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Environmental Interest Groups and Land Regulation: Avoiding the Clutches of *Lucas v. South Carolina Coastal Council*

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I. INTRODUCTION

The United States Supreme Court's highly controversial decision of *Lucas v. South Carolina Coastal Council*[1] promulgated a flood of literature concerning the bounds of state police power under the Fifth[2] and Fourteenth[3] Amendments. Although the decision may only apply in the "relatively rare situations" when a landowner is deprived of all economically viable land uses,[4] scholars have had a field day scrutinizing the basis and effect of the decision. The criticism of the decision, however, began long before the flood of literature. When the Court released the *Lucas* decision, it contained two vehement dissents, by Justices Blackmun and Stevens. The fulcrum of the *Lucas* critique is the newly pronounced categorical takings rule and the drastic changes it brings to a previously established framework. This Note focuses not on the overall disposition of the case, but rather on the controversy that surrounds the framework utilized by the Court in *Lucas*.

The instrumental factors in the *Lucas* dispute are a South Carolina

1. 112 S. Ct. 2886 (1992).

2. The Fifth Amendment's Takings clause reads, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

3. "The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the Fourteenth Amendment." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 142 n.3 (1978) (Rehnquist, J., dissenting).

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

coastal preservation act[5] and a landowner who owned two parcels of beachfront property. The implications of the controversy, however, spread far beyond the confines of the parties at issue.

David Lucas purchased two beachfront lots on the Isle of Palms, South Carolina, in 1986.[6] At the time of his purchase, there were no existing land-use restrictions that would have prohibited development on Lucas' property.[7] His intention was to build single-family homes upon each of the plots.[8] Subsequent to Lucas' purchase, but prior to the development of his land, South Carolina enacted the Beachfront Management Act ("the Act").[9] The Act effectively prohibited David Lucas from erecting any habitable structures on his property, although certain nonhabitable uses would have been allowed.[10] Furthermore, the Act's language was absolute and provided for no exceptions.[11]

David Lucas filed suit in the South Carolina Court of Common Pleas alleging that as a result of the severe restrictions placed on his land by the Act, he had suffered a Fifth Amendment taking.[12] The trial court agreed and found that Lucas' lots were left with no economically viable use.[13] Accordingly, the trial court awarded David Lucas $1,232,387.50 as just compensation for the taking.[14]

On appeal, the South Carolina Supreme Court reversed.[15] The South Carolina court determined that the Act was necessary to protect the health, safety, and welfare of the state. The court based its decision on the line of cases that followed *Mugler v. Kansas*[16] and the resulting "noxious use" doctrine.[17] That doctrine provided that a state may enact legislation that prohibits nuisance-like activity, or activities akin to nuisance, and resist the payment of compensation to landowners under their inherent police powers.[18]

The United States Supreme Court granted certiorari and heard oral argument on March 2, 1992. On June 29, 1992, the final day of the

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5. S.C. Code § 48-39-10 *et. seq.* (1987).
6. *Lucas*, 112 S. Ct. at 2889.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 2889-90 n.2.
11. *Id.* at 2890.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. 123 U.S. 623 (1887).
17. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 901-02 (S.C. 1991), *rev'd on other grounds*, 112 S. Ct. 2886 (1992) (holding that the *Mugler* rule is designed to prevent serious public harm and is applicable to the facts at hand).
18. *Id.* at 900.

term, the Court released its *Lucas* decision. Five different Justices wrote opinions in the case that was decided 6-3 in favor of the private landowner, David Lucas. Writing for the majority, Justice Scalia refused to follow the *Mugler* noxious use analysis. Instead, he pronounced a new categorical takings rule to be used whenever a landowner is denied all economically viable land uses as a result of a severe land regulation.[19] The rule states that unless there were prior restrictions placed on the land, such as restrictions under state nuisance or property law, a land restriction of such an extreme consequence constituted a per se violation of the Fifth Amendment.[20] If such a total taking was found, states could no longer justify uncompensated land regulation by purporting to prohibit nuisance-like activity. Courts must instead inquire into background nuisance law to determine if the regulation seeks to avoid an actual nuisance, or inquire into background property law to see if the limitations inhered in the landowners title.[21]

Under *Lucas*' categorical analysis, the Court declared that it would obviate any "case-specific inquiry" into the nature of the state's regulation.[22] This aspect of the newly pronounced test is significant because all prior takings decisions had considered the legitimacy of the state action and had generally deferred to legislative judgments. The great deference afforded state lawmakers helped enhance a broad concept of state police power to regulate land without providing compensation. At present, however, state legislative decisions receive no deference whatsoever when courts use the categorical rule. Accordingly, *Lucas* effectively ignores the statute at issue and places an extreme limitation on legislative power to enact strict environmental plans, such as the South Carolina act.

Moreover, *Lucas* renders the statutory process a non-factor in deciding some important land-use controversies. As a result of this facet of *Lucas*, environmental advocates and environmental interest groups that formerly played a key role in legislative land-use policy-making are also rendered non-factors under this test. Since *Lucas* presents a change in takings law that apparently favors private landowners,[23] this Note takes a devil's advocate position and analyzes situations and strategies that can avoid or nullify the decision's effects. Accordingly, this Note depicts the critical elements of *Lucas* that environmental advocates should attack.

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19. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893-2900 (1992).

20. *Id.* at 2900-01.

21. *Id.* at 2900.

22. *Id.* at 2893.

23. Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943 (1993).

Part II of this Note analyzes takings law as it existed pre-*Lucas* and highlights the relevant aspects of the doctrine that have since changed. Part II further analyzes the opinion itself and pinpoints a critical flaw in the Court's analysis—failure to resolve the issue of defining the property unit. Part III focuses on the cost-benefit analysis that is significant in protecting the environment through land regulation. Part IV focuses on one suggestion to environmental advocates who, in the wake of *Lucas*, are litigating claims that achieve the very goals that restrictive legislation would have accomplished. Due to justiciability concerns, funding, and difficulty in naming suits with broad reaching consequences, however, this suggestion would not presently meet with the most success. Part V focuses on lobbying strategies that will help undermine *Lucas*' impact on environmental legislation. The essence of this section is to broaden state conceptions of nuisance law to maximize the utility of *Lucas*' lone exception. Finally, Part VI analyzes the most effective way to combat *Lucas*—utilizing lobbying activity to promulgate expansive legislation that regulates, while providing landowners with an administrative option. Under this option, landowners can avoid costly takings litigation and receive transferable development rights (TDRs) to ensure that they maintain an economically viable use for their property. In turn, *Lucas* is rendered inapplicable, and courts can once again utilize a balancing approach to decide regulatory takings cases. If that is achieved, courts will once again defer to legislative judgments and provide environmental advocates a chance to help shape land-use policy via restrictive land regulation.

II. THE TAKINGS DOCTRINE AND *LUCAS*: REDEFINING THE OUTER BOUNDARIES OF STATE POLICE POWER

The Supreme Court's takings decisions have unfortunately created a spectrum in which the precise boundaries of a state's police power are uncertain.[24] Recent changes in the Court's Fifth Amendment takings analysis have cut back on broad state police power in favor of enhanced protection of private property rights.[25] These changes began when the

24. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (Brennan, J., plurality opinion); *The Supreme Court, 1991 Term-Leading Cases*, 106 HARV. L. REV. 269, 269-70 (1992); Laurie G. Ballenger, Note, *A House Built on Sand:* Lucas v. South Carolina Coastal Council, 71 N.C. L. REV. 928 (1993).

25. Jeremy Paul, *Scalia's Pursuit Of Holy Grail Has Its Price*, N.J.L.J., Aug. 3, 1992, at 15 (arguing that *Lucas* resulted in the anticipated shift in the constitutional balance since the Court decided in favor of the landowner); John M. Payne, *From the Courts—Takings and Environmental Regulations*, 21 REAL EST. L.J. 312, 319 (1993) (arguing that the new takings inquiry favors state compensation of takings claimants); Daniel J. Popeo & Paul D. Kamenar, *The Tide Has Finally Turned In Favor of Property Rights*, N.J.L.J., Aug. 3, 1992, at 15 (arguing that the new takings rule effectuates judicial protection of private property rights).

Court decided *Nollan v. California Coastal Commission*[26] and culminated with the disposition of *Lucas v. South Carolina Coastal Council*.[27] The two opinions, both authored by Justice Antonin Scalia, apparently have turned the tide in favor of protecting private land interests over state regulatory interests. As is often the case, however, American law evolves as our society's needs and standards change.[28] Therefore, some changes in the law will prove to be necessary responses to changing conditions. Due to this adaptability in American legal constructions, it is essential to focus on the historical development of modern takings law in order to comprehend the technical innovations that *Lucas* brings to takings law. Accordingly, this section critically analyzes the prior standards and legal constructions used by the Court in Fifth Amendment cases prior to *Lucas*. Specifically, this section highlights the balancing of interests test and the deferential standard of reviewing legislative judgments to regulate land.

A. *Balancing the Interests: A Balance Weighted in Favor of the State*

The Court's early takings decisions emphasized that state governments must be able to regulate land without providing compensation for every change in state land-use law.[29] The early rule protected a state's ability to prohibit harmful, noxious, or nuisance-like activity within its borders.[30] So long as the regulation purported to reach one of these aims, it was found constitutional as an exercise of a state's police power. The justification for such a rule is simple: it is an inherent power of the state to regulate in a manner that promotes the health, safety, or welfare of its citizens. States are free to regulate under this implied "police power" as long as the power is not used arbitrarily, unreasonably, or capriciously.[31]

Over time, the boundary of state police power changed. Instead of relying on noxious use language, the Court enumerated a requirement that examined the overall legitimacy of the state action. The oft-stated principle was that in order to be valid, a state regulation "must advance a legitimate state interest."[32] This rule was applied liberally by the modern

26. 483 U.S. 825 (1987) (holding that the state cannot condition the issuance of a building permit on the landowner's agreement to allow public access across his property).

27. 112 S. Ct. 2886 (1992).

28. Paul, *supra* note 25. *See also Lucas*, 112 S. Ct. at 2922 (Stevens, J., dissenting).

29. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

30. *Lucas*, 112 S. Ct. at 2897. *See also* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (holding that states can regulate uses that are "injurious to the health, morals, or safety of the community" and resist compensating landowners for such regulation).

31. 29A C.J.S. *Eminent Domain* § 8 (1992).

32. *E.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980).

Court. As a result, the Court recognized a broad concept of "legitimate state interest" and made it relatively easy for states to justify land-use restrictions as valid exercises of police power.[33] Relying on this police power justification, the Court upheld a broad range of state interests as legitimate for Fifth Amendment takings purposes.[34]

Despite the relatively lenient standard, the Court recognized that state police power was not unbounded and frequently referred to Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*.[35] In that case, Justice Holmes declared, "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[36] This limitation, deriving from the Constitution's Fifth Amendment, attempts to ensure that valid state objectives are not met via unconstitutional deprivations of property. In short, the limitation is geared to prevent private land from being pressed into public use without the requisite just compensation.[37]

Unfortunately, prior decisions failed to demarcate the precise points at which regulation is deemed to have gone "too far."[38] In an effort to draw a line as to when a regulation has gone too far, the Court noted, in strong dicta,[39] that a regulation violates the Fifth Amendment if it "denies an owner economically viable use of his land."[40] This language appeared in many Supreme Court takings decisions but had never been relied on as the sole basis in finding a taking of property.[41] As a result, takings law remained unpredictable throughout the 1980's, a period of considerable takings litigation.[42]

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33. Richard A. Epstein, *Ruminations on* Lucas v. South Carolina Coastal Council: *An Introduction to Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1225 (1992).

34. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987). *See also* Miller v. Shoene, 276 U.S. 272 (1928) (upholding a state order that forced the owner to destroy cedar trees in order to protect nearby apple orchards); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a law prohibiting the continued use of a brickyard); Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a law prohibiting the manufacture of alcoholic beverages).

35. 260 U.S. 393 (1922).

36. *Id.* at 415.

37. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (stating that one risk involved with regulation is "that private property is being pressed into some form of public service under the guise of mitigating serious public harm").

38. *Id.* at 2893.

39. *Id.* at 2918 (Stevens, J., dissenting).

40. *E.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980).

41. *Lucas*, 112 S. Ct. at 2918-19 (Stevens, J., dissenting).

42. In that decade, the Court decided several important takings cases, including, Agins v. Tiburon, 447 U.S. 255 (1980), Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981), San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), and Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470 (1987).

In the Court's words, it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government," rather than be absorbed by private landowners.[43] Accordingly, the Court did not rely on absolute "linedrawing" as suggested by its constitutional constraint that regulation may not deprive a landowner of all economically viable land uses.

Instead, the Court implemented a balancing test, referred to by scholars as the "multi-factor"[44] or "three-factor"[45] test. The Court applied this test on an ad hoc basis to determine if a Fifth Amendment violation occurred.[46] The most notable aspect of this test is that under its application, all relevant factors in a land-use conflict were considered. The economic impact to the landowner was only one of the relevant factors, and certainly was not used as the determinative factor.

In *Penn Central Transportation Co. v. City of New York*,[47] the Supreme Court specifically enumerated the factors to be considered in balancing the private and state interests at stake in a takings dispute. To determine the relative effect of the regulation or statute on the private interest, the Court examined the "economic impact of the regulation on the [takings] claimant" and the "extent to which the regulation has interfered with [the landowner's] distinct investment-backed expectations."[48] On the other side of the proverbial balance, the Court examined the legitimacy and importance of the state's interest advanced by the regulatory measure as enumerated in the statute.[49] Under this framework, a landowner who suffered a near total loss in property value presented a strong case against the factors balanced on the state's side. However, the financial impact was never determinative of the result under the balancing test; the Court *always* considered the legitimacy of the state's interest.

Furthermore, the Court imposed a deferential standard in reviewing legislative decisions to regulate.[50] As would be expected, the benefit of

43. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See also* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

44. Paul, *supra* note 25.

45. Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573, 578 (1993).

46. *E.g.*, *Penn Central*, 438 U.S. at 124.

47. 438 U.S. 104 (1978).

48. *Id.* at 124.

49. *Id.*

50. Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 (1987) (Brennan, J., dissenting) ("It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective.") (citing Minnesota v. Clover Leaf Creamery Co.,

the doubt went to the state and the balancing test weighted heavily in its favor.[51] Accordingly, states enjoyed much latitude in regulating land uses that might be harmful to the environment.

Professor Cass Sunstein asserts that in applying the rather lenient, deferential standard, "the Court has held it sufficient if a legitimate purpose can be hypothesized and there is a minimally plausible connection between that purpose and the statute at issue."[52] The significant aspect of this standard is that the Court never required the statute's effect to precisely match its aims.[53] So long as any legitimate purpose for the statute existed, the Court held the legislative action valid.[54] The logical antecedent to such a liberal mandate was a broad conception of "state's interest" and "police power."

A growing faction of the Supreme Court, comprised of the more conservative justices,[55] grew dissatisfied with this deferential standard of review and, in their eyes, the overly broad concept of state police power. This faction of Justices attempted to change takings law, in part, by reducing the expansive view that accepted the prohibition of all nuisance-like activity as within a state's inherent power.[56] *Nollan v. Cali-*

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449 U.S. 456, 466 (1981)); *accord* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Six years after *Penn Central*, the Court displayed the same deferential attitude in Hawaii Housing Auth. v. Midkiff. 467 U.S. 229 (1984). Writing for the Court, Justice O'Connor noted that it is unnecessary for a zoning provision to actually accomplish its stated purpose, "the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective." *Id.* at 242 (citing Western & Sullivan Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981) (alteration in original)); *see also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (arguing that the practical effects of regulation are better left to the legislative branch since the democratic process will rectify improvident decisions); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 877-78 (1987) (arguing that deferring to judgments of state legislatures is one of the constitutional strategies of the contemporary Supreme Court).

51. Since the Court's finding in favor of the takings claimant in *Pennsylvania Coal Co. v. Mahon*, no Supreme Court takings decision had so severely limited the scope of a state's police power as in *Lucas*. *See* Epstein, *supra* note 33, at 1225.

52. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 52 (1985).

53. *Nollan*, 483 U.S. at 843 n.1 (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955)).

54. *Williamson*, 348 U.S. at 487-88 ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

55. The Conservative voting block consisted of Chief Justice Rehnquist, and Justices Scalia, O'Connor, and Powell. Justice White joined this faction in *Nollan* but voted with the liberals in *Keystone*. In *Lucas*, the conservative voting block was joined by Justice White, as well as Justices Kennedy and Thomas.

56. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513-14 (Rehnquist, C.J., dissenting) (arguing that the existing standard is inadequate in placing workable boundaries on state police power).

fornia Coastal Commission demarcated a shift in power to this conservative faction. The *Nollan* majority jumped at the opportunity to implement their reductivist views of the limits to state police power; the result was a gradual movement towards greater protection of private property rights.[57] Accordingly, the outer bounds of state police power drifted away from the polar limits to a more conservative midpoint.

In *Nollan*, the Court effectuated this change by manipulating the standard of review applied in takings cases. The Court pronounced a more stringent level of scrutiny to be used in analyzing such takings cases. The *Nollan* standard requires a closer nexus between the enumerated means and ends of a regulation.[58] It is no longer sufficient for some hypothesized state objective to exist.

As a result, where once the Court required that a regulation merely advance a legitimate state interest, it now requires the regulation to "substantially" advance the state's interest.[59] This requirement places an added burden on state legislatures since it requires more precision in matching needs for land regulation with state policy implementations. Due to this added pressure on state legislatures, private landowners enjoy a previously unexperienced "added protection" of their property rights.

In summation, under the pure form of the balancing test, the Court always considered both the private and public interests at stake in a takings dispute. The Court never relied on one factor to the exclusion of the others, but always gave the interests on either side of the balance the chance to outweigh the others. As enumerated by the Court, "the ultimate conclusion" of whether or not a taking occurred always required a "weighing of both private *and* public interests."[60] Furthermore, under the historical application of the balancing of interests test, the Court spotlighted an expansive police power by implementing a highly deferential standard of review. *Lucas v. South Carolina Coastal Council* enumerated a rule that focused solely on the takings claimant's "bundle of rights."[61] In doing so, it virtually ignored the state's enumerated inter-

57. Dissenting in *Nollan*, Justice Brennan argued that "[t]he Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast" would "hamper the ability" of the Coastal Commission to regulate in the spirit of the public good. *Nollan*, 483 U.S. at 848. He labeled the Court's more stringent standard of review "unreasonably demanding" and argued that such a modification of the previous standard "could hamper innovative efforts to preserve an increasingly fragile national resource." *Id.* at 849.

58. *Id.* at 865 (Blackmun, J., dissenting).

59. *Id.* at 835.

60. Agins v. Tiburon, 447 U.S. 255, 261 (1980) (unanimous decision) (emphasis added).

61. 112 S. Ct. 2886, 2922-23 (1992) (Stevens, J., dissenting) ("Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.").

ests, a factor that had been crucial under the balancing test.

B. *Categorical Disposition of Regulatory Takings Claims: Focusing on the Private Rights at Stake*

In *Lucas*, the Court enumerated two instances in which the balancing approach is rejected in favor of a categorical rule. The first occurs when a property owner is forced to suffer a physical invasion of his property.[62] Regardless of the extent of the invasion, the Court will find that a Fifth Amendment taking of the burdened portion has occurred.[63] In some instances, the invasion can be as minute as a cable wire[64] and may even result in an increase to the property's value.[65] Nevertheless, there is a taking of property that requires the regulating state to pay just compensation.

The second instance in which a takings claim is decided categorically is when a "regulation denies all economically beneficial or productive use of land."[66] If a court finds that all practical and economically viable uses of land are prohibited by a challenged regulation or statute, it must categorically find a taking.[67] The lone exception to such a finding is when "background principles of nuisance and property law" would prohibit the intended land uses.[68] As a rationale for this exception, the Court stated that such a severe limitation must inhere in the title itself; it cannot be created by the legislature. The situation is treated as if the contemplated land use was never within the landowner's "bundle of rights" in the first place. This exception, due to its reliance on the common law of nuisance, has been commonly referred to as the "nuisance exception" to regulatory takings.[69] This exception is a far cry from the more generous noxious use standard that allowed the prohibition of anything that was nuisance-like.

The impact of the *Lucas* rule, and the extent to which it will apply, are questionable. According to Justice Scalia, a finding of "no economically viable use" will only occur in "relatively rare" situations.[70] This point might explain why the Court had never relied on that language, alone, as the basis for a takings decision. It is certainly conceivable that

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62. *Id.* at 2893.
63. *Id.*
64. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
65. *Id.* at 452 & n.9 (Blackmun, J., dissenting).
66. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).
67. *Id.* at 2894 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).
68. *Id.* at 2901-02.
69. *Id.* at 2920 (Stevens, J., dissenting); Paul, *supra* note 25, at 1093; Popeo & Kamenar, *supra* note 25, at 1092.
70. *Lucas*, 112 S. Ct. at 2894.

Lucas may only be applied in limited circumstances.[71] If this proves to be true, the majority of cases would be decided under the former standards, a hybrid of *Penn Central's* balancing test and *Nollan's* heightened scrutiny.

Despite the arguments that *Lucas* will only rarely apply, Justices Harry Blackmun and John Paul Stevens argued that the categorical rule will be extensively utilized in the post-*Lucas* era.[72] If, in fact, the case has a significant impact on future takings decisions and the categorical rule becomes widely utilized by a majority of states, two aspects of the rule will substantially change the legal constructs underpinning takings law. First, where past takings decisions deferred to the language and intent of legislative judgments, *Lucas* mandates virtual ignorance of the plain meaning and intent of a challenged regulatory measure.[73] Second, rather than focus on legislative judgments to advance state interests, courts must now examine background nuisance and property law as it relates to the "valueless" parcel.[74]

First, regarding the standard of review, the Court decided takings cases for decades by maintaining strict judicial deference to state legislatures.[75] In *Nollan*, a conservative majority held that tighter scrutiny was required to evaluate the constitutionality of challenged state actions.[76] Consequently, this correlated with less legislative influence in land-use law and greater protection of private property rights. Under *Nollan*, however, courts were still required to at least evaluate and balance the state's interest in the regulation.

In *Lucas*, a more solid majority of conservatives[77] continued to expand on the principles established in *Nollan*. The new position seems rather extremist in consideration of the abundance of case precedent that displayed the deferential standard. Under the newly pronounced takings

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71. Paul, *supra* note 25, at 1093; *The Supreme Court, 1991 Term-Leading Cases*, *supra* note 24, at 270.

72. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2904 (1992) (Blackmun, J., dissenting) ("My fear is that the Court's new policies will spread beyond the narrow confines of the present case."); *id.* at 2920-21 (Stevens, J., dissenting) (arguing that the Court's rule can have a sweeping effect); Payne, *supra* note 25, at 316 (arguing that *Lucas* does not have the feel of a narrow doctrine); Popeo & Kamenar, *supra* note 25, at 1092 (arguing that *Lucas* may result in a flood of new litigation).

73. *Lucas*, 112 S. Ct. at 2893.

74. *Id.* at 2901-02.

75. *Id.* at 2909 (Blackmun, J., dissenting); Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 (Brennan, J., dissenting); *id.* at 865 (Blackmun, J., dissenting).

76. *Nollan*, 483 U.S. 825.

77. The *Nollan* majority consisted of five justices while the *Lucas* majority consisted of six. Although three justices left the bench prior to *Lucas*, two of the three new justices, Kennedy and Thomas, voted in favor of David Lucas.

rule, courts are not required to examine the legislature's intent at all.[78] If a finding of "no economically viable use" is made, the only relevant inquiries are into background nuisance and property law.

This aspect of *Lucas* drew sharp criticism from Justice Blackmun. He placed considerable weight on the impact of *stare decisis* and the former burdens placed on individuals that challenged the constitutionality of state regulatory measures. He argued that prior cases all held that courts must defer to legislative judgments unless the plaintiff overcomes a "presumption of constitutionality."[79] *Lucas* deviates from this long-established rule. At present, according to Justice Blackmun, "the State has the burden to convince the courts that its legislative judgments are correct."[80] Furthermore, so long as a regulatory measure purported to prevent a public harm, the Court had found such a regulation valid.[81] This aspect, as well, was solid legal precedent grounded in a long line of takings decisions.

Justice Scalia responded to the arguments advanced by Justice Blackmun. He characterized the former standard as too lenient and too easy to circumvent. Justice Scalia suggested that requiring a statute to merely "recite a harm-preventing justification" is insufficient to bound state police power.[82] He stated that since a harm-preventing justification "can be formulated in practically every case," the deferential standard "amounts to a test of whether the legislature has a stupid staff."[83] The Justice continued, "We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations."[84]

Second, regarding the consideration of the State's interest involved in a regulation, the Court provided the lone exception to the categorical rule as a mechanism to prohibit certain land uses in accordance with state police power.[85] This exception is noticeably narrower than the *Mugler*-type exception that only required prohibited activity to be nuisance-like. *Lucas* announces a narrow nuisance exception, an analysis that was previously rejected by the Court as a touchstone in determining the legitimacy of state police power.[86] The narrow exception, however,

78. *Lucas*, 112 S. Ct. at 2893 (stating that when the categorical rule is implemented, there is no "case-specific inquiry" into the legislative intent behind the statute).

79. *Id.* at 2909 (quoting O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 257 (1931)).

80. *Id.*

81. *Id.* at 2910-12.

82. *Id.* at 2898 n.12.

83. *Id.*

84. *Id.*

85. *Id.* at 2900-02.

86. In *Keystone*, the dissent argued that a broad application of a nuisance exception (i.e. requiring a statute to prevent "nuisance-like" activity) "would surely allow government much

is the only remaining avenue by which a state can advance its interests in regulating certain activity.

The significance of the nuisance exception is that courts look to common law principles instead of legislative pronouncements.[87] If a court finds that all economically beneficial use of land has been prohibited as a result of a "confiscatory" regulation,[88] the limitation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[89] These principles, though well established, are often antiquated and obscure. As a means of setting land-use policy, it seems inadequate to have such a test to resolve a constitutional issue since it is now harder to update the law than by simple legislation.

In its conclusion, the Court held that David Lucas was entitled to compensation unless his development plans did not comport with existing limitations placed upon his property under South Carolina nuisance and property law.[90] If these uses were not part of his existing "bundle of rights," it could not be said that the state "took" a property interest from him.[91] On remand, the South Carolina Supreme Court must apply the state's version of nuisance law and examine the scope of Lucas' property rights. If, as Justice Scalia expects, they are unable to demonstrate a prior limitation, Lucas must be awarded just compensation.[92]

Although the "nuisance exception" provides a mechanism for implementing state policy, it noticeably cuts back on the broad police

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greater authority" than has been recognized in the past. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting).

The *Keystone* majority, however, refused to impose a narrow nuisance exception in regulatory takings cases. The majority specifically noted that in Miller v. Shoene, 276 U.S. 272 (1928), "the Court did not consider it necessary to weigh with nicety the question whether [the trees at issue] constituted a nuisance according to common law." *Keystone*, 480 U.S. at 491 (interior quotations omitted).

87. *Lucas*, 112 S. Ct. at 2912 n.15 (Blackmun, J., dissenting).

88. A regulation that "prohibit[s] all economically beneficial use of land." *Id.* at 2900.

89. *Id.*

90. *Id.* at 2901-02.

91. *Id.* at 2899, 2902.

92. Justice Scalia stated, "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on [Lucas's] land; they rarely support prohibition of the 'essential use' of land." *Id.* at 2901 (citation omitted). *See also* Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 LOY. L.A. L. REV. 955, 965 (1993) (arguing that common law principles would not prohibit the construction on David Lucas' property).

Both Justice Scalia and Professor Epstein were correct. On remand of *Lucas*, the South Carolina Supreme Court held that the limitations placed on Lucas' property did not inhere in the title itself, and that nuisance or property law in the state do not prohibit development on his land. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

power protected under a *Mugler* analysis or *Penn Central* standard. With little surprise, the nuisance exception to the categorical takings rule has been sharply criticized as being impractical and unsound.[93]

Due to the two substantial changes in the takings doctrine, abolition of the deferential standard of review and a narrow nuisance/property exception, the legislative power to regulate land-use has been drastically reduced if regulation results in total losses of economically viable uses.[94] Courts applying *Lucas* will only examine the private interests and a body of nuisance and property law that may be outdated. Accordingly, *Lucas* favors private property interests at the expense of state regulatory power. It follows, then, that environmental protection advocates or citizen groups, who previously relied on state legislation to effectuate their goals, have lost a powerful weapon.

The lone question that remains is: To what extent will *Lucas* replace the balancing of interests test? The answer to this question depends on how often courts find that distinct property units are left with no economically viable use. Unfortunately, there is no answer to this dilemma, nor an answer to how courts should define the property units at issue.

C. *The Unresolved Problem: Defining the Unit of Property*

A major flaw in the *Lucas* analysis is the Court's failure to resolve a pressing issue regarding the definition of property units. This flaw is of extreme importance because the definition of the property unit acts as a threshold in determining the applicability of *Lucas*' categorical rule.[95] This is due to the fact that the requisite finding of no economically viable use, *Lucas*' triggering mechanism, hinges upon such property definitions.[96] Therefore, as stated above, the relevant question to be asked in analyzing a takings challenge is: what is the unit of property that the claimant argues is left with no economically viable use? Once this question is answered, the court can proceed to analyze the value of the land unit as it exists subsequent to the enactment of a restrictive use regulation or statute. Accordingly, upon this determination, courts will either apply *Lucas* or a hybrid of the *Penn Central* and *Nollan* standards.

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93. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J., dissenting) (arguing that nuisance law should not be "the sole source of state authority to impose severe restrictions"); *id.* at 2918, 2921 (Stevens, J., dissenting) (arguing that the nuisance exception is too rigid, too narrow, and "freezes" state common law); Payne, *supra* note 25, at 317-18 (arguing that nuisance law is too arcane to be useful).

94. Payne, *supra* note 25, at 318 (arguing that a literal application of the categorical rule renders the statutory process essentially meaningless).

95. *Lucas*, 112 S. Ct. at 2913 (Blackmun, J., dissenting).

96. *Id.*

This problem of defining the unit of property at issue in a takings challenge has continuously plagued the Supreme Court. As Justice Scalia noted:

> 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 of the tract as a whole.[97]

"[T]his uncertainty regarding the composition of the denominator in [the] 'deprivation' fraction has produced inconsistent pronouncements by the Court."[98] The deprivation fraction is the way the Court views a takings case.[99] The denominator of the fraction represents the total value of the land unit at issue and "the numerator represents the value after the regulation."[100]

The inconsistent pronouncements alluded to by Justice Scalia were the decisions in *Pennsylvania Coal Co. v. Mahon*[101] and *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[102] In *Mahon*, the Court found that the Kohler Act[103] effectuated a taking of land because it rendered the mining of certain coal deposits commercially impractical.[104] Viewing the seams of coal as a separate unit of property that had been "taken," the *Mahon* Court defined the mineral estate, standing alone, as the denominator of the fraction. Upon this finding, the Court ignored the surface estate, and any necessary correlation between it and the coal deposits, for purposes of defining the affected property unit.

In *Keystone*, a similar regulation was challenged[105] and found not to effectuate a compensable taking.[106] The difference in results between the two cases was the *Keystone* Court's definition of a broader property denominator. In finding that the mineral estate was useless without the surface estate,[107] and thus not sufficiently an independent parcel of land, the Court held that the affected seams of coal did not represent a "separate segment of property for takings law purposes."[108] Accordingly, the

97. *Id.* at 2894 n.7.
98. *Id.*
99. *Id.*
100. Ballenger, *supra* note 24, at 935.
101. 260 U.S. 393 (1922).
102. 480 U.S. 470 (1987).
103. PA. STAT. ANN. tit. 52, § 661 *et seq.* (1966).
104. *Penn Coal*, 260 U.S. at 414.
105. The statute at issue in *Keystone* was the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52, § 1406.1 *et seq.* (Supp. 1986).
106. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).
107. *Id.* at 502.
108. *Id.* at 499.

determination of whether or not a taking occurred depended on the definition of the property unit.

In *Lucas*, the Court did not resolve this pressing issue. The Court merely stated that the answer lies within state laws of property.[109] Each state has its own principles of property, as well as its own statutory and common law. Therefore, in the fifty different states, there may be inconsistent property definitions and different results under Fifth Amendment scrutiny. Since the definition of the property unit is of crucial importance under this categorical rule, the application and viability of *Lucas* is still uncertain. A determination in one state that a parcel of land is sufficiently independent to stand alone may be different than a determination in another state. In part, takings claimants will experience a "luck of the draw." Some courts will recognize smaller segments of property while others may only view property in its broadest terms, accepting entire holdings or aggregates of property as distinct units.

If state courts recognize that smaller units of property are identifiable land units for takings law purposes, it is much easier for a takings claimant to show that a taking has occurred.[110] When property is viewed in a broader fashion, as in *Penn Central* and *Keystone*,[111] a court will rarely find that the categorical rule applies since the court can always find at least some existing economically viable use. The logic behind such a proposition is quite simplistic and easily illustrated by the following example.

Suppose that an individual owns a 100-acre parcel of land that he would like to divide into ten-acre plots and develop ten homes, one on each plot. A court's refusal to recognize each ten-acre parcel as a separate property segment would destroy most chances of succeeding on the merits of a takings claim. In theory, the owner would try to conceptually sever each ten-acre plot from the main body of land. If the court refuses to acknowledge the severance, the main body of land must be looked at as the denominator in a takings claim.

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109. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

110. "The larger the denominator in the fraction, the less likely it is that the percentage of value lost to regulation will approximate zero, thus resulting in a taking." Ballenger, *supra* note 24, at 935. It logically follows that the smaller the unit of property representing the denominator, the more likely it is that a statute will render the residual value close to zero. The only way for the fraction to ever reach zero, or sufficiently close thereto, is for the numerator, or residual value, to equal or approximate zero. This signifies the "total deprivation" intended to be covered by *Lucas*.

111. In *Penn Central*, the Court refused to sever Penn Central's air rights from the entire city block. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978). This city block, containing both under- and over-ground structures, represented the claimant's aggregate holdings. In *Keystone*, the Court refused to recognize coal deposits as separate from the mining company's aggregate holdings, including the surface and mining estates. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498-500 (1987).

Further suppose that a zoning ordinance is enacted that requires fifty-acre zoning for land development and that land development is the only profitable land use in the area. The ordinance prohibits the building of the homes on the ten-acre plots. If a court views each ten-acre plot as severable from the main body or as an independent unit, each ten-acre plot, in this over-simplified example, would be left valueless. On the other hand, if a court refused to define each ten-acre plot as the denominator for takings purposes, the court would focus on the entire 100-acre parcel as the land unit. Therefore, under this analysis, the court must conclude that two homes could be built, one on each fifty-acre parcel.

When viewed in this broad sense, the unit of property still has an economically viable use and has not been "taken." Although the landowner could not maximize his profits, as he would by building the desired ten homes, he could earn a reasonable return on his investment. Accordingly, at least in states that view an owner's aggregate holding or total interest in adjacent land parcels as the denominator of the property unit, *Lucas* will seldom apply.[112]

In short, the Court's failure to resolve this seemingly critical issue leaves many questions unanswered regarding the significance of the decision. Although Justice Scalia argued that the categorical rule will only apply in relatively rare situations, the concerns expressed by Justices Blackmun and Stevens are certainly realistic. In the post-*Lucas* period, landowners will attempt to show that smaller segments of property should be treated as distinct units of property. If courts accept these arguments and analyze a takings claim in relation to this smaller unit, it is much more likely that *Lucas* will have a significant impact.

This Note proceeds under the presumption that *Lucas* will have a drastic impact on future takings cases and that the decision may have sounded the deathknell for the balancing of interests test. This presumption is based on the fact that recent Supreme Court decisions are moving in the direction of enhanced protection of private land interests. This power necessarily comes at the state's expense. The remainder of this Note analyzes the position of environmental advocates after *Lucas*. The Note highlights the ways in which the balancing of interests test will be utilized most often. The balancing test is more equitable since it considers all relevant factors, including the protection of our nation's long-range environmental interests. The following analysis features discus-

112. *See* Gardner v. New Jersey Pinelands Comm'n, 593 A.2d 251 (N.J. 1991) (holding that a 217-acre farm is not divisible into independent units of ten-acre farmettes for takings law purposes).

sions of interest group litigation, state nuisance law, and transferable development rights ("TDRs").

III. Environmental Protection Through Land Regulation: Analyzing Cost-Benefit Factors

The development of the modern takings doctrine encompassed the decision of important issues regarding alleged harmful land uses and property value destruction. Regulatory measures challenged under the Fifth Amendment purported to achieve certain goals, most importantly, curtailing both current and future harms to society. Some cases demonstrated that when states seek to prevent current harms with immediate manifestations, it is relatively easy to identify the imminent danger involved with the contemplated land use.[113] Regulating land to prevent future danger, or harm that manifests itself at some future date, presents a trickier situation. In such instances, it is more difficult to identify a general pattern in the substantive goals of regulatory plans.[114] Most statutes or regulations that seek to protect our nation's environment fall within this second category of cases. In regard to environmental concerns, the danger may be imminent, but the manifestations of the danger may not show for some time.

A fundamental principle in the United States is that legislative authority and action is the primary "framework" for environmental protection.[115] Legislative decisions to enact environmental protection plans are not easy since "[t]here is a constant tension between economic activity and environmental purity."[116] Legislators must engage in analyses of the costs and benefits involved in the regulatory plan. Accordingly, a "self-evident, but most important proposition" is that "[t]he perennial determination in environmental policy is whether the social costs of a particular regulatory action are worth the benefits received."[117] As Justice Scalia stated in a recent essay for the *Houston Law Review*, "[C]ost

113. *See, e.g.*, Miller v. Shoene, 276 U.S. 272 (1928) (challenged ordinance sought to prevent the imminent infection of nearby apple orchards).

114. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (challenged regulation sought to protect public access to the beach but did not seek to prevent an imminent harm to the area); Agins v. Tiburon, 447 U.S. 255 (1980) (challenged regulation sought to prevent future harms resulting from urban development); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (challenged Act sought to protect and preserve landmark sites in an attempt to provide future benefits to the city).

115. Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 Env. Aff. 519 (1992).

116. F. Henry Habicht II, *Responses to Justice Antonin Scalia*, 24 Hous. L. Rev. 111 (1987). *See also* Antonin Scalia, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 Hous. L. Rev. 97, 101 (1987).

117. Habicht, *supra* note 116, at 111.

benefit analysis is simply a weighing of all the desirable effects of a proposed action against all the undesirable effects, whether or not they are susceptible of being expressed in economic terms."[118]

In light of *Lucas* and the Act, several modifications must be made by legislatures in considering the costs and benefits of newly proposed measures. A fundamental consideration, in addition to the qualitative factors regarding future societal benefits from land regulation, is the economic consequences of environmental statutes. When Congress passes environmental laws, they "simultaneously embody national goals and rely on states to implement federal guidelines through the exercise of state police powers."[119] Therefore, as *Lucas* apparently cuts back on previously acceptable broad police power, legislatures cannot rely as heavily on police power justifications for state-created responses to federal environmental protection laws.

For example, South Carolina's Act was a state response to a federal environmental protection plan. *Lucas* demonstrates that the United States Supreme Court is unwilling to accept that states can regulate in a nearly confiscatory manner and justify such action with their inherent police power. In the post-*Lucas* era, legislators must now add quantitative economic costs in their analysis of qualitative costs and benefits for environmental protection statutes. Some states must now contemplate compensating landowners, such as South Carolina in regard to David Lucas. Accordingly, there are definite and palpable economic costs for environmental statutes that prohibit all economically viable land uses.

The *quid pro quo* for cutting back on broad police power and the resulting economic costs is less legislative power and discretion in protecting our environment. There is one alternative, however, as enumerated by *Lucas*' lone exception. States can still justify, under their police powers, enforcement of federal environmental plans if the land uses prohibited by the regulatory measure constitute a nuisance under the existing law of the state. Accordingly, for those segments of our population that advocate environmental protection, *Lucas* poses a tricky situation that requires some changes in strategy.

As a result, public interest groups or citizen groups that advocate environmental protection must respond to *Lucas* by altering their old

118. Scalia, *supra* note 116, at 101. Cost-benefit analysis encompasses either quantitative or qualitative factors. A quantative analysis of costs and benefits requires the determining entity to select the alternative which can be implemented at the least cost per unit of benefit. *See id.* In other instances, when decisions must be made on non-economic factors, quantification of costs and benefits is less helpful. *See id.* One such instance is the legislative determination of whether or not to enact legislation that provides future benefits to society at some cost that is immeasurable in purely economic terms.

119. Wald, *supra* note 115, at 521.

strategies. They must either utilize the nuisance exception to their advantage or prevent courts from applying *Lucas* in the first place.

The remainder of this Note explores how environmental protection or citizen groups can respond to *Lucas* in an effort to restore broad legislative power in protecting our nation's resources. These citizen groups can litigate claims that result in judicial decisions that prohibit, under state property or nuisance law, land development in certain "target" areas. These suits should try to duplicate the effects of broad-reaching statutes intending to achieve the same. These groups can lobby state legislatures for statutes that broaden state nuisance law. The easier it is to show that a land use is a nuisance, the more likely the state can justify its action through *Lucas*' exception. Finally, they can lobby for legislation that empowers administrative agencies to award transferable development rights (TDRs) to landowners who are unable to develop their own parcels due to a regulatory plan. TDRs will ensure that a landowner retains at least some economically viable use for his property. If this occurs, subsequent takings claims filed by such landowners that are still unsatisfied will be decided under a balancing test. That test is more favorable to environmental groups since it considers both private and public interests, and generally defers to the wisdom of the legislature.

IV. ENVIRONMENTAL INTEREST GROUPS AS LITIGATORS IN THE POST-*LUCAS* ERA

Rather than simply lobby state legislatures for environmental statutes that may be too costly as a result of *Lucas*, environmental interest groups can play the role of litigator. At first glance, this solution seems like a powerful, efficient method to combat *Lucas* and preserve broad police power. As a primary goal, such groups must attempt to win lawsuits that would act in the spirit of legislation intended to achieve the same results—mostly, preventing development in environmentally sensitive areas.

Using the *Lucas* scenario as an example, a typical citizen suit would seek an injunction against David Lucas under a nuisance theory. In the alternative, a suit may be brought that seeks a declaratory judgment that Lucas' intended land uses constitute a nuisance. Even if Lucas succeeded in proving that he lost all economically viable uses for his land, the state could still prohibit all development on his land since his intended use was contrary to the state's nuisance law. In short, a plain meaning of the *Lucas* exception is that state police power justifications can successfully defeat a takings claim where the intended land use constitutes a nuisance. In a perfect world, citizen group suits would operate well under this framework.

Unfortunately, there are significant limitations on citizen groups that attempt to litigate claims in the spirit of environmental protection. First, a citizen group must overcome Article III standing requirements. Second, citizen groups must overcome the costs of litigation and "free rider" organizational difficulties. Finally, in regards to the type of suits such groups could bring forth, nuisance claims or declaratory judgment claims, there are practical difficulties in achieving the intended broad-reaching results and further problems convincing courts to grant the declaratory relief.

First, interest groups are likely to encounter problems with justiciability[120] since Article III of the Constitution limits federal courts to deciding "cases and controversies"[121] between proper parties.[122] Accordingly, in order to present a justiciable claim, interest group plaintiffs must allege the requisite standing requirements: injury-in-fact, causation, and redressability.[123]

If an environmental group lacks standing, a court has no jurisdiction to decide the case, regardless of its significance. Landmark cases depict this inherent difficulty in interest group litigation. In *Sierra Club v. Morton*,[124] a public interest group was denied standing because it could not specify any concrete injury-in-fact suffered by its members.[125]

The Sierra Club, an environmental interest group seeking to protect "the national parks, game refuges and forests of the country,"[126] sued the United States Forest Service to prohibit the construction of a ski resort in a California mountain region.[127] The group alleged that the resort

120. In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court elaborated on justiciability and the concept of standing, regarding their uncertain scope and meaning. *Id.* at 95. The Court stated that "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Id.* (footnotes omitted). Furthermore, claims that are not ripe for judicial review are not justiciable. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2891 (1992).

121. *Flast*, 392 U.S. at 94.

122. *Id.* at 99-101.

123. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40-46 (1976). Professor Steven L. Winter argued that courts essentially analyze the merits of an ordinary tort case by focusing on the injury-causation-redressability issues. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1477 (1988). He concluded, "Standing law and tort law share the same animating genes—that is, the same conceptual schema." *Id.* Because under this format, courts are required to decide an issue that is essentially the merits of a tort case on a record that is incompletely developed, the logical result of this "truncated process" is "unsatisfactory opinions and bad decisions." *Id.* at 1477-78.

124. 405 U.S. 727 (1972).

125. *Id.* at 731, 741 (affirming the Ninth Circuit's decision that the Sierra Club did not make the requisite allegation of direct injury to any of its members).

126. *Id.* at 730.

127. *Id.*

would adversely affect the aesthetics and ecology of the area.[128]

Despite the important public interest advanced by the Sierra Club, the Court found that the plaintiffs lacked standing. The Court ruled as such because it imposed a strict injury-in-fact requirement.[129] As indicated by this result, standing requirements drastically limit the ability of citizen groups to bring actions on behalf of the public's best interests, interests in the short and long-run implications of our activities.

Professor Winter, in a recent, well-acclaimed article, argued that the standing doctrine is more a creation of Justices Brandeis and Frankfurter and less of an historical formulation of law.[130] Furthermore, he concluded that modern concepts of standing have "disordering effects on our legal analysis which produce bad decisions on the merits."[131] Winter argued that individuals acting for the good of the whole, or community, should not be deprived of their ability to do so.[132] Accordingly, Winter advocates a more flexible standing doctrine that would mandate judicial determination of important public issues, such as those in environmental cases.[133] Valid claims seeking to advance a legitimate public purpose should be allowed to proceed on the merits. One such mechanism to allow cases to proceed is liberalizing the injury-in-fact requirement through congressional grants of standing to sue.[134] This flexibility is achieved by more advanced concepts of injury. These conceptions must focus on present injury with future manifestations, not just present injury with immediate manifestations.

In one instance, the Court appeared to adopt a more flexible

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128. *Id.* at 734.

129. The Court recognized that aesthetic and environmental well-being are interests "deserving of legal protection through the judicial process," but "the 'injury in fact' test requires more than an injury to a cognizable interest." *Id.* at 734-35. A less stringent approach would result in judicial grants of standing so long as a legitimate interest would be injured. The focus would be more on the interests at stake and less on the parties. *See* Winter, *supra* note 123, at 1470 (" 'Standing' is and can only be a question about the legal rights at stake."). Cases decided under this approach must still meet the minimum requirements set forth in *Flast v. Cohen* in that the dispute must be "presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. 83, 101 (1968).

130. Winter, *supra* note 123, Parts IV, V.

131. *Id.* at 1459.

132. Professor Winter concluded, "No longer need we always stand alone, apart from one another. Instead, we may stand up for one another; we may stand by each other." *Id.* at 1515.

133. *Id.* at 1491.

134. The Supreme Court divided the standing doctrine into two branches, "prudential limitations of standing" and "the constitutional 'core' of standing." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983). In regard to the first branch, Congress or the Court can broaden or restrict findings of standing. In relation to the constitutional "core" of standing, all parties, regardless of congressional or judicial intent, must allege the requisite injury-in-fact, causation, and redressability. *Id.*

approach in ruling on an interest group standing issue. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[135] the Court found that an interest group had standing to sue although the plaintiff's claim appeared strikingly similar, in terms of harm alleged, to that of the Sierra Club.[136] In *SCRAP*, a group of law students brought suit because the Interstate Commerce Commission ("ICC") failed to prepare an environmental impact statement before allowing the continuation of a surcharge on railroad freight rates.[137] Since the surcharge would lead to an increased consumption of natural resources, some of which would come from the Washington, D.C. area,[138] the Court found that the students who used the forests, streams, and mountains in the area would be injured by the adverse impact to the environment.[139] Therefore, the Court concluded that the plaintiff interest group had alleged a concrete injury-in-fact and had standing to bring its claim.

Although the alleged injury to society in *SCRAP* was similar to that claimed in *Sierra Club*, only the former met the technical requirements of the standing doctrine. Accordingly, it appears that the injury-in-fact requirement was applied more liberally in *SCRAP*, possibly due to the Court's "willingness to discern breathlessly broad congressional grants of standing."[140] Environmental interest groups must rely on the Court's treatment in *SCRAP* to overcome this inherent limitation on an interest group's ability to litigate claims.[141] Some states may attempt to liber-

135. 412 U.S. 669 (1973).

136. *Id.* at 678. The *SCRAP* Court, however, apparently perceived the two complaints as "very different." *Id.* at 688. The Court focused on the tangible injury suffered by the members and its nexus to the complaint. In contrast, the Sierra Club presented a claim that focused on harm to the environment. Such harm is more attenuated to defined individuals than that alleged in *SCRAP*. Accordingly, consistent with the principles behind the standing doctrine, the Court denied standing to the Sierra Club and refused to allow it to bring a suit that was essentially on behalf of the public in general.

The *SCRAP* Court pinpointed the difference between the two cases as the ability for the *SCRAP* plaintiffs to identify "perceptible harm" that distinguished them from the public in general. *Id.* at 689. The Court ultimately found that SCRAP had standing to sue based on their properly plead complaint that identified their members that used the natural resources in question, rather than just identifying use of the environment in general.

137. *Id.* at 678-79.

138. *Id.* at 678.

139. *Id.* at 683-90.

140. Scalia, *supra* note 134, at 898.

141. Justice Scalia suggested that the Court's adherence to the principles established in *SCRAP* will not endure. *Id.* Viewing the standing conundrum in this context, there is an obvious tension between the Scalia approach and the Winter approach. Where Justice Scalia contemplates judicial limitation on broad congressional intentions to grant standing, Professor Winter advocates a system that is more flexible. Winter concludes that a system of adjudication that recognizes both private and public rights "provides one legal mechanism through which we can seek and attempt to maintain a sense both that we are individuals and that what happens to varied communities upon which we depend matters very much to each of us." Winter, *supra* note 123, at 1515.

alize standing requirements by passing statutes that grant standing to members of the general public, to sue on the public's behalf.

Second, even if an environmental group can present a justiciable claim, there is another major hurdle standing in its way. There is no guarantee that the group will have the financial capacity to proceed through the costly litigation process.[142] Interest groups have trouble with "free rider" problems as well as difficulties in meeting organizational costs. "The free rider problem refers to the issue of why an individual should join the group . . . if he cannot be excluded from the benefits" that the group obtains.[143] Accordingly, since "free riders" provide no contribution to an organization's funds, the costs involved with formulating a campaign are sometimes unobtainable. Professors Daniel Farber and Philip Frickey, two leaders in the field of public choice theory, argued that due to "free rider" problems, it is nearly impossible to organize very large groups of individuals.[144] Stated another way, the entire country benefits from better environmental quality. Therefore, it is a "public good" because it "is enjoyed in equal amounts by everyone in society."[145] When confronted with an opportunity to expend their private resources for environmental causes, most individuals opt against the choice to contribute organizational funds and seek a "free ride" on the shoulders of contributing group members.

The rising costs of litigation and a lack of necessary funding may render this option for environmental groups impractical. As our nation's economy continues to struggle, financial contributions to interest groups is sure to wane. Economic considerations are of vital importance to any plaintiff groups seeking to play the litigator role.

Third, even if citizen groups overcome organizational and litigation costs, there is a major problem in deciding whom to sue and under what claim of right. Most environmental citizen suits are brought directly under existing state or federal statutes.[146] In order to nullify the effects

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Accordingly, flexibility in standing principles enables environmental groups to advance important "public rights" that positively influence our communities.

Unfortunately, a recent case that focused on environmental group standing may have sounded a strong victory for the Scalia approach. *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992) (plurality opinion). Regarding *Lujan*, however, it has been argued that due to its "multiple opinions and multiple lines of reasoning . . . it is impossible to predict with confidence the scope and effect of the holding." Richard J. Pierce, Jr., Comment, Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1188 (1993).

142. *See* Wald, *supra* note 115, at 526.

143. Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 342 n.18 (1988).

144. Farber & Frickey, *supra* note 50, at 892.

145. JOSEPH J. SENECA & MICHAEL K. TAUSIG, ENVIRONMENTAL ECONOMICS 86 (3d ed. 1984).

146. *See, e.g.*, Friends of the Earth v. Weinberger, 562 F. Supp. 265 (D. D.C. 1983) (interest group suit brought under National Environmental Protection Act); United States v. Metropolitan Dist. Comm'n, 679 F. Supp. 1154 (D. Mass. 1988) (interest group suit brought under Federal

of *Lucas*, citizen suits must attempt to identify certain land uses as nuisances. Such suits, however, would normally not have an underlying stautory claim. Despite this fact, if these suits are successful, they would open the door for broad-reaching environmental statutes that would prohibit these activities that are predetermined as nuisances.

With this goal in mind, there are two weapons that are useful in these citizen suits. First, injunctive relief in accordance with suits brought under nuisance law. Second, declaratory relief in accordance with suits seeking declarations that certain land uses are nuisances.

Environmental groups can try to bring nuisance actions against landowners that are contemplating development projects in environmentally sensitive "target" areas. In *Sierra Club v. Block*,[147] an environmental interest group sought, and obtained, a preliminary injunction preventing the cutting of timber in five Texas wilderness areas. The court granted Sierra Club's request for an injunction because it determined that the interest groups would likely succeed on the merits of a claim brought under the National Environmental Policy Act.[148]

In the hypothetical nuisance claims contemplated as responses to *Lucas*, there would be no such underlying claim based on a federal regulation. Therefore, the only way to bring the nuisance suit an obtain an injunction would be to wait until a development project was underway. If, in fact, a citizen suit successfully prevented a landowner from building, there would be little precedential value in the decision. Therefore, the decision would only secure narrow positive effects. In order to achieve a widespread result, the citizen group must sue each and every landowner that is seeking to develop within the target area. Each nuisance claim must be litigated fully, and independently, because each nuisance case rests on the particular facts at issue.[149]

In conclusion, seeking a string of injunctions to prevent development in the target area is not a realistic option to achieve long-term success with widespread results. This "piecemeal" approach would be too costly for citizen groups to implement, and a more broad-reaching solution should be found.

One mechanism to achieve broad-reaching positive results is to

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Water Pollution Control Act); Massachusetts Pub. Interest Research Group v. ICI Americas Inc., 777 F. Supp. 1032 (D. Mass. 1991) (interest group suit brought under provisions of the Clean Water Act); New York Pub. Interest Research Group, Inc. v. Limco Mfg. Corp., 697 F. Supp. 608 (E.D.N.Y. 1987) (interest group suit brought under Federal Water Pollution Control Act).

147. 614 F. Supp. 134 (E.D. Tex. 1985).

148. *Id.* at 135.

149. Town of Preble v. Song Mountain, Inc., 308 N.Y.S.2d 1001, 1010 (N.Y. Sup. Ct. 1970); Reid v. Brodsky, 156 A.2d 334, 338 (Pa. 1959); Shields v. Wondries, 316 P.2d 9, 13 (Cal. Dist. Ct. App. 1957).

utilize declaratory judgment suits to prevent development in the entire target area. Rather than sue individual landowners, citizen groups should sue all landowners that have property within the target area. The suit would be a form of reverse class action, with the defendants comprising the class. Such an approach would produce advantages on both sides of the dispute.

First, the citizen group would have an easier time presenting a ripe claim. Chances are, at any given time, there would be at least one landowner in the class contemplating a development project within the target area. So long as at least one landowner within the class is sufficiently close to beginning a project, the clam would be ripe for adjudication.[150]

Second, a further advantage is secured by the citizen group since the first suit brought before the court would have a broader reaching collateral estoppel effect against other class members.[151] This, in turn, produces a more cost-efficient method of bringing suits, to both the plaintiff and defendant class.[152] For the citizen group, it is much less costly to bring one suit as opposed to many. For the defendant class, it is more cost efficient for litigation costs to be spread among all the class members rather than be borne solely by each individual member.

In order to successfully obtain declaratory relief, the citizen group must first satisfy Article III's justiciability requirements.[153] In the situation contemplated above, a defendant class action against landowners in a target area, the two primary limitations would be standing and ripeness.

Some declaratory judgment suits present larger problems with standing than others. In one type of declaratory judgment suit, a party that anticipates being haled into court in a traditional coercive lawsuit seeks declaratory relief so that the court can declare the respective rights of the parties.[154] In such a case, there is little doubt that the parties would have standing since they are actually defendants in a coercive suit that has yet to be filed.

In the case of the citizen suits, there is no such coercive lawsuit in which the group would be named as a defendant.[155] Therefore, such suits present complex standing issues, not unlike the issues contem-

150. *See* 26 C.J.S. *Declaratory Judgments* § 28 (1956).

151. Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978).

152. *Id.*

153. Collin County v. Homeowners Ass'n (Haven), 915 F.2d 167, 170-71 (5th Cir. 1990).

154. *E.g., id.* at 172; Kansas City Power & Light Co. v. Kansas Gas & Elec. Co., 747 F. Supp. 567, 572 (W.D. Mo. 1990).

155. In the environmental cases, any coerciveness must be on the part of the interest group because members of the general public would have little to gain by suing such a group.

plated in the earlier discussion of interest group standing.[156] Regarding standing and the declaratory judgment suit, courts should focus on the principles enumerated by Professor Winter and return to the "public rights" model of standing to broaden conceptions of injury-in-fact.[157]

Courts should recognize a more liberal concept of injury-in-fact, one that is more suitable in dealing with complex environmental issues. Primarily, courts should accept, for injury-in-fact purposes, present injuries that have future manifestations. In environmental issues, such future manifestations of injury are part of the standard scenario. Injuries to our environment that occur today are sufficiently concrete regardless of whether the manifestations are apparent today or at some time in the future. By adopting this approach, courts will accept that damage to the environment, even if not presently manifesting itself, is still a present injury, cognizeable for injury-in-fact purposes. Therefore, under a *SCRAP* or Winter model of liberal, environment-conscious standing, interest groups can bring these declaratory judgment suits that seek to prevent current harm with future manifestations.

In addition to standing problems, citizen groups that seek declaratory judgments may have ripeness problems as well.[158] At the time the hypothetical suit would be brought by the citizen group, there must be at least one landowner whose intentions to develop provide the basis for a current case or controversy. The defendant class action concept, however, may limit the applicability of ripeness concerns if the class is broad enough that the reviewing court is convinced that at least one landowner's intentions make the controversy ripe for review.

At some point, ripeness concerns and standing concerns intersect, leaving the reviewing court with a dilemma as to whether at a certain point in time, a controversy exists under which there is a present, cognizable injury. Accordingly, the Article III dilemma may severely undermine an interest group's ability to use declaratory judgments to advance broad-reaching environmental policy.

Another consideration regarding declaratory relief is a judicially imposed constraint that such relief will not be issued unless certain "basic principles" are satisfied.[159] "The most important of these principles are the adversity of the interest of the parties, the conclusiveness of the judicial judgment and the practical help, or utility of that judgment."[160] Most significant to the contemplated citizen suits is the

156. *See supra* notes 120-141 and accompanying text.

157. For a discussion of the public rights model, see Winter, *supra* note 123, at 1394-1417.

158. *See generally* 26 C.J.S. *Declaratory Judgments* § 28 (1956).

159. *See* Step-Saver Data Sys., Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990).

160. *Id.*

requirement that the issuance of the declaratory judgment would be "conclusive to define and clarify the legal rights or relation of the parties."[161] One issue is the extent to which a declaratory judgment would finalize any controversy surrounding intended land uses within the target zone. If a landowner could still challenge a regulation enacted subsequent to the declaratory judgment action, the disposition of that takings claim would symbolize the absolute finality of the dispute. With that in mind, courts may feel awkward granting declaratory relief when it is likely that affected landowners would still need judicial assistance in deciphering the boundaries of their rights.

Finally, despite the presence of these basic principles, the final decision to issue a declaratory judgment is within the discretion of the trial court.[162] Under this standard, however, the trial court has broad discretion to deny declaratory relief even if the basic principles are met. This can also act to limit the effectiveness of such efforts taken by citizen group litigators.

In conclusion, although interest group lawsuits have been successful in some contexts in the past, they are probably not the best solution to counteract *Lucas*. Accordingly, interest groups should focus their attention on modifying their lobbying practices to either expand *Lucas*' enumerated exception or to avoid the case entirely.

V. ENVIRONMENTAL GROUPS AS LOBBYISTS SEEKING MODIFICATION OF STATE NUISANCE LAW

A second solution to the problem created by *Lucas* is for environmental groups to continue, but modify, their lobbying practices. The thrust of *Lucas* is essentially repelled if legislators statutorily alter the relevant considerations in applying the exception to the categorical takings rule. Accordingly, the goal is to convince legislators to statutorily alter nuisance law, enabling a state to more readily defend its regulatory measures as valid exercises of nuisance-preventing police power. A broader state nuisance doctrine affords legislators more discretion regarding restrictive-use statutes.[163] If the procedural posture of a takings case reached the stage in which a court must determine the applicability of the nuisance exception, an expansive nuisance statute would provide a state with a winning argument that the intended land uses do

161. *Id.* at 648.

162. *E.g.*, Telectronics Pacing Sys., Inc. v. Ventritex, Inc., 982 F.2d 1520, 1526 (Fed. Cir. 1992); Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 682 (7th Cir. 1992); ACLU Found. of S. Cal. v. Barr, 952 F.2d 457, 466 (D.C. Cir. 1991); Minnesota Mining and Mfg. Co. v. Norton Co., 929 F.2d 670, 672 (Fed. Cir. 1991); Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1511 (D. Ariz. 1990).

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

not inhere within the landowner's title. As mandated by *Lucas*, the state's argument will succeed because the restrictions placed upon the land parcel existed prior to the challenged legislation.[164]

Some states have enacted broad nuisance statutes to supplement their common law. Each state used slightly different language in defining "nuisance." In Louisiana, a landowner cannot engage in activity on his property "which may deprive his neighbor of the liberty of enjoying his own [property], or which may be the cause of any damage to him."[165] Alabama has a somewhat broader concept of nuisance, and defines it as "anything that works hurt, inconvenience or damage to another."[166] The Alabama statute sets forth a reasonable person test in evaluating whether or not something causes an inconvenience to the neighboring landowner.[167] The state of Washington enacted two provisions that establish causes of action for nuisance.[168] California also uses nuisance statutes to maintain broad conceptions of nuisance. That statute provides that "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."[169] Other states, such as Texas and New York, have recognized that state legislatures have the power to alter the common law of nuisance through statutory creations.[170]

As a general rule, these states have all recognized that legislation can only define as nuisance that which is, in fact, a nuisance.[171] At least in New York, the "power of the legislature to enlarge the category of public nuisances is not limited to those known at common law."[172]

Statutes that broaden nuisance law will help nullify the effects of *Lucas*' pro-plaintiff rule by broadening its exception. The result would be a renewed opportunity for environmental groups to promote the good

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164. The merit of this argument depends, in part, on how literally Justice Scalia meant for this opinion to be read and how literally it was to be applied. Under a strict reading, *Lucas* requires that proposed restrictions adhere in the principles that nuisance law "already place upon land ownership." *Id.* at 2900. Legislation avoids *Lucas* if passed in two steps. The first step can adjust nuisance or property law, putting in place the restrictions according to state law. The second step would then regulate the land by prohibiting certain uses within the bounds of the statutes passed in the first step.

165. LA. CIV. CODE ANN. art. 667 (West 1980).

166. ALA. CODE § 6-5-120 (1993).

167. *Id.*

168. WASH REV. CODE ANN. § 7.48.010, and § 7.48.120 (West 1992).

169. CAL. CIVIL CODE § 3479 (West 1970).

170. *See* 81 N.Y. JUR. 2d *Nuisances* § 9 (1989); 54 TEX. JUR. 3d *Nuisances* § 8 (1987).

171. *See, e.g.*, Ace Tire Co. v. Municipal Officers of Waterville, 302 A.2d 90, 98 (Me. 1973); Biber v. O'Brien, 32 P. 425, 427 (Cal. Dist. Ct. App. 1934). *See also* 47 CAL. JUR. 3d *Nuisances* § 4 (1979); 54 TEX. JUR. 3d *Nuisances* § 8 (1987).

172. 81 N.Y. JUR. 2d *Nuisances* § 9 (1989).

of society by advancing land development control and protection in environmentally sensitive areas.

Unfortunately, although the *Lucas* majority did not specify that state legislation could not manipulate takings law as such, there is a strong argument against the previously enumerated suggestion. Justice Stevens argued in dissent that *Lucas* effectively "freezes" the common law.[173] He interpreted the majority opinion as mandating a constant application of nuisance and property law that cannot be altered with changing societal circumstances.[174] Accordingly, under this view, nuisance and property law must remain static—unable to be changed through statutory creations.

Recent Supreme Court decisions, however, reflect that as society changes, the law must change as well.[175] Under this rationale, it would be imprudent to analyze takings cases in relation to ancient law that was formulated on circumstances which have long since changed. New laws must reflect new societal problems brought forth by changed circumstances, technology, and environmental problems. For example, as our comprehension of environmental damage increases, state nuisance laws must appereciate the characteristics of such damage. One such characteristic that should be reflected in newly enacted statutes is that present nuisances exist when harm is apparent, though not manifesting itself for some time. This will ensure that nuisance law encompasses all activities that rightly fall within the purposes behind such a doctrine.

Furthermore, state nuisance law is ill-suited as a touchstone in deciding complex land-use matters unless there is a device that will ensure fair applications of the doctrine as society's needs change. In *Park Center Inc. v. Champion International Corp.*,[176] a federal district court stated that it was necessary to construe an Alabama nuisance statute broadly to effect the statute's purpose—nuisance law that evolves with changed circumstances.[177] Other courts need to follow this approach as well, deferring to nuisance statutes and interpreting them as broadly as possible.

It is essential for courts to maintain a flexible approach to nuisance

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173. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2921 (1992).

174. *Id.* at 2921-22, 2922 n.5.

175. As Justice Stevens argued in dissent, "We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government 'the largest legislative discretion' to deal with 'the special exigencies of the moment,' it is imperative to do so today." *Id.* at 2922 (citation omitted).

Professor Sax noted, however, that "[t]he tone and rhetoric of *Lucas* seems deliberately calculated to cut off arguments that changing times create changing needs." Sax, *supra* note 23, at 945.

176. 804 F. Supp. 294 (S.D. Ala. 1992).

177. *Id.* at 302.

law since it has long been a difficult area to define and apply. One court called nuisance law "the great grab bag, the dust bin, of the law.[178] Needless to say, " 'nuisance' is a term which does not have a fixed content either at common law or at the present time."[179]

In *People v. Lim*,[180] the California Supreme Court addressed the difficulties involved with nuisance law. The court concluded, "In a field where the meaning of terms is so vague and uncertain it is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity."[181]

Considering these dynamics of nuisance law, and those stated in *Lucas*, states must be allowed to update nuisance law as they see fit. Even though a land use was not a nuisance yesterday, it does not necessarily follow that it is not a nuisance today. In light of today's knowledge, the utilities and injuries of a given land use may be interpreted differently than in the past. Accordingly, *Lucas* should not be interpreted as requiring a constant application of nuisance law. Instead, it should be interpreted as requiring state statutes to specifically name the evils that the statute is intending to cure. So long as the enumerated means and ends of the statute are reasonable, courts should defer to their language. If legislation updates nuisance law by establishing broad parameters, as in Alabama and California, *Lucas*' exception will have greater applicability. This, in turn, would give broad police powers to state governments.

In conclusion, this solution to the problems confronting environmental groups in the post-*Lucas* period will effectively expand the nuisance exception. Although this solution will work in jurisdictions that desire broad nuisance law to enable comprehensive environmental protection, other jurisdictions may be reluctant to do so. Therefore, environmental groups should not rely on this strategy as their sole mechanism to nullify the impact of *Lucas*.

VI. Environmental Groups as Lobbyists Seeking TDR Plans to Preserve Landowners' Economically Viable Uses

The final specific strategy is for environmental groups to lobby legislators to enact statutes that provide for an administrative remedy. In

178. Awad v. McColgan, 98 N.W.2d 571, 573 (Mich. 1959). The court further stated that nuisance "is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others." *Id.*

179. People v. Lim, 118 P.2d 472, 476 (Cal. 1941).

180. *Id.*

181. *Id.* at 476.

accordance with this remedy, an administrative agency would be empowered to develop a transfer of development rights ("TDR") program to coincide with a regulatory scheme. Under such a program, landowners will retain an economically viable use of their land in the form of a marketable TDR.[182] Thus, *Lucas*' categorical rule will be inapplicable since the requisite finding of "no economically viable use" will be lacking.[183] Although there are pros and cons to the TDR plan, the benefits should be sufficient to render this option the most practical response to *Lucas*.

Under a TDR program, a landowner's right to develop is severed from the remaining rights within the metaphorical bundle.[184] The right to develop, although prohibited within the burdened tract that exists inside a regulated area, can be sold to another developer who owns property within an area designated to "receive" TDR's.[185] Accordingly, a burdened landowner retains some economic value of his tract despite a prohibition on the development of his own land. This economic value represents a return of value on any investment made by the landowner. Sometimes this return will result in a profit, while other times, it may result in a slight loss. Regardless, as far as the Supreme Court is concerned, the land has definitely not lost *all* economic value.

Although all landowners assume a risk that subsequent social or legal developments may decrease the value of their property, TDR programs provide for a form of compensation to burdened landowners. Therefore, the disparity between burdened and unburdened landowners is reduced.[186] As a result, TDR programs operate in the "spirit of fair play" by ensuring that private land is not forced into public use without ample opportunity for a return on the landowner's investment.[187]

Landowners that possess or have the oppportunity to acquire TDRs are not prohibited from challenging regulations as unconstitutional takings of property.[188] A court's analysis, however, would follow under a

182. *See* Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 387 (1976); Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 575 (1992) (arguing that in theory, TDRs permit landowners to recoup some of the value lost as a result of development restrictions).

183. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

184. Kayden, *supra* note 182, at 575.

185. Norman Marcus, *Transferable Development Rights: A Current Appraisal*, PROP. & PROB., Mar.-Apr. 1987, at 40.

186. *Id.*

187. *Id.*

188. The Supreme Court fully understands that some people would prefer faster or less expensive alternatives to the litigation process. In Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), the Court held that a non-Article III tribunal could decide cases involving alleged securities sales improprieties. On the facts in *Schor*, the Court determined that

"balancing of interest" test rather than under a *Lucas* categorical approach. One important consideration is that based on the Court's pronouncements regarding TDRs, it is unlikely that marketable development rights would be considered the equivalent of "just compensation."[189] Accordingly, if TDR programs are used, landowners have the best of both worlds. They maintain economically viable land uses, generally a sufficient return to avoid a costly litigation process. Also, they can still challenge zoning regulations as unconstitutional takings in order to receive just compensation for their land.

TDR programs are also useful to the state in advancing important land-use policies. State and local governments can intervene in the marketing of TDRs. States can acquire development rights from burdened landowners and "bank them for resale to developing properties" in receiving areas.[190] Development banks are valuable because they help to "insure rudimentary fairness in the allocation of economic burdens."[191] This aspect of TDRs undermines one of the main criticisms of development rights transfer programs.

The criticism focuses on the nature of the TDR market. As in all markets, the buyers and sellers of TDRs integrate outside factors in determining fair market value of such development rights. These factors consist of the quality and quantity of density restrictions in "receiving" areas, the quantity of landowners possessing TDRs, and the level of administrative cost involved in TDR transactions. Once buyers and sellers consider the marketplace in a broad sense, values can be attributed to the chunks of floating rights transferred between parties.

In *Fred F. French Investing Co. v. City of New York*,[192] the New York Court of Appeals invalidated a TDR program based on certain enumerated deficiencies in the TDR marketplace. Primarily, the court focused on the uncertainty and instability in regard to the supply and demand of marketable TDRs.[193] In simple terms, what good is a TDR if nobody is willing to buy at a fair price? The *French* court concluded

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by availing himself of the administrative remedy, the plaintiff "waived any right he may have possessed to the full trial" of a related counterclaim before an Article III court. *Id.* at 849. The Court rationalized that the administrative proceeding in *Schor* was constitutional because it did not seek to misappropriate the "essential attributes of judicial power" from Article III courts. *Id.* at 851. Accordingly, in cases that require the determination of constitution claims, as in Fifth Amendment takings claims, there is probably no effective waiver of one's right to an adjudication before an Article III tribunal. *See id.* at 848 (stating the purposes behind Article III, section 1). Therefore, landowners can seek faster remedies at the administrative level, and, if unsatisfied, can proceed to file a claim in court.

189. Marcus, *supra* note 185, at 41.

190. *Id.*

191. Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 389 (N.Y. 1976).

192. *Id.*

193. *Id.* at 387-89.

that if there was no legitimate government purpose behind the challenged ordinance, the restriction and TDR program were invalid as violative of the burdened landowners' due process rights.[194] Courts that follow the *French* approach may be reluctant to uphold TDR programs unless the state becomes more involved by creating a TDR bank.

A second argument against TDR plans as a solution to *Lucas* is that although state and local governments can continue to regulate certain areas of land, other areas designated to receive TDRs are subject to overdevelopment.[195] This, in turn, could lead to problems when the initial regulation that creates the TDR program covers a vast area of land and many different owners.

Furthermore, there are steep transaction costs involved in trading TDRs.[196] Most notably, "TDR transactions involve time-consuming negotiations over price, preparation of purchase and sale agreements and other documents, and closings."[197]

In conclusion, TDR programs can work. Landowners can receive valuable development rights that can be sold to the state or private parties. If states regulate by adding TDR incentives, it will be easier to incorporate broad environmental plans within the state's police power. Reviewing courts would be forced to analyze a subsequent takings claim under a balancing of interests test, instead of the *Lucas* test. The former test is more favorable to states and fosters a broader conception of police power. Environmental interest groups should place this solution to *Lucas* ahead of the other suggestions. It is the most practical way to respond to *Lucas* since it is an effective way to avoid litigation entirely.

VII. CONCLUSION

Prior to *Lucas*, courts decided takings cases by balancing the interests of the private landowner against those of the state. Under this balancing of interests test, courts applied a highly deferential standard of review regarding legislative judgments. Accordingly, courts granted wide latitude to state governments that enacted environmental protection plans which adversely affected some property values.

Lucas' categorical takings rule focuses solely on the landowner's interests and background principles of state nuisance and property law. In applying this rule, courts do not inquire into the legitimacy of the state's actions as enumerated in the challenged statutes. Therefore, legislative decision-making is irrelevant under a strict application of *Lucas*.

194. *Id.* at 386-87.
195. Marcus, *supra* note 185, at 42.
196. Kayden, *supra* note 182, at 578.
197. *Id.*

One important factor ignored in *Lucas* is the influence exerted by concerned citizen groups over their elected representatives. This necessarily makes it more difficult for environmental groups to help create legislation that is necessary to protect our environment.

Since our society's future depends on our ability to curtail the destruction of our environment, it is advantageous to ensure that *Lucas* is simply an isolated case resting on a narrow set of facts. To reach these ends, environmental interest groups can restructure their efforts and attempt to render the case inapplicable or expand its lone exception. Such groups may achieve success litigating claims in court or lobbying for legislation that broadens a state's conception of nuisance. Most environmental groups will find more success, however, if they lobby for legislation that provides for the issuance of TDRs to burdened landowners. Transferable rights provide an economically viable use for landowners, despite restrictive-use ordinances or statutes.

If landowners retain at least some reasonable economically viable use for their land, courts will be forced to rely on the balancing of interests test to decide takings cases. Because that test considers both sides of a takings dispute, it obtains the normative goals of the Fifth Amendment's Takings Clause: justice and fairness.[198] *Lucas* may have been a just result given the facts of that case. However, future takings decisions should consider all of the relevant factors, as dictated by the line of cases that followed *Penn Central*. Under this approach, states will have the necessary power to regulate our land in a fashion that protects our long-term interests in our environment.

STEVEN R. LEVINE

198. Sharon G. Burrows, *Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes Be Reconciled with Punitive Damage Goals and the Takings Clause?*, 47 U. MIAMI L. REV. 437, 461 (1992).