Justice drew the “misuse or illegal use” test from an *arguendo* discussion in *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (holding that the Secretary of Interior did not have the power to limit uses of private inholdings in Yosemite Park). Besides being dictum, the *Curtin* “misuse or illegal use” test is also circular. All uses banned by legislation are by definition illegal and thus are misuses of property — provided the legislation is valid, which is of course precisely the point at issue. To accept the *Curtin* dictum on its face would confirm the constitutional justifiability of any land-use restriction whose violation the legislature has declared to be an illegal use and, hence, a misuse of land.

39. Chief Justice Rehnquist joined in the opinion, perhaps a sign of tempering of his previously stated views, referred to in the preceding two footnotes and accompanying text.

40. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992) (quoting *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 (1987)).

41. *Id.* (quoting *Nollan*, 483 U.S. at 834-35).

Indeed, no such narrow reading of state legislatures' land-use powers, limiting them to re-enacting the common law of nuisance, is supported by precedent. While some land-use regulations upheld against takings challenge may have rested on discrete and narrow purposes, the same can scarcely be said of the whole wide array of safety, health, aesthetic, and even lifestyle objectives that have been validly advanced under the police power.⁴² The Court has plainly acknowledged that legislatures have greater power by using language such as "akin to a public nuisance" and "nuisance-like" to describe kinds of land uses a legislature may restrict,⁴³ and by declaring it unnecessary to "weigh with nicety" the question of whether a particular restricted use was a nuisance according to the common law.⁴⁴ Even more to the point, the Court has consistently upheld legislatures' power to restrict a wide variety of undesirable uses and activities not considered nuisances at common law, such as siting adult theaters in certain locations,⁴⁵ trading in eagle feathers,⁴⁶ building houses on lots smaller than one to five acres,⁴⁷ permitting three or more unrelated tenants to share a single-family house,⁴⁸ mining gravel,⁴⁹ leaving timber scraps on the ground,⁵⁰ constructing tall buildings,⁵¹ selling water interstate,⁵² and manufacturing and selling margarine⁵³ and alcoholic beverages.⁵⁴

In sum, the historic breadth of the legislative power to restrict uses of property without compensation seems to have extended, potentially, to any use the legislature deemed likely to harm other persons or the community as a whole. The Supreme Court in *Lu-*

42. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (aesthetics); *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (family lifestyle); other cases cited *infra* notes 45-54.

43. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 491 n.20 (1987). As Justice Stevens wrote: "[N]o individual has a right to use his property so as to create a nuisance or otherwise harm others." *Id.* (emphasis added).

44. *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (upholding uncompensated destruction of cedar trees to protect nearby apple trees owned by others).

45. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

46. *Andrus v. Allard*, 444 U.S. 51 (1979).

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

48. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

49. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

50. *Perley v. North Carolina*, 249 U.S. 510 (1919).

51. *Welch v. Swasey*, 214 U.S. 91 (1909).

52. *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908).

53. *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

54. *Mugler v. Kansas*, 123 U.S. 623 (1887).

cas confirmed this broad reach of legislative authority, except for lands whose sole market value is for uses too harmful to allow.

B. *Common Law Nuisances*

Impetus for linking legislative land-use powers more closely to common law nuisance seems to stem from at least two considerations. One is the search for limiting principles to narrow the range of permissible non-compensable regulations so that not every law to advance public welfare will be *ipso facto* insulated from the Constitution's compensation requirement.⁵⁵ The other is to avoid placing uncompensated burdens on people who have committed no wrong and only want to use their own property in ways that are not noxious or dangerous, or otherwise a "misuse" of land.⁵⁶

The notion that nuisance law can provide a suitable exogenous anchor for takings law is unrealistic. Far from being a likely source of definition or scope, the common law of nuisance is itself an "impenetrable jungle."⁵⁷ The problem is not that common law nuisance presents many difficult borderline cases, an illusory objection that Professor Epstein properly refutes.⁵⁸ The problem inheres in the very nature of common law nuisance as a body of law. It is not a set of flat prohibitions against various deleterious activities or blameworthy conduct. It is, instead, a multi-factored balancing process for deciding *which* harms to prohibit.

Nuisance law starts from an implicit assumption that uses of land may have detrimental effects on others but still not necessarily be either socially intolerable or in any sense blameworthy.⁵⁹ A legal rule that tried to prohibit all detrimental effects of land use would be not only highly impractical but, probably, an economic disaster. Therefore, when people suffer harm caused by others'

55. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting). See also *supra* text accompanying notes 35-38.

56. *Id.* at 512. See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

57. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 86, at 616 (5th ed. 1984).

58. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 115-21 (1985).

59. As the *Restatement* explains, "Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference." *RESTATEMENT (SECOND) OF TORTS* § 822 cmt. g (1979). In the *Restatement's* terminology, only those uses of land with deleterious effects that are both "significant" and "unreasonable" can be considered unlawful as nuisances. *Id.* §§ 821B, 821F, 822(a), 826.

land uses, there is often no sensible policy choice but to decide that, on balance, the public interest is best advanced by allowing the uses (such as important industries) to proceed despite their harmful effects on neighbors or the community at large.

Legal rights to use property in ways that incidentally harm innocent others are, as a result, well known in our law — they are the essence of the principle of *damnum absque injuria*.⁶⁰ Even substantial harms can be lawfully visited on others (for example, flooding neighbors by diverting surface water) or on the community (demolishing an inspirational landmark or permitting smoke-stack emissions that cause acid rain), depending on the policy judgments and choices reflected in the applicable law.⁶¹ Tolerating such rights to cause harm is, as a practical matter, unavoidable, but it does not follow that such rights should ever be constitutionally *inviolable*. They must, instead, be *variable*, evolving with changing times and circumstance.

The common law of public nuisance and of private nuisance together provide frameworks for varying the outer contours of property rights to use land. When particular land uses produce negative impacts on neighboring uses or conflict with other private or societal goals, judges use these frameworks to help them determine whether or not the negative impacts or conflicts are too harmful, on balance, to tolerate.

For example, the common law of *private* nuisance is not a defined catalog of noxious, reprehensible, or even merely forbidden behavior but is, instead, an essentially relativistic concept.⁶² A nuisance, the Supreme Court has said, “may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.”⁶³ The decision whether particular conduct qualifies as a private nuisance depends not only on its location and surroundings, but also on whether “the gravity of the harm caused out-

60. Loss, hurt, or harm without a legally recognized injury.

61. See, e.g., *Johnson v. Whitten*, 384 A.2d 698 (Me. 1978) (surface water); *Hatch v. W.S. Hatch Co.*, 283 P.2d 217 (Utah 1955) (noise, fumes, bright lights); *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229 (N.Y. App. Div. 1932) (heavily polluting coke plant across from residence).

62. See generally KEETON et al., *supra* note 57, at 619-33. The *Restatement of Torts* expresses this relativistic character by stating that interference with others' land use can be a nuisance if, among other things, “the gravity of the harm outweighs the utility of the actor's conduct.” RESTATEMENT (SECOND) OF TORTS § 826(a) (1979).

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

weighs the utility of the conduct,"⁶⁴ or on an even more complex weighing of various factors that are normal concomitants of private nuisance tests.⁶⁵

The common law of *public* nuisance is, if anything, even more indeterminate than private nuisance in the range of behavior to which it can potentially apply. Over 700 years ago, Bracton observed that "nuisances are truly infinite."⁶⁶ In the eighteenth century, public nuisance was defined as "a species of offenses against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing that the common good requires."⁶⁷

As the range of public nuisance developed, it grew to be essentially co-extensive with the police power itself — potentially encompassing any act or omission that "injuriously affects the safety, health or morals of the public,"⁶⁸ or acts that "endanger or injure the property, health, safety or comfort of a considerable number of persons."⁶⁹ According to the *Second Restatement of Torts*, a public nuisance can be any act that significantly interferes with public health, safety, peace, comfort, or convenience.⁷⁰ If

64. KEETON et al., *supra* note 57, at 630.

65. See generally Jeff L. Lewin, Boomer and the American Law of Nuisance: Past, Present, and Future, 54 ALB. L. REV. 189, 212-14, 234-36 (1990).

66. HENRY DE BRACTON, 3 ON THE LAWS AND CUSTOMS OF ENGLAND 189 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569) ("*nocumenta vero infinita sunt*").

67. 4 WILLIAM BLACKSTONE, COMMENTARIES *167. Accord 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 197-200 (Arno Press 1972) (1724). According to Hawkins, the 1724 list of indictable public nuisances included such noisome uses as "common Bawdy-houses," gaming houses, and stages for rope-dancers, as well as interfering with public rights of way by laying logs in a navigable public river. *Id.* at 198. It also included various right-thing-in-the-wrong-place nuisances such as a swineyard in town, "divid[ing] a House in a Town for poor People to inhabit in, by reason whereof it will be more dangerous in the Time of Infection of the Plague," a brew-house "erected in such an inconvenient Place, wherein the Business cannot be carried on without greatly incommoding the Neighbourhood," or a common play-house "if it draw together such Numbers of Coaches or People, etc. as prove generally inconvenient to the Places adjacent." *Id.* at 198-99.

68. Commonwealth v. South Covington & Cincinnati St. Ry., 205 S.W. 581, 583 (Ky. 1918).

69. See, e.g., Copart Indus. v. Consolidated Edison, 362 N.E.2d 968, 971 (N.Y. 1977).

70. RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979). Like private nuisance analysis, the law of public nuisance is relativistic, as memorably expressed in the early case that refused to treat air pollution from candle making as a nuisance because "[l]e utility del chose excusera le noisomeness del stink," *id.* § 826 cmt. a (quoting an unnamed case quoted in JAMES F. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 106 (Fred. B. Rothman & Co. 1985) (1890)). But cf. *infra* text accompanying notes 78-82 (noting that a balancing of utilities may not be appropriate in the public nuisance context).

the Court's goal in *Lucas* was to confine the range of permissible total takings to something less than the full breadth of the police power, the common law of public nuisance hardly seems to provide the narrowing principles it sought.

The only objective feature that common law nuisance cases seem to share is that somebody did something, not otherwise a tort or crime, whose consequences had negative effects on others.⁷¹ Nuisance, "as a general term, describes the *consequences* of conduct, the inconveniences to others, rather than the type of conduct involved."⁷² Common law nuisance has never confined courts to a reiteration of past cases declaring certain past uses to be nuisances. Before the common law of nuisance can supply takings analysis with objective parameters to limit the breadth of legislative powers, nuisance law itself must first be reoriented and, probably, petrified.

Perhaps because the path of common law nuisance can lead to such a wide range of prohibitible land uses, the Supreme Court took pains to caution state courts not to feel overly free in letting their local common law evolve. It stressed that a decree that eliminates all economically beneficial uses may be "defended" only on the basis of an "*objectively reasonable application* of relevant precedent"⁷³ and cited several factors from the *Second Restatement of Torts* version of nuisance law as "things" that total takings analysis will "ordinarily entail."⁷⁴

Apparently concerned that the *Restatement* factors may not sufficiently constrain future common-law developments, the Court suggested two further "facts" that "*ordinarily* import[] a lack of

71. Cf. KEETON et al., *supra* note 57, at 619 ("The essence of a private nuisance is an *interference*." (emphasis added)).

72. *Copart Indus.*, 362 N.E.2d at 971 (emphasis added). After reviewing numerous examples Dean Prosser concluded that "nuisance, in short, is not conduct, nor is it even a condition. It is the invasion of an interest, a type of harm or damage . . ." William L. Prosser, *Private Actions for Public Nuisance*, 52 VA. L. REV. 997, 1004 (1966). See also RESTATEMENT (SECOND) OF TORTS, § 821A cmt. c (1979) ("as used in the Restatement, 'nuisance' does not signify any particular kind of conduct on the part of the defendant").

73. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2902 n.18 (1992).

74. *Id.* at 2901: "The 'total taking' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's activities, . . . the social value of the claimant's proposed activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike . . ." (citations omitted).

any common-law prohibition.”⁷⁵ One is the “fact that a particular use has long been engaged in by similarly situated owners.” The other is the “fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.”⁷⁶ Whether state courts will actually be required to give major weight to these two additional “facts” (where present) is unclear. If, as the Court insisted, “the question . . . is one of *state law*,”⁷⁷ then it should be up to state courts to decide how much weight, if any, such factors should have.

It should be noted that the Supreme Court, in its effort to define nuisance with paraphrases from the *Second Restatement of Torts* plus these two additional factors, did not necessarily exhaust the relevant “background principles” of nuisance, especially of public nuisance. The cited *Restatement* provisions,⁷⁸ for example, reflect the *Restatement’s* private tort orientation and, accordingly, stress a “balance of utilities” approach that bases determinations of nuisance on whether “the gravity of the harm outweighs the utility of the actor’s conduct.”⁷⁹ It is, however, highly debatable whether any such private-tort balancing of utilities is proper in the public nuisance context.⁸⁰ The reason is that public nuisance enforcement is essentially an exercise of the state’s police power, and the public welfare it aims to protect is not just another interest in a mix with competing private concerns.⁸¹ In the post-*Lucas* period, therefore, the most important “background principle” of nuisance law may be the one that the Supreme Court adopted when, long before *Lucas*, it rejected any simple “balancing of utilities” for public nuisance cases brought by a state:

This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the con-

75. *Lucas*, 112 S. Ct. at 2901 (emphasis added).

76. *Id.*

77. *Id.* (emphasis added).

78. See *supra* note 74.

79. RESTATEMENT (SECOND) OF TORTS, § 826(a) (1979).

80. For a fine discussion of this and other confusions between public and private nuisance law, see Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 358, 377-78 *passim* (1990).

81. *Id.* at 378. As the Court wrote in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907): “The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law.”

siderations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity of a possible stop to the defendants' business⁸²

Like the balancing test, the two additional "facts" cited in *Lucas* as "ordinarily" indicative of nuisance also appear to be incomplete expressions of the background principles that they represent. The idea, for example, that state courts must allow people to undertake particular activities just because they have "long been engaged in" by others is inconsistent with the tradition of nuisance law as a flexible body of legal responses. Indeed, the Supreme Court itself contradicted such a notion when it observed that "changed circumstances or new knowledge may make what was previously permissible no longer so."⁸³

Similarly, the significance of the fact that "other landowners . . . are permitted to continue the use denied to the claimant" is greatly tempered by equity's longstanding concern with relative hardship⁸⁴ — a concern that often suggests that existing uses should, in fairness, be treated less strictly than uses that are merely proposed.⁸⁵ Destroying an investment in an existing land use that has since been deemed "undesirable" typically works a far greater burden on the affected owners than merely prohibiting the establishment of new detrimental land uses. A landowner who is forbidden to commence a new use and a landowner who is not permitted to continue an existing use are never really quite "similarly situated."

The key word in all of this is "ordinarily" — that the treatment of "similarly situated owners *ordinarily* imports a lack of any common-law prohibition."⁸⁶ When ongoing activities are permitted to continue, it is ordinarily a fair and natural presumption that the activities produce no undue harm (if, indeed, they produce any harm at all). Or, in a somewhat different vein, one may ordinarily

82. *Georgia v. Tennessee Copper Co.*, 206 U.S. at 239 (granting injunction against a polluting factory whose sulphurous fumes caused and threatened damage to "forests and vegetable life, if not to health, within the plaintiff state").

83. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g (1979)).

84. See HENRY L. MCCLINTOCK, EQUITY §§ 144-45 (2d ed. 1948).

85. RESTATEMENT (SECOND) OF TORTS § 941 (1979). *Cf., e.g.,* *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970) (refusing to enjoin a polluting activity on the grounds that, although the \$45,000,000 factory had caused substantial damage, there was a "large disparity in the economic consequences of the nuisance and of the injunction").

86. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992) (emphasis added).

presume that merely stopping one actor while letting others continue serves no purpose because the harm supposedly being addressed would end up occurring anyway.⁸⁷

Any such natural presumptions about the "ordinary" case are, however, equally naturally rebuttable. When, for example, the observed results of land-use activities are themselves the cause for alarm (as, for example, in the cases of filling of wetlands, destruction of habitat, and pollution of reservoirs), the fact that the particular activities were lawful in the past does not, in itself, become a permanent justification for their continuation. On the contrary, the fact that observed consequences of particular land-use activities impelled the legislature to move against them is a sign that non-"ordinary" circumstances are present. It is, after all, still a comparatively rare event for legislatures to ban previously lawful uses of land.⁸⁸

Only time will tell whether the Supreme Court will let "background principles of state property and nuisance"⁸⁹ law freely evolve in their new constitutional role, or whether their evolution will be hemmed and hobbled by federally-enforced "objectively reasonable application of relevant precedents."⁹⁰ The latter alternative, which is possible if state law developments seem too liberal, would amount to the creation of a supervening federal law of *damnum absque injuria* to protect private owners' rights to engage in harm-producing uses of land.

87. Two situations must be carefully distinguished. One is the case mentioned in the text, in which particular land-use activities that could be viewed as deleterious in another context are permitted because the goals of a prohibition cannot (or can no longer) be accomplished. For example, it would be pointless to prohibit a Manhattan construction project in order to preserve a potential habitat for large mammalian species that disappeared from the city long ago.

This is, however, very different from a case in which a prospective polluter claims a freedom from use regulations on the ground that her discrete addition to the existing load would be too negligible to matter. Such "deaths of a thousand cuts" are the classic way that environmental resources degrade or vanish, and there may be no logical place to draw the line except at the point to which things have progressed when the need for a response is perceived. The legislature may not wish (or be able) to undo the "cuts" that have already occurred, but it should not for that reason forfeit its ability to prevent further resource degradation.

88. New enactments of local zoning laws and the downzoning of areas to less intensive uses probably represent the most frequent instances of legislatures banning previously lawful land uses. For any given piece of land, however, the imposition of a new zoning law usually happens only once, and subsequent downzonings of the land — though they can occur — are relatively rare occurrences.

89. *Lucas*, 112 S. Ct. at 2900.

90. *Id.* at 2902 n.18 (emphasis omitted).

C. *Statutory Nuisances: Redefining The "Rights to Harm Others"*

As knowledge, needs, and social values evolve with time and changed circumstances, what once seemed innocuous may grow noxious, while the noxious may become benign. A century ago, for example, beer and margarine were considered harmful enough substances to justify a legal ban, while opiates were sold without prescription and Coca-Cola contained cocaine.⁹¹ The valued wetlands of today were the noisome swamps and bogs of yesteryear. Beaches and riverbanks, once thought the perfect place for a house, are now viewed in hindsight, after disastrous floods, in a very different way. As conditions change with the times, so do the thresholds of socially intolerable conduct, including uses of land.

For hundreds of years, both legislatures and the courts have had the power to declare new kinds of nuisances as new needs became evident.⁹² Indeed, for public nuisance — an indictable offense⁹³ — it has been long regarded as a classically legislative function to determine “what the interests of the public require” and “what measures are necessary for the protection of such interests.”⁹⁴ Most of the historic range of public nuisance, like other common law crimes, is now encompassed in various statutory offenses.⁹⁵ In fact, the common law crime of public nuisance, rather than the tort of private nuisance, is more naturally regarded as the pre-statutory ancestor of most land-use regulations today — especially those whose violation is indictable and enjoined.

91. See *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (margarine); *Mugler v. Kansas*, 123 U.S. 623 (1887) (beer); *United States v. Housley*, 751 F. Supp. 1446, 1447 (D. Nev. 1990) (noting that Coca-Cola “once contained a small amount of cocaine”); TROY DUSTER, *THE LEGISLATION OF MORALITY* 3-15 (1970) (discussing the prevalence and effects of over-the-counter sales of narcotics until such sales were prohibited in 1914); RONALD HAMOWY, *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL* 9-12 (1987).

92. See generally J.R. Spencer, *Public Nuisance — A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989).

93. RESTATEMENT (SECOND) OF TORTS § 821B cmts. a, d (1979).

94. *Lawton v. Steele*, 152 U.S. 133, 136 (1894). See also *Mugler*, 123 U.S. at 660-61 (“Power to determine such questions, so as to bind all, must exist somewhere Under our system that power is lodged with the legislative branch of the government.”).

95. For example, public nuisances affecting public health (such as maintaining “foul and unhealthy” swampy land or polluting public water supplies) are encompassed in public health regulations. See, e.g., CONN. GEN. STAT. ANN. § 25-43 (West 1990), CONN. GEN. STAT. ANN. § 19a-212 (West 1986). Public nuisances affecting public comfort, such as operating noisome businesses near highways, might be dealt with as health offenses (e.g., N.Y. PUB. HEALTH LAW § 1300-a (McKinney 1990)) or through segregation of incompatible uses under zoning regulations.

able by the state.⁹⁶ The courts long ago relinquished their original dominant role in defining public nuisances; as society's malefactors discovered ever new kinds of mischief to plague the rest of us, it generally has fallen to legislatures to keep the law of nuisance up to date.⁹⁷

Even before the modern criminal law codifications, legislatures have traditionally had authority to add new kinds of public mischief to the list of public nuisances.⁹⁸ One of the first *legislated* public nuisances was an Elizabethan regulation forbidding cottages to be built on rural lots of fewer than four acres freehold.⁹⁹ Violations of the London building code of 1666 are another example of early public nuisances.¹⁰⁰

Following the American Revolution, state legislatures assumed the role in the United States that Parliament had played in England as the principal legislators in the public nuisance field. Though today the legislature usually declares public harms to be illegal without actually denominating them as "public nuisances," the principle is the same. As for the constitutional validity of legislated additions to the public nuisance list, the Supreme Court held, when the question first arose a century ago, that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."¹⁰¹ The Court later added that it is "clearly within the police power of the State . . . 'to declare that in particular circumstances and in particular localities a [use affecting the "health and comfort of the community"] shall be *deemed* a nuisance in fact and in law.'"¹⁰²

The Court recognized, in short, that legislatures must be able to withdraw prior existing rights to harm others and to reset the thresholds of "nuisance" as new conditions arise. To hold other-

96. For example, a violation of the Standard Zoning Enabling Act is a misdemeanor punishable by fine or imprisonment or both. STANDARD ZONING ENABLING ACT § 8 (U.S. Dept of Commerce, rev. ed. 1926), *reprinted in* DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 168-72 (3d ed. 1990).

97. In fact, it has been said that "to the extent that public nuisance is still a crime, it is codified by statute and does not exist in the common law." Abrams & Washington, *supra* note 80, at 365.

98. *See generally* Spencer, *supra* note 92.

99. *See* BLACKSTONE, *supra* note 67, at *168.

100. Act for Rebuilding the City of London, 1666, 19 Car. 2, ch. 3, III (Eng.), *reprinted in* 8 DANBY PICKERING, *STATUTES AT LARGE* 233, 234 (Cambridge University, London, 1763).

101. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887).

102. *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (quoting *Reinman v. City of Little Rock*, 237 U.S. 171 (1915)) (emphasis added).

wise would deny state legislatures vital authority to respond to change. Accordingly, even though property ownership must, as a practical matter, involve incidental rights to cause external harms, such rights to harm others have long been subject to legislative redefinition.¹⁰³

In its 1922 landmark opinion in *Pennsylvania Coal Co. v. Mahon*,¹⁰⁴ however, the Court introduced a now oft-quoted caveat: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁰⁵ Although the Court did not say in *Mahon* exactly how far is “too far,” it held that the Pennsylvania legislature had overstepped the line by enacting a law forbidding people from removing coal from under other people’s houses.¹⁰⁶ In striking down Pennsylvania’s law, the Court affirmed that there are, to quote *Lucas*, “limits to the noncompensable exercise of the police power.”¹⁰⁷

Loath to “nullify” this “affirmation of limits,”¹⁰⁸ the Court in *Lucas* chose instead to solidify and entrench *Mahon*’s truncation of elected legislatures’ centuries-old authority. As support for such a distribution of institutional power the Court cited a “historic compact recorded in the Takings Clause that has become part of our constitutional culture”¹⁰⁹ (as distinguished, apparently, from the Takings Clause that the Framers intended to make part of the Constitution itself).¹¹⁰ In limiting the legislature’s power the

103. See *supra* text accompanying note 94.

104. 260 U.S. 393 (1922).

105. *Id.* at 415.

106. Because earlier conveyances had severed the surface rights from the mineral rights, the coal and the houses had different owners, and the Pennsylvania law in question rendered the mineral rights valueless. However, it was necessary for the coal to remain in the ground to prevent the houses on the surface from sinking into subsidence craters.

107. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

108. *Id.* at 2899, 2900 n.15.

109. *Id.* at 2900. The Court also cited a series of cases beginning in 1980 that have repeated the dictum that a compensable taking occurs when a land-use regulation “denies an owner economically viable use of his land.” *Id.* at 2893 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and subsequent cases reiterating the *Agins* quotation). Based upon this oft-repeated *Agins* dictum, the Court insisted that it did not “invent” the *Lucas* rule for total takings. *Id.* at 2893 n.6.

Regardless of the genesis of the rule, *Lucas* appears to be the first case actually to hold that a particular land use restriction violated the *Agins* “economically viable use” criterion. Before *Lucas* thus elevated dictum to holding, the question was open whether the Takings Clause really gives owners a minimum, inviolable economic guarantee.

110. As far as the historical evidence reveals, the Takings Clause was not originally intended to apply to mere restrictions on use. See, e.g., William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE

Court made it a certainty that at least some private rights to harm others will now be constitutionally inviolable.¹¹¹

Even with its theoretically narrow application to "relatively rare situations,"¹¹² the *Lucas-Mahon* truncation of legislative authority may have some wider implications. For instance, it is possible that *Lucas* is only the beginning of a trend towards greater protection of property owners from public interest legislation.¹¹³ An

L.J. 694, 711 (1985). Certainly no such intention was reflected in the legal institutions of our country's formative years. See Scott M. Reznick, Note, *Land Use Regulation and the Concept of Takings in 19th Century America*, 40 U. CHI. L. REV. 854 (1973). As late as 1897, the Supreme Court still firmly believed, based on an "immense weight of authority," that taking required a "physical invasion of the real estate." *Gibson v. United States*, 166 U.S. 269, 275-76 (1897) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are *universally* held not to be a taking within the meaning of the constitutional provision." (emphasis added) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878))). The true origin of the regulatory takings law is Justice Holmes's bold and brilliant judicial activism in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), see *supra* text accompanying notes 104-06.

The majority opinion in *Lucas* conceded that it "is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all" *Lucas*, 112 S. Ct. at 2900 n.15. However, it dismissed these earlier understandings as "entirely irrelevant" in light of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (extending the application of the Takings Clause to the states) and *Pennsylvania Coal*, 260 U.S. 393 (first recognizing the regulatory taking concept). These two cases seem to be the location of the majority's "historic compact," assuming it is located anywhere at all.

111. Except, of course, if the public is willing to pay the harmdoer to refrain from committing the harm.

112. *Lucas*, 112 S. Ct. at 2894.

113. "This issue 'is the new frontier in property law,' " according to Scott Bullock, an attorney for the Institute of Justice, which filed an *amicus* brief in *Lucas* urging an expansion of property owners' rights under the takings clause. Yang with Hong, *supra* note 27, at 31. Yang and Hong also reported that "property-rights activists plan to test how far the court is willing to carry its logic." *Id.*

A recent announcement by the Pacific Research Institute for Public Policy refers to the "growing number of owners who have organized under various banners, including the controversial Wise Use movement. Employing a strategy of selective litigation combined with grass roots lobbying and public relations campaigns, Wise Use activists and others are seeking compensation when government restrains the use of their land. The *Lucas* decision signals that these efforts are paying off." Mark Pollot *Available for Interview and Commentary*, PR NEWswire, June 29, 1992, available in LEXIS, Nexis Library, PR Newswire File.

As of early 1992, almost 200 takings claims were pending in the United State Claims Court, including challenges to the government's authority to "clean up toxic wastes, regulate grazing and water rights, buy land for national parks, restrict mining in wild areas and set aside private land to protect wetlands." Keith Schneider, *Environment Laws Face a Stiff Test from Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1. The results of some recent cases brought in that court have, arguably, been more favorable to landowners than can be justified by a reading of past Supreme Court decisions on segmentation (see *infra* text accompanying notes 117-20). See, e.g., *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990) (wetland protection); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (wet-

obvious way to extend the *Lucas* holding would be simply to relax the requirement of “total taking.” A rule giving compensation for less-than-100% value reductions would, however, present difficult issues of line drawing (and, in the process, become a fertile source of litigation). Anyway, the *Lucas* majority seemed unconcerned that singling out “total takings” gives a weird talismanic significance to the last few percentage points of value affected by a regulation. As it noted (with a less-than-keen sense of equity): “Takings law is full of these ‘all-or-nothing’ situations.”¹¹⁴

A more conservative approach to extending *Lucas* might involve increasing the number of situations that are deemed to fall within the “total takings” zone. There is nothing self-evident about when a use restriction takes “all economically beneficial use.”¹¹⁵ For example, can a use that provides only below-market rates of return still be considered “economically beneficial”? Most business people would probably say no. On the other hand, the “economically beneficial” concept cannot be logically tied to *rates* of return without making the whole analysis circular, since rates of return depend on market values, while market values depend on rates of return. A further problem is that, if owners are constitutionally guaranteed some minimum “rate” of return, private market transactions will ratchet up constitutionally assured minimum uses of land.¹¹⁶

Another approach to increasing the number of situations that fall in the “total takings” zone, and one in which the *Lucas* majority showed some interest, is to eliminate or cut back on the “no-segmentation” rule, which provides:

‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action

land protection); see also *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991) (strip mining in alluvial valley floor).

See also Charles P. Alexander, *Gunning For the Greens*, TIME, Feb. 3, 1992, at 70; H. Jane Lehman, *Landowners Go to Court to Fight for Property Rights*, WASH. POST, Jan. 4, 1992, at E1; David Kaplan & Bob Cohn, *Pay Me or Get Off My Land*, NEWSWEEK, March 9, 1992, at 70.

114. *Lucas*, 112 S. Ct. at 2895 n.8.

115. “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured.” *Lucas*, 112 S. Ct. at 2894 n.7.

116. See my earlier discussion of this subject in John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 360-65 (1989).

and on the nature of the interference with rights *in the parcel as a whole*¹¹⁷

It would be difficult to exaggerate the importance of this rule, especially after *Lucas*. It is largely because of no-segmentation that total regulatory takings are, as the Court observed, “relatively rare.”¹¹⁸ Many millions of acres of America’s important natural resource lands — wetlands, coastlands, reservoir watersheds, stream corridors, endangered species habitats — have little commercial value in their natural condition. These same lands, however, have great market value potential if their natural features can be degraded or destroyed by development. After *Lucas*, regulatory protection of these vulnerable portions of our national landbase depends on their being joined in larger parcels that have substantial value “as a whole.”

Although the no-segmentation rule has been a constitutional fixture for nearly as long as the *Mahon* truncation that it qualifies, the Court’s opinion in *Lucas* exhibits a marked lack of enthusiasm for the rule.¹¹⁹ Despite the rule’s explicitness, the majority found its application to be “unclear”:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is *unclear* whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.¹²⁰

The opinion also dismissed the several post-*Mahon* cases applying the rule as “inconsistent pronouncements” by the Court.¹²¹ It seems a fair surmise that some of the Justices, at least, have serious doubts about the rule itself. An “Imperial Judiciary” would have no difficulty extending *Lucas* by contracting “no-segmentation,” but institutional considerations counsel against doing so.¹²²

117. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

118. See *supra* text accompanying note 112.

119. Chief Justice Rehnquist’s earlier opinions have evinced a similar skepticism about the no-segmentation rule. See, e.g., *Keystone*, 480 U.S. at 515-18 (Rehnquist, C.J., dissenting); *Penn Cent.*, 438 U.S. at 142-43, 149 n.13 (Rehnquist, C.J., dissenting).

120. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992) (emphasis added).

121. *Id.*

122. On its first day in session after rendering the *Lucas* decision, the Supreme Court denied certiorari in a case that would have raised the “no-segmentation” rule directly.

IV. JUDICIAL SUPERVISION AND THE REVISION OF LEGISLATIVE JUDGMENTS

It is, as stated earlier, a perennial question of legal policy to determine which interference-producing uses of land should be tolerated and which, on balance, ought to be banned. There is a separate and essentially *constitutional* question: Which part of the government should be doing the balancing and making the substantive decisions about land-use rights and wrongs?

Our nation's constitutional tradition is clear: "Power to determine such questions, so as to bind all, must exist somewhere Under our system that power is lodged with the legislative branch of the government."¹²³ "[A]nd in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."¹²⁴ Nevertheless, a legislature's own "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."¹²⁵ The proper scope for this judicial supervision of legislatures is the crux of the "regulatory takings" issue.

In recent years, regulatory takings review has sometimes been treated as an occasion for judges to rethink, *ad hoc*, the purposes and means that the legislature has selected — turning the question of legislative authority into a rebalancing of the relevant interests to see if the legislature's land-use regulation was a sound policy choice.¹²⁶ For the most part, since the repudiation of the

Tull v. Virginia, 113 S. Ct. 191 (1992). The state had denied the owner of a 43-acre site a permit to fill the approximately two acres of wetlands on the site. Tull v. Virginia (Cir. Ct. Accomack County Va. Nov. 4, 1991), *petition for cert. filed* 61 U.S.L.W. 3160 (U.S. Sept. 8, 1992) (No. 92-112) ("Question presented: Does Fifth Amendment allow denial of just compensation by including non-regulated upland property into 'relevant calculus,' when just compensation would be required if 'parcel as a whole' were limited to regulated wetlands and permit denial prohibited all economic viable use of wetland property that must remain forever in its natural state?").

123. *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887).

124. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

125. *Id.* at 137.

126. The "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," a question that "necessarily requires a weighing of private and public interests." *Keystone Bituminous Coal Ass'n v. DeBenedictis*,

Lochner line of cases in the late 1930's,¹²⁷ the Supreme Court's decisions have not supported such judicial second-guessing in the economic sphere.¹²⁸ Beyond assuring that legislative purposes fall within a "broad range" of legitimacy¹²⁹ and that the means selected are rational,¹³⁰ the courts have been largely deferential in a regulatory takings review.

By making the common law of nuisance a criterion for legislative validity, however, the Supreme Court has read the Takings Clause as a warrant for courts to substitute their own substantive judgments about land-use rights and wrongs in place of those of the legislature. At least in cases of "total takings," *Lucas* directs the courts to establish limits on the legislature's authority by reweighing the very same sorts of factors that the legislature itself should have considered when deciding whether to enact the challenged law. In applying the common-law nuisance criterion, the question for the courts is not whether the legislature proceeded in a rational way towards a proper objective. It is whether the legislature reached the right conclusion.

In evaluating this assignment of ultimate land-use authority to the courts, it is not enough to observe that the legislative process can sometimes result in unjust burdens to private owners. While legislatures cannot always be relied on to provide perfectly "just" results, neither can courts — a choice between an imperfect dem-

480 U.S. 470, 492 (1987) (emphasis added) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980)).

For an example of explicit judicial replication of the legislative weighing process, see *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161, 166-68 (1990).

127. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a labor standards law on substantive due process grounds). By 1938, the Court had made it clear that due process protections were, at least in regard to economic legislation, not a basis for courts to second-guess the wisdom of legislative judgments. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis . . ."). See also, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (upholding rent control); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (stating that legislative acts must be reviewed under a "rational basis" standard); *Day-Bright Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("We do not sit as a super-legislature to weigh the wisdom of legislation . . .").

128. See *supra* text accompanying notes 41, 45-54.

129. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987).

130. Judicial "inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation," the sole constitutional question on review being whether the "Legislature *rationally could have believed* that the [Act] would promote its objective." *Key-stone*, 480 U.S. at 511 n.3 (Rehnquist, C.J., dissenting) (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

ocratic process and an imperfect non-democratic one. The question is this: As social norms, knowledge, and context shift over time, which institution is better suited to weigh and reweigh the many competing interests, public and private, and keep the laws attuned to the times?

There are good reasons why the final authority to fix and revise the optimal balance in the land-use field has historically been left to legislators. Legislatures are set up to address complex issues comprehensively, to deal with diverse interrelated issues programmatically, and to codify rather than merely to decide controversies case by case.¹³¹ Unlike judges, moreover, legislators face frequent re-elections and constant constituent contact. But most importantly, access to legislators is a legitimate right of everyone who cares about the policy choices being made. Courts, by contrast, are purposely insulated from such a diversity of views. No matter how widespread the potential impact of a pending case, only the parties to the litigation have the right to address the judge, or provide perspective on the issues.

In short, legislatures are generally far better positioned than the judicial branch to exercise that "large discretion . . . to determine, not only what the interests of the public require, but what

131. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) (declining to enjoin an air pollution source on the ground (among others) that courts should not try, "as a by-product of private litigation . . . to lay down and implement an effective policy for the elimination of air pollution," explaining that "the judicial establishment is neither equipped . . . nor prepared" to do so).

In their review of "judicial zoning" referred to earlier, Beuscher and Morrison noted that judge-made criteria for resolving land use conflicts "show the extreme difficulty of choosing, through the individualized process of case law, between clashing land uses that exist in bewildering variety." Beuscher & Morrison, *supra* note 34, at 442-43. While common law nuisance criteria can work fairly effectively in areas that have already acquired a homogeneous developed character, courts "hesitate to forecast the land use future" of mixed use districts and "are apt to stand aside and let topsy-like growth run its course." *Id.* at 447. Thus, it is seldom possible to obtain an advance injunction prohibiting the establishment of a specific use threatening to be a nuisance because, as one court put it, if the use were "'restrained in the first instance, we could never learn from the great teacher experience, whether [it] would, in fact, be a nuisance or not.'" *Oechsle v. Ruhl*, 54 A.2d 462, 467 (N.J. 1947) (quoting *Duncan v. Hayes & Greenwood*, 22 N.J. Eq. 25, 28 (1871)).

Another consequence of the courts' case-by-case approach is that it leaves the common law of nuisance almost powerless to deal with subtle, long-range cumulative deleterious impacts. For example, the extension of suburban sprawl into a public reservoir watershed can ultimately destroy the reservoir's water quality, but each individual new house contributes so imperceptibly to the problem that it does not seem to be a "nuisance" in itself. *Cf. supra* note 87 (discussing the legislature's ability to address subtle, long-term resource degradation).

measures are necessary for the protection of such interests.”¹³² This is especially so in the economic sphere, where “the fact is that virtually all economic regulation benefits some segments of the society and harms others.”¹³³

The “reality [is] that determination of ‘the public interest’ in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment”¹³⁴ If legislative decisions to regulate objectionable land uses are “made subject to *ex post facto* judicial assessment of ‘the public interest,’ with personal liability of city officials a possible consequence, [the Supreme Court] will have gone far to compromise the States’ ability to regulate their domestic commerce”¹³⁵ and, one might add, to protect the viability of their domestic landbase.

A reviewing court may or may not agree that a particular legislative land-use restriction is justified by the potentially deleterious external impacts that it averts, or that the economic impact on private owners is justified. The question is how far the Takings Clause should be diverted from its historic purpose¹³⁶ and read as a license for courts to substitute their *de novo* determinations on these points for those of the legislatures elected by the people.¹³⁷

132. *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

133. *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344, 1352 (1991) (Scalia, J.).

Occasionally, of course, judicial review of legislative acts may provide appropriate occasions for substantive decision-making. Review of legislation that appears to impinge upon “fundamental rights,” a situation in which the democratic processes may be especially dis-trusted, is an example of such an occasion.

The subject of “fundamental rights” is far outside the scope of this article, but it is noted in passing that rights to make particular uses of property do not at all fit the mold of “fundamental rights.” A typical characteristic of a fundamental right (such as free expres-sion and voting) is that everyone can enjoy the full exercise of the right without interfering appreciably with the full and equal exercise of the right by everyone else. Property rights do not possess this characteristic: each person’s use of property all too frequently conflicts and interferes, to some extent, with other people’s uses of *their* property. If *X* is accorded a “fundamental” right to use his property as a family residence, then next-door neighbor *Y* plainly cannot have a “fundamental” right to use her property as a steel mill, or vice versa.

A related point is that “fundamental rights” are distributed equally (or they ought to be). Property rights, by contrast, are not distributed equally, making it doubtful that they are (or ought to be) the subject of a “fundamental” constitutional guarantee.

134. *Omni Outdoor*, 111 S. Ct. at 1352.

135. *Id.* (citing *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985)).

136. As noted earlier, the available historical evidence indicates that the Takings Clause was not intended to apply to use restrictions at all. See *supra* note 110.

137. In adumbrating a far more fitting role for the courts in regulatory takings cases, Professor Farber recently described the Takings Clause as “a method of universalizing the

The regulatory takings debate is not really about property rights, their sanctity, or the appropriateness of governmental limits on their exercise. It is not, in its essence, a debate about private owner sovereignty as opposed to governmental sovereignty over the land of the United States.¹³⁸ It is, more fundamentally, an *institutional* debate as to which branch of government should have the final say on the substantive issues of land-use regulation. For a “relatively rare” group of cases, at least, the Supreme Court has resolved that question in favor of the judiciary by elevating the common law of nuisance to a position of unprecedented constitutional importance.

The holding of *Lucas* is narrow, and its substantive effects will be easy enough for legislatures to avoid. By creating procedures for “hardship variances” for owners who can prove total takings, governmental entities should be able to avoid liability even for “temporary regulatory takings.”¹³⁹ The integrity of programs to protect low market-value natural resource lands can be largely maintained as well. By judicious use of “subdivision regulations” to prevent sensitive lands from being severed from their buildable neighbors, parcels that contain sensitive lands can retain their “economically beneficial use” viewed “as a whole,” preclud-

usual practice of government compensation for certain losses.” Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 303 (1992). His conception of the just-compensation requirement as essentially a “trade usage” law is potent, both as a matter of explanation and legal prescription. *Id.* at 298-99. Recognizing that elected legislatures are normally motivated to provide compensation in a variety of circumstances, he argues that the key role of the constitutional requirement is to “make the compensation practice uniform” — to prevent the stochastic injustice of occasional compensation denials in circumstances where compensation usually is granted. *Id.* at 299. Thus, instead of mediating the great social debates about the ideal roles of private property and community self-protection programs, courts would leave such questions to elected legislatures, confining themselves to ensuring that the legislative balancing process — whatever it is — is fairly and consistently applied.

Indeed, Professor Farber’s argument could be taken even further, assimilating takings jurisprudence to the law of private property generally. Are not *all* laws protecting private property (such as laws prohibiting trespass and burglary) essentially like trade usage law, enforcing against occasional opportunistic disregard of the deference that most people give to other people’s possession anyway?

138. These are very important matters, of course, but they are not at the essence of the regulatory takings debate.

139. The Court has held that a use restriction that eliminates “all use” of private land entitles the owner to compensation for the resultant “temporary taking” even if the government later repeals the offending law. *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987). The Court emphasized, however, that its holding did not apply to “normal delays in obtaining . . . variances, and the like.” *Id.* at 321.

ing the need for excessive use of variances.¹⁴⁰ Perhaps the easiest way to inoculate land-use laws against *Lucas* will be to create limited systems of transferable development rights so that no property in land could ever be considered entirely without economically beneficial use.¹⁴¹

Narrow and easily avoidable or not, however, even a partial reduction of traditional legislative authority is cause for concern. Each time it happens, as the *Lucas* author stated in another case, "the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."¹⁴² And as the Supreme Court itself cautioned at another time, "one branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."¹⁴³

V. CONCLUSION

Societal regulation of intolerable behavior, in connection with land use and otherwise, cannot be a fixed set of rules, but must evolve with the times. Legislative additions to the common law of nuisance have been a primary mechanism for keeping land-use law up to date. In apparent response to sentiment for reining in legislatures' broad traditional discretion, however, the Supreme Court in *Lucas v. South Carolina Coastal Council* erected a new "categorical" rule of takings for the "relatively rare situations" of "total takings" of "all economically beneficial use."

The *Lucas* case was presented as a takings case, but the Supreme Court declined to decide whether the land-use regula-

140. Of course, this strategy of keeping sensitive lands united in ownership with adjacent reasonably buildable lands will only work to the extent that the no-segmentation rule remains in place. See *supra* text accompanying notes 117-20.

As noted earlier, since *Lucas*, the Court has already denied certiorari in a case that would have raised the "no-segmentation" rule directly. See *supra* note 122.

141. I have, in another article, discussed the possible constitutional infirmity of transferable development rights systems where the connection between the sending and receiving parcels is not sufficiently close. Humbach, *supra* note 116, at 352 n.39.

142. *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2883 (1992) (Scalia, J., dissenting) (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in *Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 10, 101st Cong., 1st Sess. 139 (1989)).

143. *Powell v. Pennsylvania*, 127 U.S. 678, 685 (1888). Accord *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (stating that the judiciary must avoid "taking to itself authority to govern the country without express constitutional authority").

tion at issue was a taking. Instead, it created an enclave of legislative impotence in a field where the policy choices of the people's elected representatives had previously reigned supreme. Uses of land inevitably come into conflict with one another and with other important values, and hard choices inevitably must be made. The *Lucas* truncation of legislatures' powers to make these choices is, at the least, a questionable reassignment of institutional authority.