Examing the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas

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COMMENT

EXAMINING THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE: IS THERE LIFE FOR ENVIRONMENTAL REGULATIONS AFTER LUCAS?

INTRODUCTION

Justice Holmes once observed that the public interest in its natural resources is “omnipresent wherever there is a State, and grows more pressing as [the] population grows.” In this statement, Holmes acknowledged what John Locke had understood to be the greatest challenge to the private ownership of property, the end of common property. Locke wrote that it is “the taking [of] what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the Common is of no use.” Locke knew that his labor theory of property was valid only where there was no prejudice to any other person. But Locke was unable to envision such a dilemma, where there was no property left unclaimed. He assumed that there would always be unclaimed property; perhaps, not in Europe, but certainly in America. We find ourselves confronted with a different reality. The common resources of this country are scarce, and the administration that runs this government is only beginning to confront the dangers of continued unchecked development.

Today, the federal and state governments have been implementing plans to protect certain ecologically sensitive property. Wetlands once seen as a hindrance to development, with no purpose except to be filled, are now recognized for their aesthetic beauty and for their contributions, as protectors against pollution and as habitats for endangered plants and animals. The beaches, overdeveloped and underprotected, are now threatened with severe erosion, and houses, once built far from the beach, suffer from flood damage resulting from even a normal storm.

President Clinton promises extensive regulations to protect the environment, but what happens to the people who own the property that will bear the brunt of the regulations? Does the state, through its power of eminent domain, have to buy all of the land that it wishes to regulate? If the answer is yes, then the costs of such regulations will be prohibitively high and the common resources of this country will continue to diminish. But if the answer is no, is this result fair? Should a few people be forced to carry the burden of these regulations themselves?

In 1992, the Supreme Court tried answering these questions in a series

3. This problem is exacerbated by the fact that so many people live on the beaches and on the floodplains (the land bordering rivers) because the property's location close to water makes it so highly valued.
of takings cases that culminated in the decision *Lucas v. South Carolina Coastal Council.* In *Lucas*, the Supreme Court addressed the question of whether a regulation, enacted to protect the beaches and dunes in South Carolina, violated the Fifth and Fourteenth Amendments of the Constitution if it prevented the owner of undeveloped property from building a house.

In an opinion written by Justice Scalia, the Court held that a regulation that takes away all economic value of a piece of property is an unconstitutional taking that must be compensated. This rule is subject to one exception. If the regulation is enacted for the primary purpose of regulating a common law nuisance, the takings clause does not apply. The Court then remanded the case to the South Carolina Supreme Court to determine whether the state’s common law nuisance doctrine was broad enough to cover this regulation of property.

The purpose of this Comment is not to criticize the *Lucas* decision but to show how South Carolina and other states can continue to regulate the development of wetlands, floodplains, beaches and other ecologically threatened land without having to compensate the landowners. The opinion of this author is that in most states, including South Carolina, regulations to protect these types of sensitive lands will never be takings.

Part I reviews the nuisance exception to the takings clause, its origins and its continuing vitality. There are two questions that must be answered here: (1) how do the courts interpret this exception; and (2) does the nuisance exception apply even where a regulation has removed all economic value of the land? Part II examines the *Lucas* decision, the facts that the Court relied upon, and the facts that the Court ignored in coming to its decision. Part III explores three sources of common law nuisance on which states can rely in determining that there is no unconstitutional taking of a landowner’s property. Finally, this Comment concludes that, notwithstanding the decision of the South Carolina Supreme Court on remand, states will be able to extensively regulate the use of ecologically sensitive lands without having to compensate landowners.

I. *Mugler* AND ITS PROGENY: THE ORIGINS AND VITALITY OF THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE

In *Respublica v. Sparhawk*, the court related a “memorable instance of folly” recorded in Clarendon’s history:

[It is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, nor consent to, the pulling down forty wooden houses, or to the removing the furniture, &c., belonging to the lawyers of the temple, then on the circuit, for fear he

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5. *Id.* at 2901.
6. *Id.* at 2901-02.
7. *Id.* at 357 (Pa. 1788).
8. *Id.* at 362.
should be answerable for a trespass; and in consequence of this conduct, half that great city was burnt.\textsuperscript{9}

The court understood that in certain cases, the government could take away property from private landowners without compensation. In Sparhawk, 227 barrels of flour had been taken from their owner in order to prevent the flour from falling into the hands of the approaching British army.\textsuperscript{10} The court, stating that “the safety of the people is a law above all others,”\textsuperscript{11} held that no compensation was due.\textsuperscript{12} While Sparhawk was decided on the basis of necessity, it nonetheless presents an early example of where the taking of private property was not compensable because its purpose was to protect public safety.

The rapid urbanization of the nineteenth century, created a need for government to be able to regulate private property prospectively. As the cities grew, governments found themselves unable to deal with many of the problems associated with rapid urbanization. Ad hoc regulations on the basis of necessity were insufficient.

Slums had appeared in New York City and Boston as early as 1815 and housing conditions deteriorated rapidly after 1830, in the years of great urban growth and industrialization. Municipal water supply was inadequate. The net result of these conditions was a prevalence of both epidemic and endemic diseases. Mortality statistics indicated that death rates rose in proportion to the degree of urban congestion.\textsuperscript{13}

While the government had been able to expand the railroads and the telegraph system through a combination of eminent domain and a narrow definition of compensable property interests, this power was ineffective in the urban environment.\textsuperscript{14} Nuisance law was also viewed as inadequate because it could only be applied after the harm had taken place and because “of the lack of any single plaintiff with sufficient interest to bring a suit.”\textsuperscript{15} Thus, the police power, a right for states to regu-
late property, was created as a remedy for the government. This power was distinct from the power of eminent domain and limited by common law nuisance and “a narrow application of the principle that no man should use his property to injure that of his neighbors.”

A. The Gradual Development of the Nuisance Exception

The police power was firmly established in the case Mugler v. Kansas. In Mugler, the constitution of Kansas was amended to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific and mechanical purposes. The appellant contended that his buildings were erected prior to the adoption of the temperance amendment for the purpose of manufacturing beer, and that the buildings could not be put to any other use. The Court held that the state’s police power extends to the destruction of property when it acts to abate a nuisance through remedial legislation. Where the business has become a nuisance to the community in which it is located, the state’s police powers provide a legislative remedy to protect the public health.

A prohibition [on] the use of property that [is] declared, by valid legislation, injurious to the health, morals, or safety of the community, cannot be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

(1851) (finding that plaintiff did not have standing in nuisance action even where his shop was fronted by tram line).

16. Reznick, supra note 13, at 862. This author believes that the purpose and history of the police power provides the guidance for modern courts to apply the police power in environmental takings cases. In the 1800's, the courts had come to the conclusion that if the legislatures were not given greater power, the problems of the city could not be solved because the costs would be too high. The environmental problems of the twentieth century are similar to the urban problems of the nineteenth century. The problems are vast and there are no easy solutions. Today, important legislation is not feasible because the states and the federal government are constrained by the takings clause and by the costs of compensating landowners. To solve these problems, the courts must expand the nuisance exception to include the takings clause in the same way that the courts created this exception to solve the urban problems.

17. 123 U.S. 623 (1887).
18. Id. at 655.
19. Id. at 657.
20. Id. at 658.
21. Id. at 667.
22. Id. at 668-69. The Mugler Court did place one important restriction on this doctrine.
[If] a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 661.
The Court in *Mugler* determined that the police power is conceptually different from the power of eminent domain and that regulations pursuant to this police power were not compensable.\(^{23}\)

In *Mugler*, the nuisance prohibited was the manufacturing and sale of alcohol. The legislature decided that this activity had always been a nuisance; in other words, a nuisance per se. In the next important nuisance case, *Hadacheck v. Sebastian*,\(^{24}\) the regulated activity was not a nuisance per se, but a nuisance because of where it was located. The City of Los Angeles made it unlawful to operate a brickyard within the limits of the city because the smoke from the brickyard’s operation was harmful to the public.\(^{25}\) The Court upheld the ordinance because it was a proper exercise of the police power; a residential neighborhood was not a proper location for a brickyard.

The Court implied, however, that if the regulation had taken all value of the property, the ordinance would have effected a compensable taking.\(^{26}\) But the Court did not need to address this question because it found value left in the property. “[T]here is no prohibition of the removal of the brick clay; only a prohibition of its manufacture into bricks.”\(^{27}\) Thus, the *Hadacheck* Court extended the *Mugler* doctrine to cases that were not nuisances per se.

The expansion of the police power doctrine came to a temporary halt thirteen years later. In *Pennsylvania Coal Co. v. Mahon*,\(^{28}\) the principles laid out in *Mugler* were examined and limited. In his now famous declaration, Justice Holmes said that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”\(^{29}\) His theory was different from that expressed in *Mugler*. While the *Mugler* Court reasoned that there was a fundamental difference between the power of eminent domain and the police power, Holmes believed that the difference between the two was only a matter of degree.\(^{30}\)

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24. 239 U.S. 394 (1915).
25. Id. at 408.
26. Id. at 411. In support of this position, the Court cites a California case, *Ex parte Kelso*, 82 P. 241 (Cal. 1905) where it was held that an ordinance that absolutely prohibited the operation of a stone quarry was void because it totally deprived the owner of the use of his property. A partial regulation would have been allowed.
28. 260 U.S. 393 (1922). In this case the rights of the coal company to mine under certain property were taken away by way of the Kohler Act. The courts in Pennsylvania had recognized three estates in mining property: (1) the right to use the surface; (2) the ownership of the subjacent minerals; and (3) the right to have the surface supported by the subjacent strata. Id. at 395. In this case, the third estate was owned by the coal company, but under the Kohler Act, the coal company was not permitted to mine. Id. at 412.
29. Id. at 415.
30. This theory, known as the “continuum of appropriation” was first stated by Holmes in a decision while he was still sitting on the Massachusetts Supreme Judicial court.

[T]he difference [between the police power and eminent domain] is only one of
When the government regulation of property “reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.”

Holmes also understood that not every application of the police power would be exempt from the takings clause. Only those regulations designed to abate a public nuisance (a subset of the greater police power) would be exempted from compensation.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

Holmes limited the regulation of private property without compensation to cases where the regulation was enacted to abate narrowly defined public nuisances. Further, even where the regulation was designed to abate a nuisance, it could be a taking if the regulation was too extensive. In *Mahon*, the public interest in the Kohler Act was limited because the Act did not apply to land where the same person owned the mining rights and the surface rights. In addition, the rule could not be justified as a protection of public safety because that purpose was satisfied by the requirement of timely notice before mining.

*Mahon* did not address whether the nuisance exception would be applied in cases where the deprivation was total. Although there was a complete taking of the support estate, the majority refused to characterize the decision as a nuisance case.

If *Mahon* was a retrenchment after *Hadacheck*, standing for the premise...
principle that the prevention of a nuisance was going to be the only situation where extensive regulation was allowed and that nuisance was going to be defined narrowly, the Mahon thinking was quickly abandoned. From the late twenties until the late eighties, there were two incremental extensions of the nuisance exception. The first phase was the elimination of the requirement that the regulation had to prohibit a common law nuisance. This period is defined by two cases, Miller v. Schoene36 and Goldblatt v. Town of Hempstead.37 The second phase was a greater widening of this doctrine so that nuisance was no longer required to except a government action from the constraints of the takings clause. The only requirement was that the regulation be a valid exercise of the police power in furtherance of the public interest. This period is defined by two recent Supreme Court decisions, Penn Central Transp. Co. v. New York City38 and Keystone Bituminous Coal Assn. v. DeBenedictis.39

B. The End of the Common Law Requirement

While the early cases focused on whether the regulated act was a common law nuisance, the courts soon recognized that nuisance was not a static doctrine. In Miller, the Court was faced with the question of whether these legislative nuisances would be covered under the nuisance exception.

Under section 1 of the Cedar Rust Act of Virginia, it was declared unlawful for any person to “own, plant or keep alive and standing” on his property any red cedar tree which was the source or might be the source of cedar rust.40 Rust infected trees, growing within a certain radius from any apple orchard, were declared a public nuisance and were to be destroyed.41 The property owners in Miller brought an action to prevent the destruction of their cedar trees, arguing that this was an unconstitutional taking of their property.

The Miller Court held that there was no taking, despite the fact that at common law, it was not a nuisance to grow ornamental cedar trees (even those infected with cedar rust disease). The legislature decided that cedar trees carrying the rust disease were a nuisance. However, the Court did not see the need to “weigh with nicety the question whether

36. 276 U.S. 272 (1928).
37. 369 U.S. 590 (1962). As an aside, Mario Cuomo, now Governor of the State of New York and once a potential Bill Clinton nominee for the Supreme Court, was one of the attorneys for the town of Hempstead.
40. Miller, 276 U.S. at 277.
41. Id.

[C]edar rust is an infectious plant disease in the form of a fungoid organism which is destructive of the fruit and foliage of the apple, but without effect on the value of the cedar. The only practicable method of controlling the disease and protecting apple trees from its ravages is the destruction of all red cedar trees, subject to the infection, located within two miles of apple orchards. Id. at 278-79 (citations omitted).
the infected cedars constitute[d] a nuisance according the common law; or whether they may be so declared by statute."

This expansion of the nuisance exception was explained further in *Goldblatt*. In this case, the property owner was a company that had mined sand and gravel on a site since 1927. After one year of mining, the excavation reached the water table and the excavated crater became a twenty-acre lake. The town proceeded to grow, and in 1958, the town amended its ordinance regulating such excavations, to prohibit any excavation below two feet above the maximum ground water level at the site. The excavation reached this level in 1927, so pursuant to the ordinance, no further excavation could take place and the mining stopped. The mining company argued that all economic use of the land had been taken away, and, as a defense, the town argued that the measure was enacted to protect the safety of the community. Citing *Mugler*, the Court held that a regulation designed to protect the public safety could not be a taking. Further, the Court noted that "it is [not] of controlling significance that the use prohibited [gravel mining] is not a common law nuisance." Thus, after *Miller* and *Goldblatt*, the Court consistently held that the common law definition of nuisance did not limit the nuisance exception. If the legislature decided that an activity is a nuisance, it could regulate that activity without compensating affected property owners.

C. Extending the Nuisance Exception to All Valid Applications of the Police Power

The exception, as envisioned, was limited to cases where the legislature was regulating a nuisance. In the 1980's, the Court expanded this excep-
tion. Instead of focusing on whether the regulation was enacted to abate a nuisance, the Court asked whether the regulation was made pursuant to the state’s police power. These recent decisions made no distinction between harm-preventing regulations and benefit-conferring regulations. So long as there was a legitimate state interest, a regulation would not be a taking. In cases like Penn Central, the government’s ability to enact land-use regulations was greatly expanded.

Pursuant to New York City’s Landmark Preservation Law,\(^4\) the owner of a landmark building was required to keep the exterior features “in good repair,” and any plans to alter the exterior of the building had to be approved by the Commission.\(^4\) The owners of Grand Central Station, a historical landmark,\(^5\) wanted to build a fifty-five story office building on top of the terminal and they submitted a plan to the Landmark Commission.\(^5\) When the proposal was denied, the owners brought an action against the city claiming that the regulation was excessive and that it was a taking of their property that required compensation under the Fifth and Fourteenth Amendments.\(^5\)

This was not a nuisance case. The majority opinion never used the term nuisance. As Justice Rehnquist pointed out in his dissent, “the proposed addition to the Grand Central Terminal would be in full compliance with zoning, height limitations, and other health and safety requirements.”\(^5\) Mugler and the earlier cases based this exception on nuisance, but in Penn Central, Justice Brennan redefined this exception. Valid exercises of the police power do not depend on the “‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy expected to produce a widespread public benefit.”\(^5\) Thus, the Court held that as long as the restrictions imposed are “substantially related to the promotion of the general welfare,” there is no taking of the property.\(^5\)

The Keystone Court relied on this interpretation when deciding a case

\(^{4}\) N.Y.C. ADMIN. CODE § 205-1.0(a) (1976).
\(^{4}\) Penn Central, 438 U.S. at 111-12.
\(^{5}\) Grand Central Station was “regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.” Id. at 115.
\(^{5}\) Id. at 116-17.
\(^{5}\) Id. at 119.
\(^{5}\) Id. at 146 (Rehnquist, J., dissenting).
\(^{5}\) Id. at 134 n.30.
\(^{5}\) Id. at 138. It is the author’s opinion that this case is wrongly decided for two reasons: (1) Justice Brandeis, in his dissent in Mahon, stated that he felt that the proper bundle of property to look at was the combined mining and support estates because they were part of the same plot of land, the same property interest. Mahon, 260 U.S. at 419. It seems unlikely that Brandeis would have held that Penn Central’s various real estate holdings in the neighborhood of Grand Central Station were akin to a single property interest; and (2) while the holding in Keystone can be properly justified under the nuisance exception, the Penn Central Court can in no way be justified under this doctrine. To open this can of worms would create an exception that swallows the rule. If Penn
whose facts were almost identical to the *Mahon* case decided almost fifty years earlier. Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act prohibited all coal mining that caused subsidence damage to pre-existing public buildings, dwellings and cemeteries. Instead of deciding the case as a nuisance, the Court focused on whether the Act had a public purpose. Citing to section 2 of the Subsidence Act, the Court stated that:

> [u]nlike the Kohler Act the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas.

The result of cases like *Penn Central* and *Keystone* is that the emphasis in takings cases was not whether the regulation’s purpose was to abate a nuisance, but rather, whether the regulation was a valid exercise of the police power.

**D. Retrenchment**

In his dissent in *Penn Central*, Justice Rehnquist argued that “[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others.” Rehnquist stated that the City of New York was not prohibiting a nuisance, but was “seeking to preserve what they believe to be an outstanding example of beaux arts architecture.” As such, the regulation of the property should not have been covered by the nuisance exception because there was no nuisance.

Returning to the origins of this exception, Rehnquist's argument

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*Central* is taken to its extreme, no property interest is safe from uncompensated government appropriation.

57. While the Court noted that the State was abating an activity “akin to a public nuisance,” the Court emphasized that the State was protecting the “public interest in health, the environment, and the fiscal integrity of the area.” *Id.* at 488.
58. This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than “open pit” or “strip” mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania.

*Id.* at 485-86 (quoting PA. STAT. ANN., Tit. 52, § 1406.2 (Purdon Supp. 1986)).
59. *Id.* at 485.
60. *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting). Essentially, Rehnquist repeats the argument made by Holmes in *Mahon*. *See supra* notes 29-32 and accompanying text.
61. *Id.* at 146.
makes sense. The exception was based on the premise that because a
nuisance action against the property owner would prevent the noxious
use of the land, the State could regulate this use before the noxious act
occurred. New York would not have been able to prevent the construc-
tion above Penn Station in the absence of the Landmark Preservation
Law. To extend the exception to all valid exercises of the police power
would be to create the exception that swallowed the rule. However, it
took ten years for the Court to move from Justice Brennan’s reasoning in
Penn Central towards the reasoning of the Rehnquist dissent.

In Nollan v. California Coastal Comm’n, Justice Scalia briefly ad-
dressed this issue. The Commission, relying on Penn Central, argued
that a “public access to the beach” requirement, as a condition of grant-
ing a building permit, was “part of a comprehensive program to provide
continuous public access along [the] . beach.” As such, the regula-
tion was a police power regulation in furtherance of the public interest.
Responding, Justice Scalia writes that this argument,

is simply an expression of the Commission’s belief that the public inter-
est will be served by a continuous strip of publicly accessible beach
along the coast. The Commission may well be right that it is a good
idea, but that does not establish that the Nollans alone can be
compelled to contribute to its realization. Rather, California is free to
advance its “comprehensive program,” if it wishes, by using its power
of eminent domain for this “public purpose,” but if it wants an easement
across the Nollans’ property, it must pay for it.

Scalia rejects Brennan’s argument. It is not enough that the regulation
is in the public’s interest; it can still be a taking. The table was set for the
Lucas decision.

II. Lucas v. South Carolina Coastal Council

In 1986, David Lucas bought two vacant lots on the Isle of Palms, one
of the barrier islands off the coast of South Carolina. The lots, numbers
22 and 24, were located in the Beachwood East Subdivision of the Wild Dunes development. Lucas paid $975,000 for the two lots, upon which he planned to build residential houses. In 1988, the state, in an attempt to control the erosion that had ravaged the coastline, passed the Beachfront Management Act (BMA). Pursuant to the BMA, the Coastal

hurricane destruction, Lucas had no reasonable economic expectations. This statement would certainly be true if Lucas' plots were located on top of a glacier, on top of an earthquake fault or next to a volcano. The result is the same if the property were located on a river floodplain or on an unstable hillside. See Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988); Maple Leaf Investors v. State Dep't of Ecology, 565 P.2d 1162 (Wash. 1977). By denying the right to build improvements on Lucas' land, the State is not taking away his property, but confirming the natural limitations of beachfront property.

Lucas, 112 S. Ct. at 2889. Lucas paid $475,000 for lot 22 and $500,000 for lot 24. Transcript of Record on Appeal at 26-27, South Carolina Coastal Council v. Lucas, No. 88-CP-10-66 (Charleston County, August 10, 1989) [hereinafter Tr. Trans.]. At the time of the purchase, both lots were zoned for single-family homes and a similar home was already in existence on lot 23 (the lot between Lucas' two lots) and on other similar lots along the beach. Id. Lucas argues, and Justice Scalia agrees, that the existence of beach houses on the neighboring properties is an indication that this use of the land is not a nuisance. Lucas, 112 S. Ct. at 2901. However, Lucas was a member of the Wild Dunes development company. See supra note 65. Lucas helped to create the condition that he is now relying on. He built and marketed the houses on Wild Dunes. Given this fact, the houses on adjacent lots prove nothing towards the suitability of the lots for residential purposes.

SECTION 1. The General Assembly Finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions:

(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39, Title 48, Code of Laws of South Carolina, 1976, Coastal Tidelands and Wetlands, does not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development has been unwisely sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard
Council established a setback line, seaward of which, no new construction could occur. Lucas was barred from building his houses because his plots were located within the setback zone. Lucas brought suit against the South Carolina Coastal Council claiming that "even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all economically viable use of his property and therefore effected a taking under the Fifth and Fourteenth Amendments of the United States Constitution."

structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the long shore transport of sand, can deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also can deprive the beach/dune system of much needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and effectively manage the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.


69. Lucas, 112 S. Ct. at 2889.
70. Id.
71. Eugene J. Morris, In 'Lucas' Opinions, Supreme Court Elaborates on 'Taking' in Landmark Case, N.Y.L.J., Sept. 16, 1992 at S-5. One of Lucas' arguments was that there is no nuisance exception to the takings clause at all since Mugler was decided as a due process case and not as a takings case (the Court did not incorporate the takings clause against the states until Chicago B.Q.R. Co. v. Chicago, 166 U.S. 226 (1897)) and because Mugler antedated Justice Holmes' proclamation that regulation can go too far. See supra note 29 and accompanying text. Thus, according to Lucas, the nuisance exception only applies to due process claims. See Douglas W. Kmiec, When Must Compensation Be Paid Under the Takings Clause: Is Building a Beach House Really a Nuisance?, 7 A.B.A. PREVIEW OF UNITED STATES SUPREME COURT CASES, Mar. 27, 1992. Kmiec objects to this argument stating that the nuisance exception was applied to takings cases in Miller and in Goldblatt. Id. In addition, Kmiec argues that there really is no purpose in separating "due process" claims from "due process claims incorporating the takings clause." Id. In any event, the Supreme Court did not address this argument of Lucas, and Justice Scalia makes it quite clear that the nuisance exception applies to takings cases and that it is the only exception where the economic deprivation is complete. See generally, Lucas, 112 S. Ct. at 2900-02.
The state trial court agreed with Lucas, finding that the property had been rendered valueless by the 1988 Act and awarded Lucas $1,232,387.50 in damages.\textsuperscript{72} On appeal, the State Supreme Court noted that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." The court held that since Lucas failed to contest the legislative findings, he conceded that the purpose of the Act was to prevent a great public harm.\textsuperscript{74} Thus, the high court overruled the trial court, holding that the legislation was designed to prevent a public harm and was therefore excepted from the protection of the takings clause.\textsuperscript{75}

The Lucas case reached the Supreme Court in 1992, and relying on the finding of the trial court that all value had been taken,\textsuperscript{76} the Court held

\textsuperscript{72} The trial judge found that due to the BMA, the property had no market value and that the regulation was a "total taking of Lucas's [sic] two beach front lots." Tr. Trans., supra note 66, at 130. "Since the State has totally acquired Lucas' property, it is entitled to a deed to the property free and clear of any encumbrances." \textit{Id.} Thus, the judge ordered the state to pay compensation equal to the full market-value of the lots ($585,000/lot), the real estate taxes paid after the BMA went into effect and the interest from the mortgage. \textit{Id.}\textsuperscript{73}

\textsuperscript{73} \textit{Lucas,} 404 S.E.2d at 899 (quoting \textit{Keystone,} 480 U.S. at 491 n.20).

\textsuperscript{74} \textit{Id.} at 898.

\textsuperscript{75} \textit{Id.} at 902.

\textsuperscript{76} \textit{Lucas,} 112 S. Ct. at 2896. Justice Scalia writes that the essential use of land is to erect habitable or productive improvements on the land. \textit{Id.} at 2901. The implication of this statement is that if the development rights are denied, the state has effected a taking. If this is what Justice Scalia means, he has overruled a substantial line of precedent that holds otherwise. See \textit{Kaiser Aetna v. United States,} 444 U.S. 164 (1979) (no taking where the owner had right to evict others from the property); \textit{Hodel v. Irving,} 481 U.S. 704 (1987) (the right to sell and bequeath is an important property right). The Supreme Court of South Carolina has also held that the right to sell property and the right to exclude others from property are important rights, leaving value to land even when the development rights are taken away. See \textit{Beard v. South Carolina Coastal Council,} 403 S.E.2d 620, 622 (S.C.) (note, however, that here only part of the property was "taken"), \textit{cert. denied,} 112 S. Ct. 185 (1991). Several of the dissenting justices in \textit{Lucas} also wondered whether the finding that the land had no value was correct. Justice Blackmun writes that the majority,

[relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the court imagines that it will arise 'relatively rarely' or only in 'extraordinary circumstances.' Almost certainly it did not happen in this case.]

\textit{Id.} at 2904 (Blackmun, J., dissenting). Further, he writes that Lucas "can picnic, swim, camp in a tent, or live on the property in a movable trailer" and that state courts have recognized that such uses give land economic value. \textit{Id.} at 2908. See, e.g., \textit{Turnpike Realty v. Dedham,} 284 N.E.2d 891 (Mass. 1972), \textit{cert. denied,} 409 U.S. 1108 (1973); \textit{Turner v. Del Norte,} 101 Cal. Rptr. 93 (1972); \textit{Hall v. Board of Envtl. Protection,} 528 A.2d 453 (Me. 1987). While Justice Scalia had the opportunity to decide that the factual findings were not substantiated by the record, he chose not to address the issue. \textit{Lucas,} 112 S. Ct. at 2896 n.9. This lends credence to the author's opinion that Justice Scalia agrees with the state trial court that property has no value when the right to develop is taken away.
that unless the State could show on remand that the primary purpose of the act was to prevent a nuisance, there was a taking of Lucas' property.\textsuperscript{77}

While the Court had previously applied a balancing test in all regulatory takings cases, in \textit{Lucas}, the Court held that where property is rendered valueless by regulation, no balancing test is applied.\textsuperscript{78} Finally, while the nuisance exception to the takings clause still applied, the Court emphasized that:

\begin{quote}
\begin{itemize}
  \item to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as \textit{sic utere tuo ut alienum non laedas}. \textsuperscript{79}
  \item Instead South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.\textsuperscript{80}
\end{itemize}
\end{quote}

There are two interesting points to note about the holding. First, the Court concluded that the nuisance exception applies, even where there is

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  \item \textsuperscript{77} \textit{Lucas}, 112 S. Ct. at 2901.
  \item \textsuperscript{78} \textit{Id.} at 2900. In \textit{Loretto v. Telepromter Manhattan CATV Corp.}, 458 U.S. 419 (1982), the Court held that when a statute causes a permanent physical occupation of property, the government must compensate the property owner, no matter what public interests are involved. However, prior to \textit{Lucas}, in regulatory takings cases (where there is no physical invasion of the property), it was well established that there were three factors to be considered and balanced against one another. See \textit{Pruneyard Shopping Center v. Robbins}, 447 U.S. 74 (1980). These factors are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. \textit{Id.} at 83. The \textit{Lucas} holding seems to define another Fifth Amendment category, where the property has been rendered valueless. Scalia labels this category as "confiscatory regulations." His reasoning is that the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." \textit{Lucas}, 112 S. Ct. at 2894 (citations omitted). Scalia also cites to three Supreme Court decisions: \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825, 834 (1987); \textit{Keystone Bituminous Coal Assn. v. DeBenedictis}, 480 U.S. 470, 495 (1987); \textit{Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.}, 452 U.S. 264, 295-96 (1981). One commentator, Donald Ayer, points out that Justice Scalia's assertion is not as well founded in law as his words indicate. Donald B. Ayer, \textit{Straying From the Right Religion}, \textit{The Recorder}, Aug. 13, 1992, at 8. The \textit{Nollan} and \textit{Keystone} cites are only dicta, and while \textit{Hodel} states that where all value is not taken, there is no regulatory takung, "it does not follow that the inverse is also true - that a regulatory taking necessarily occurs where all value is taken." \textit{Id.} Ayer writes that the balancing approach is the anathema to Justice Scalia's belief that the law is a "set of rules applicable with substantial certainty and predictability." \textit{Id.} Ayer cites Scalia's dissent in \textit{Morrison v. Olson}, 487 U.S. 654 (1988) where Scalia criticizes the Court's balancing test for substituting for a legal rule "the unfettered wisdom of a majority of this court, revealed to an obedient people on a case-by-case basis." While to preserve the certainty of law is a noble pursuit, Ayer questions what he sees in \textit{Lucas} as "judicial creativity and rewriting of precedent" to further this goal. \textit{Id.} Ayer concludes that even a "restrained group of strict constructionists [are] not beyond building a constitutional sand castle now and then, even as they assail others for shoring up a similar edifice whose foundation and architecture they abhor." \textit{Id.}
  \item \textsuperscript{79} One should use his own property in such a manner as not to injure that of another. \textit{Black's Law Dictionary} 1380 (6th ed. 1990).
  \item \textsuperscript{80} \textit{Lucas}, 112 S. Ct. at 2901-02 (citations omitted).
\end{itemize}
a complete deprivation of the economic value of the property. It is surprising that Justice Scalia would hold this way, given the Rehnquist dissent in Keystone to which Justice Scalia joined. Justice Rehnquist noted in Keystone that "our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property."

We have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." But this part of the Lucas holding makes sense. If the state or a neighbor prevails in a nuisance action against the property owner, the owner could be enjoined from all use of his property. Similarly, the state, to prevent a nuisance, should be able to regulate all use of property.

The second and more controversial feature of the holding is that it overrules Miller and the other cases where the legislature had declared that certain uses of property were nuisances. Justice Scalia, in describing these confiscatory regulations, writes that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but 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." The "legislature's recitation of a noxious-use justification cannot be the basis for departing from [the] categorical rule that total regulatory takings must be compensated." At least one commentator believes that this holding is problematic because it assumes that nuisance and property law are fixed for eternity. However, like the beaches of South Carolina itself, nuisance is constantly being redefined. Lottery tickets were once considered noxious goods, and in Mugler, the production of alcoholic beverages was considered a nuisance. Today, the production of neither good is considered a nuisance. As Donald Ayer points out, "[U]nless Justice Scalia intends to freeze nuisance and property law absolutely at some point in history or, for each party, at the time he buys his land — two unimaginable thoughts — takings claims will continue to involve difficult and subjective judgments about appropriate uses of prope-

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81. As previously noted, the Court never had to address a case where all economic value had been taken away. See supra notes 26-27, 35, 42, 47 and accompanying text.
82. Keystone, 480 U.S. at 513. But see First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 313 (1987) ("[W]e have no occasion to decide whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations") (emphasis added).
83. Lucas, 112 S. Ct. at 2900. The text seems to indicate that the common law requirement applies only to cases where the economic use of the land is totally deprived. "Any limitation so severe cannot be newly legislated." Id. If this is the holding, there is room to argue that in cases where the deprivation is not complete, the legislature's determination that the use is a nuisance may be sufficient to not require compensation.
84. Id. at 2899.
85. Ayer, supra note 78.
86. See The Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
Despite these criticisms, state courts must now address the issue of whether the common law definitions of nuisance and property are broad enough to protect a regulation from being a taking. 

III. SOUTH CAROLINA COMMON LAW NUISANCE

A. Nuisance Per Accidens: The Inappropriateness of Building on the Beach

In Lucas, Justice Scalia wrote that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." Similar expressions of this statement can be found in the dissents of several South Carolina cases regarding whether beachfront houses are nuisances. In Esposito v. South Carolina Coastal Council, Judge Hall wrote that "the rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as 'tantamount to a public nuisance.'" Citing Mugler, Hadacheck, Miller and Goldblatt, Judge Hall concluded that "living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified." Property that sells for a half of a million dollars cannot be a nuisance. But is this view correct? The manufacture of bricks, the growing of cedar...
trees and the mining of gravel were not nuisances per se. They were nuisances because of where they were located.94 Even a bible camp is a nuisance if it is built in an inappropriate location. This was the result in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.95 In First English, a church purchased a twenty-one acre campground known as Lutherglen.96 Twelve of these acres were on the floodplain of Mill Creek.97 In 1977, approximately 3,860 acres of the floodplain area were burned in a fire, causing a potential flood hazard.98 In 1978, as a result of eleven inches of rainfall in the watershed area, Mill Creek overflowed, destroying the buildings on the banks.99 Ten people drowned and millions of dollars of property were destroyed.100 Further losses were prevented only because Lutherglen's planned camp for handi-

similar floodplain parcels; presumably persons who ignore the flood hazard offer the highest prices.” Id. “Alternatively, buyers who know about the flood hazard can ignore it for other reasons, because public subsidies or weaknesses in tort remedies allow them to externalize costs caused on and off the site.” Id. at 208 n.20.

94. As Justice Scalia states, the owner of a nuclear power plant is not entitled to compensation “when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.” Lucas, 112 S. Ct. at 2900.

95. 258 Cal. Rptr. 893 (2d App. Div. 1989) [hereinafter First English II], cert. denied, 493 U.S. 1056 (1990). This case had already reached the Supreme Court on the issue of whether “temporary takings” were compensable. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987) [hereinafter First English I]. However, the Court did not address the issue of whether the ordinance was enacted as a safety regulation which would “avoid the conclusion that a compensable taking had occurred.” Id. at 313. In some ways this case resembles Lucas. The regulation in both cases deprived the owners of the right to build. Both California and South Carolina argued that the regulation was enacted for safety purposes. The difference is that in First English I, the Court was ruling on one issue: temporary takings. Justice Stevens, in his dissenting opinion, restated the importance of this limited holding. “No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court’s precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.” Id. at 325. The California court was deciding the state’s safety argument with no negative guidance from the Supreme Court. However, in Lucas, Justice Scalia told the South Carolina court that he felt it unlikely that the BMA would be covered by background nuisance principles. “We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.” Lucas, 112 S. Ct. at 2902 n.18. First English II and Lucas on remand may have been decided differently because of the different guidance received by the state courts.

96. First English II, 258 Cal. Rptr. at 894.
97. Id.
98. Id. at 895.
99. Id. at 895.
100. Id.

The vegetation of a watershed area normally protects against flooding because the vegetation slows the flow of water, which can then percolate into the soil or be carried away by streams. When the vegetation is burned, however, there is no slowing of the flow, and the crust on the ground formed by the fire's intense heat prevents percolation of water into the soil. Additionally, the ash and debris from the fire increase the bulk of the flow, known as the bulking factor, which increases the erosion damage caused by the runoff.
capped children scheduled for that week had been canceled.\textsuperscript{101}

In response to this flood, the County of Los Angeles adopted an intermediate ordinance prohibiting the construction or reconstruction of any building in an interim flood protection area, which included Lutherglen.\textsuperscript{102} Shortly after, the church started an inverse condemnation action claiming that all use of Lutherglen was denied as a result of the ordinance.\textsuperscript{103}

Citing \textit{Mugler}, the California court denied the church relief, holding that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."\textsuperscript{104} The court recognized that the use of the property here was not traditionally viewed as a nuisance but because of its location, its use had to be regulated. "[A] brewery is a far cry from a Bible camp. But here the threat to public health and safety emanates not from what is produced on the property but from the presence of any substantial structures on that property."\textsuperscript{105} Finally, the court concluded that "it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death."\textsuperscript{106}

The reasoning employed in \textit{First English}, is easily applicable to \textit{Lucas}. As recent storms have shown, building on the beach is equally dangerous to building on a floodplain or at the base of a volcano. As a safety precaution, this construction can be prohibited by the state.\textsuperscript{107}

In 1972, Congress enacted the Coastal Zone Management Act,\textsuperscript{108} creating a partnership between the states and the federal government in order to manage the coastal zone. Section 1452(2)(B) of the Act states that programs should be designed to

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minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsidence, and saltwater intrusion, and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier
\end{quote}

\begin{itemize}
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id. at 899.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id. at 901. The court goes on to say that where there is no use of the property that does not threaten life and health, the government should be able to deny the property owner all uses of his property. \textit{Id.} at 902.
\item \textsuperscript{107} The Supreme Court of South Carolina has held that when a building is unfit for its use and it is a "source of danger to the community," the legislature can "require that its use for a purpose which injures the public be discontinued." Richards v. Columbia, 88 S.E.2d 683, 689 (S.C. 1955) (quoting Adamic v. Post, 7 N.E.2d 120, 124 (N.Y. 1937)).
\end{itemize}
islands.\textsuperscript{109} 

In 1982, Congress made further attempts to discourage landowners from building on the beach by enacting the Coastal Barrier Resources Act.\textsuperscript{110} The Act stated that "[c]oastal barriers serve as natural storm protective buffers and are \textit{generally unsuitable for development} because they are vulnerable to hurricane and other storm damage and because natural shoreline recession and the movement of unstable sediments undermine manmade structures."\textsuperscript{111}

The Isle of Palms, where Lucas' property is situated, is a coastal barrier island subject to intense storms.\textsuperscript{112} The most effective protection against the intense wind and wave action is the dunes.\textsuperscript{113} During a storm, the dunes create a "reservoir of beach sand" that helps prevent the damages caused by flood and wave damage to beachfront property.\textsuperscript{114}

In 1989, Hurricane Hugo passed over the coastline of South Carolina. Upon reviewing the damage, it was noted that the structures that lay behind substantial dunes received far less damage than those that were exposed to the wind and the waves.\textsuperscript{115} Two dunes on Litchfield Beach (north of the Isle of Palms), twenty feet tall, more than eighty feet wide and two miles long, withstood the tidal surge and protected the property behind it.\textsuperscript{116} However, "[j]ust down the beach to the south, the first floor of the Litchfield Inn, a motel that lay behind a less substantial dune, was wrecked by the storm surge. And on Pawleys Island, about forty homes were destroyed on the island's southern tip where there were no dunes."\textsuperscript{117}

At the \textit{Lucas} trial, Christopher Jones, an expert in shorefront management, testified that for two reasons, certain types of construction cause erosion on the beaches: (1) "they prevent the uplands from eroding and naturally supplying nourishment to the beach;" and (2) "they can accel-

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\item[\textsuperscript{109}] 16 U.S.C. § 1452(2)(B).
\item[\textsuperscript{111}] 16 U.S.C. § 3501(a)(3) (emphasis added).
\item[\textsuperscript{112}] On January 1, 1987, a storm hit the coast of South Carolina and eroded between twenty and fifty feet of certain beaches. \textit{See} Tr. Trans., \textit{supra} note 66, at 64. According to Christopher Jones, who gave expert testimony at trial for the Coastal Council, the areas that sustained the most damages were where the construction was near the shoreline. Examples given were Garden City, Hilton Head, Folly Beach and the east end of the Isle of Palms (the Wild Dunes area where Lucas' property is located). \textit{Id.} However, the storm that has gained the most attention in South Carolina was Hurricane Hugo that hit South Carolina while this litigation was pending.
\item[\textsuperscript{113}] "Natural sand dunes are formed by winds blowing onshore over the beach, transporting sand landward. Grass and sometimes bushes grow on sand dunes, creating a natural barrier against sea attack." \textsc{National Research Council}, \textsc{Managing Coastal Erosion} 61 (1990).
\item[\textsuperscript{114}] \textit{Id.}
\item[\textsuperscript{115}] Keith Schneider, \textit{South Carolina Begins Rebuilding Storm-Swept Beach Dunes}, \textsc{N.Y. Times}, Oct. 5, 1989, at B14.
\item[\textsuperscript{116}] \textit{Id.}
\item[\textsuperscript{117}] \textit{Id.}
\end{itemize}
erate erosion around the ends of those structures.” The types of structures to which Jones alluded, were those that extend perpendicular to the shoreline (jetties and groins), erosion control structures (abutments and seawalls) and given certain conditions, habitable structures. To continue to allow building on the beach would erode the dunes and threaten the property of those who rely on the dunes to protect their property from storms.

In Commonwealth v. Alger, the court held that “when land is so situated, or such is its conformation, that it forms a natural barrier to rivers or tidal watercourses, the owner cannot justifiably remove it, to such an extent as to . . . destroy the valuable rights of other proprietors . . . in the contiguous lands.” Building on the beach inevitably causes erosion, the destruction of the neighboring beaches, and courts, following the reasoning of Alger, should find that such construction is a nuisance.

In Lummis v. Lilly, the court held that the construction of erosion barriers could be the cause of a nuisance action brought by a neighboring landowner. In this case, the plaintiff claimed that the construction of a groin, on the beach updrift of his property, was causing his property to erode. A groin interrupts the “littoral drifting of sand along the shore, thereby producing deposition of sand on the updrift side of the structure and widening the beach.” However, the “drifting continues on the downdrift side of the structure and since the sand which is transported away is not replaced by sand from the updrift side, the beach narrows on the downdrift side of the groin.” Citing Alger, the court held that this was a proper nuisance action and dismissed the defendant’s summary judgment motion. Lucas’ construction will cause the beaches to erode in the same way that the groin in Lummis caused the neighboring beach to erode. The construction is therefore a nuisance, and South Carolina, through the BMA, can prohibit the construction without having to compensate Lucas.

Building on the beach presents an additional problem besides the erosion of the dunes. When storms hit the beachfront communities, the wind and waves send pieces of one house crashing into another, causing considerable damage. Hurricane Hugo, with its 136 m.p.h. winds, did extensive damage to the Isle of Palms. Majestic palm trees were broken in half like toothpicks and steel I-beams were twisted into pretzels and strewn across construction sites. Homeowners returned after Hugo had marched onward, only to find their houses leveled, severely damaged or

118. Tr. Trans., supra note 66, at 68.
119. Id. at 67-68.
120. 61 Mass. (7 Cush.) 53 (1851).
121. Id. at 86-87.
122. 429 N.E.2d 1146 (Mass. 1982).
123. Id. at 1147-48.
124. Id. at 1148.
125. Id.
126. Id. at 1150.
moved several hundred yards from where they once stood."127

Older buildings with slab floors were devastated when the slabs were undermined, broken and lifted up to batter the ground level. Peripheral structures, such as decks, walkways and swimming pools, and sometimes entire homes, became battering rams, knocking down other houses. First-row beach homes were transported back into the fourth row of buildings.128

The potential damage to the islands is not over once the hurricane has passed. In what is known as "reverse damage," the flood water washes back towards the coast. If the water cannot pass through the inlets, the barrier islands are flooded once again from the bay side.129 Cinder block homes fare the worst in storm situations, and while brick and wood homes can be reinforced, the extremely high costs prohibit most homeowners from doing so.130

In Spiegle v. Borough of Beach Haven,131 a New Jersey case similar to Lucas, the court held that a "fence ordinance" and a "dune ordinance" did not constitute a taking of the property even though they prevented certain construction on the beach.132 There was no taking of the property because the Borough of Beach Haven proved that building on the beach was a serious safety hazard. "[T]o construct houses oceanward of the building line" would be unsafe because of the possibility that the houses would be destroyed during a severe storm.133 The Borough also offered proof of peril to life and health "arising through the likely destruction of streets, sewer, water and gas mains, and electric power lines in the proscribed area in an ordinary storm."134 The Borough's description of potential damage seems incredibly prophetic when viewing the destruction on the Isle of Palms caused by Hurricane Hugo.

Residents of [the Isle of Palms] wondered what would happen if a powerful hurricane struck at high tide.

Today the answer greeted hundreds of them as they discovered their homes ripped apart, sand dunes washed away, streets blocked by shattered pine trees, downed electric wires, crushed automobiles and other debris.135

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129. Id.
132. Spiegle, 218 A.2d at 137.
133. Id. (Such storm damage had occurred in 1962).
134. Id.
In *First English*, it was a nuisance to build on the floodplain because of the potential loss of life and property resulting from heavy rains. Justice Stevens noted that "in light of the tragic flood and the loss of life that precipitated the safety regulation here, it is hard to understand how appellant ever expected to rebuild on Lutherglen."\(^{136}\)

In light of the destruction caused by Hurricane Hugo (to which the flooding of Lutherglen seems mild in comparison), it is difficult to understand how Justice Scalia failed to see that beachfront management is necessary to avoid catastrophe. It is a nuisance to build on the beach because of the potential loss of life and property resulting from hurricanes and other severe storms.

**B. Nuisance and the Public Trust**

At Roman Law, "these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea. No one therefore is forbidden to approach the seashore, provided that he respects habitations, monuments and buildings, which are not, like the sea, subject only to the law of nations."\(^{137}\) No one was forbidden access to the sea and everyone could use the seashore "to dry his nets there, and haul them from the sea."\(^{138}\) This common law right of the public to use the seashore still remains a "guiding principle in all or nearly all jurisdictions which acknowledge the common law and unless changed by code or statute, in all civil law jurisdictions as well."\(^{139}\) The interference with this public right is a nuisance and if the adjacent property owner's use of his land interferes with this right, the state can enjoin this use or regulate this use prospectively.

1. The Public Trust Doctrine as Applied in England, the United States and South Carolina

In England, this common law principle manifested itself in a rule of construction regarding the King's manorial grant of coastal lands. Although the King could grant rights in the tidelands,\(^{140}\) a grant of the highland adjacent to the tidelands would not carry with it any rights to the tidelands unless the grant specifically stated the rights to the tide-

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139. *Balli*, 190 S.W.2d at 100.
140. For the purposes of this discussion, the term "tidelands" refers to the land between the high tide and low tide mark that is covered at one point during the day by water. The term "submerged lands" refers to the land that is constantly covered by water and which forms the bed of the river. "Tidal streams" are streams and rivers that are subject to the ebb and flow of the sea.
lands. However, a grant of land adjacent to non-tidal waters “automatically carried with it title to the land beneath those waters, unless the grant specifically excluded that land.” Thus, in streams that were not subject to the sea’s tides, the title of riparians extended to the center of the streams. Two commentators try to explain the difference between tidal and non-tidal riparian grants based on the geography of England and on the structure of life therein. England, as an island, was “largely dependant on a sea-related economy rather than a self-sustaining continent.” Further, as noted by Justice Field in The Daniel Ball, in England there are no navigable waters “in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing.” However, in countries like France, Spain and Mexico that had reached greater levels of self-sufficiency because of more extensive resources (and where there were many rivers not subject to the tide), the distinction was not between tidal and non-tidal water, but between navigable and non-navigable waters. Where the river was navigable, the land grants did not include the rights to the land between the tides.

After the Magna Carta, this rule changed from a rule of construction to a firm rule granting certain rights to the public. Tidelands became a separate form of property, held in trust for the people by the King and incapable of being transferred to a private person. Only Parliament, as the representative of the English people (the recipients of the lands in trust), had the power to grant these lands to private persons.

When the first American states became sovereign after the revolution, their governments acceded to the King’s rights with respect to water within their borders. Under the “Equal Footing Doctrine,” new states, upon entry to the Union, received ownership of all lands under water subject to the ebb and flow of the tide.

In 1852, the Supreme Court, in The Propeller Genessee Chief v. Fitzhugh, recognized that the English rule did not make much sense in the United States. While in England, most of the rivers were subject to the

142. Id.
143. Balli, 190 S.W.2d at 111 (Sharp, J., dissenting).
144. Clineburg & Krahmer, supra note 141, at 11. The tidelands were protected so that the English public would always have access to the sea for fishing and shipping, two important island industries.
145. 77 U.S. (10 Wall.) 557 (1870).
146. Id. at 563.
147. Balli, 190 S.W.2d at 111 (Sharp, J., dissenting).
148. Clineburg & Krahmer, supra note 141, at 11-12. While the change occurred after the Magna Carta, it was not necessarily because of the Magna Carta. Id. at 11, n.14.
149. Id. at 12.
151. Id.
152. 53 U.S. (12 How.) 443 (1851).
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ebb of flow of the sea, the geography of America was quite different. The
“thousands of miles of public navigable water[s] in which there is no
tide” required that “jurisdiction [be] made to depend upon the navigable
character of the water, and not upon the ebb and flow of the tide.” The
rule in the United States thus became more like that in France and
Spain rather than that in England, relying on whether the river was navi-
gable rather than on whether the river was tidal. The Supreme Court
then extended the scope of lands held in the public trust in Phillips. The
Court held that the change from “tidal-determinable” to “navigable-de-
terminable” did not “simultaneously withdraw from public trust cover-
age those lands which had been consistently recognized as being
within that doctrine’s scope: all lands beneath waters influenced by the
ebb and flow of the tide.” As a result of Genesee and Phillips, the
federal public trust doctrine in the United States is very broad.

The Court has stated that it is a well recognized rule that individual
states have the authority to define the limits of the land that they hold in
the public trust. In 1712, the General Assembly of South Carolina
enacted a reception statute expressly declaring the common law of Eng-
land to be the law of South Carolina:

all and every part of the Common Law of England, where the same is
not inconsistent with the particular constitutions, customs and
laws of this Province is hereby made and declared to be in as full
force and virtue within this Province, as the same is or ought to be
within the said Kingdom of England.

Thus, as of 1712, the rule in South Carolina was that grants of riparian
land adjacent to tidal water did not grant title to the tidel land.

While the Supreme Court was broadening the public trust doctrine to
include more waterways, South Carolina did not follow the Court’s lead.
The two leading South Carolina cases are State v. Pacific Guano and
Cape Romain Land & Improvement Co. v. Georgia-Carolina Cannng Co.
Pursuant to these two cases, title to land below the mean high tide
line on navigable tidal streams belongs to the state to hold in trust for the

153. Id. at 457.
154. Phillips, 484 U.S. at 479-80 (citation omitted).
155. Id. at 475. The most famous example of a state limiting its public trust is the rule
in Massachusetts. “In the 1640’s, in order to encourage littoral owners to build wharves,
the colonial authorities extend[ed] private titles to [the] mean low water line or
100 rods from the mean high water line, whichever was the lesser measure.” Opinion of
the Justices to the House of Representatives, 313 N.E.2d 561, 565 (Mass. 1974). For a
thorough discussion of the public trust doctrine in the thirteen original states, see Shively
1985). See also O’Hagan v. Fraternal Aid Union, 141 S.E. 893 (S.C. 1928) (presuming
that English Common Law governs if no South Carolina authority to the contrary).
157. 2 STAT. AT LARGE OF SOUTH CAROLINA 401, 413-14 (Cooper ed. 1837), quoted
in Sloan, 328 S.E.2d at 86.
158. 22 S.C. 50 (1884).
159. 146 S.E. 434 (S.C. 1928).
public.\textsuperscript{160} On its face, the rule in South Carolina is more strict than the English rule and substantially more strict than the American rule as expressed in \textit{Phillips Petroleum}\.\textsuperscript{161} The English rule does not require that the stream be navigable, only tidal, and the American rule requires that the stream be either navigable or tidal. However, because South Carolina's definition of navigability is so broad, the navigable requirement in generally satisfied.\textsuperscript{162}

South Carolina also protects its non-tidal navigable rivers through its

\begin{itemize}
\item In a separate concurring opinion in \textit{State v. Hardee}, 193 S.E.2d 497 (S.C. 1972), Justice Bussey writes that there is no public trust to the tidelands, only to the submerged lands. He argues that \textit{Pacific Guano} is a case about submerged lands and the statements in \textit{Cape Romain} are dicta. \textit{Id} at 503-04 (Bussey, J., concurring). Historically, he argues, tidelands were treated as vacant lands. "Indeed, it is an historical fact that the economic welfare of the State throughout much of its history was largely dependent upon the cultivation of rice lands which were lawfully granted, privately owned tidelands." \textit{Id}. at 504. He also cites to a case, \textit{State v. South Carolina Phosphate Company Ltd.}, alias \textit{The Oak Point Mines} (printed in the appendix to 22 S.C. at 593). \textit{Id}. At issue in \textit{Oak Point Mines} was the title to tidelands and the court concluded that "lands below high water mark in tidal navigable rivers have been uniformly recognized by the legislature as embraced within the description of vacant lands, and subject as such to location and grant under the general regulations of the land office." \textit{Id.} at 505. The opinion of the \textit{Hardee} court, however, seems to reject Judge Bussey's contention, adhering to the rule in \textit{Cape Romain} that land between the tides on tidal navigable streams is held in trust for public purposes. The majority's interpretation of the public trust is affirmed in \textit{Hobbonny Club, Inc. v. McEachern}, 252 S.E.2d 133 (S.C. 1979), where the court states that "lands lying between the usual high water line and the usual low water line on tidal navigable watercourses enjoy a special or unique status, being held by the State in trust for public purposes." \textit{Id}. at 135.

\item In \textit{State ex rel. Medlock v. South Carolina Coastal Council}, 346 S.E.2d 716 (S.C. 1986), the court sets out the rule for determining the navigability of a river:

The true test to be applied is whether a stream inherently and by its nature has the capacity for valuable floatage, irrespective of the fact of actual use or the extent of such use. Valuable floatage is not necessarily commercial floatage.

[There is] a tendency of modern judicial thought that water is navigable which is of such character as to be of general use by the public for pleasure boating. \textit{Id}. at 719 (citation omitted). The federal rule is that for waters to be navigable "they must connect with other water highways so as to subject them to the laws of interstate commerce." \textit{Id}. In \textit{Hughes v. Nelson}, 399 S.E.2d 24 (S.C. Ct. App. 1990), the South Carolina Court of Appeals described navigable waters in a "lighter" fashion: "[t]o be navigable, a waterway does not have to embrace commercial shipping lanes. It need not accommodate the Carnival Cruise Lines or be able to float the Love Boat." \textit{Id}. at 25. The court then states:

[I]t would, indeed, be difficult to imagine a more valuable floatage than a fishing boat on the Edisto River. The deathless prose of Herbert Hoover leaps to mind: The blessings of fishing include discipline in the equality of men, meekness and inspiration before the works of nature, charity and patience toward tackle makers and the fish, a mockery of profits and conceits, a quetting of hate and gladness that you do not have to decide a blanked thing until next week. \textit{Id}. at 25-26 (quoting \textit{HERBERT HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933} 138 (1952)).
\end{itemize}
navigational servitude. Article XIV, Section 4, of the South Carolina Constitution provides in part that "all navigable waters shall forever remain public highways free to the citizens of the State . . . and no wharf [shall be] erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly".

To restate the rule in South Carolina, lands lying between the mean high water line and the mean low water line on navigable watercourses are held by the state in trust for public purposes. Applying the public trust doctrine to the facts in Lucas, the state has an interest in the beaches of the Isle of Palms. The Isle of Palms is next to tidal navigable waters. Lucas' property is adjacent to public trust land.

2. The Uses of Land Held in the Public Trust and Its Effect on Adjacent Landowners

Lucas' property is not public trust land. As the trial transcript indicates, Lucas' property is three hundred and forty feet landward of the mean high water mark. But what are the purposes for which the public trust land is held? And if these purposes would be harmed by Lucas' use, can the state regulate Lucas' land as well?

There are two important cases that demonstrate how other states have defined the scope of the public trust. The first is a New Jersey case, Matthews v. Bay Head Improvement Ass'n. The second is Marks v. Whitney, a California case. In Matthews, the court writes that while historically the rights under the public trust were to use the ocean and the land for navigation and fishing, the New Jersey courts have extended these rights "to recreational uses including bathing, swimming and other shore activities."

The nature of these activities requires that the public trust be extended to cover the adjoining privately owned land. The "exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach." In addition:

[the bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete
pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge.\textsuperscript{169}

In \textit{Marks}, there is a greater extension to the uses of land held in the public trust. The court notes that the public trust traditionally covers navigation, commerce and fisheries and that it has been extended “to include the right to fish, hunt, bathe, swim, [and] to use for boating and general recreation purposes.”\textsuperscript{170} However,

\textit{\textquotedblleft}the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.\textsuperscript{171}

While the court did not address how using the public trust land as protected tidelands would affect the public’s rights to the land adjacent to the tidelands, one can imagine that similar to the reasoning in \textit{Matthews}, some use of the adjacent private land would be required in order to gain the full enjoyment of the land held in trust. \textit{Marks} and \textit{Matthews} stand for the premise that the public trust allows states to use trust land for many purposes and that these purposes may give the public certain rights to the adjacent private property.

South Carolina never states the purposes for which land held in trust can be used. However, while the Beachfront Management Act does not specifically mention the public trust, it can be read as defining the scope and purposes of the land held in trust. It lists certain public uses of the tidelands (recreation and conservation) and then describes how the preservation of the beach/dune system is necessary to protect these public uses.\textsuperscript{172} Applying \textit{Matthews} and \textit{Marks} to South Carolina, South Caro-

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  \item \textsuperscript{169} \textit{Id.} at 365. Gilbert Finnel writes that the \textit{Matthews} court’s rationale in expanding the public’s rights to the dry sand beach is similar to the rationale behind the easement of necessity. “When an estate is land locked, its value is diminished and its use inhibited unless there is an easement for ingress and egress implied in the conveyance.” Gilbert L. Finnel, Jr., \textit{Public Access to Coastal Public Property: Judicial Theories and the Taking Issue}, 67 N.C. L. REV. 627, 645 n.147 (1989).
  \item \textsuperscript{170} \textit{Marks}, 491 P.2d at 380.
  \item \textsuperscript{171} \textit{Id.} (citation omitted). \textit{See also} Just v. Marnette County, 201 N.W.2d 761 (Wis. 1972). In \textit{Just}, the court states as reason for needing to protect the wetlands, the “active public trust duty of the state of Wisconsin in respect to navigable waters [which] requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.” \textit{Id.} at 768.
  \item \textsuperscript{172} S.C. CODE ANN. § 48-39-250(1)(c)-(d) (Law. Co-op 1992). The code specifically states that the tidelands and the adjacent dry beach are the homes of many endangered species and that these lands provide a place for the citizens of the state to spend their leisure time. \textit{Id.}
\end{itemize}
olina may have rights to the private beach land (including Lucas' property) in order to protect the public's rights to the tidelands. The question now is what happens when someone interferes with these rights.

3. It is a Nuisance to Interfere With the Public's Use of Land Held in Trust

In *Cape Romain*, the court stated that "[t]he title to land below high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes." The question arose as to whether the land held in public trust could ever be sold to private interests. While the State Attorney General expressed the view that this passage "precludes [the] sale of tidelands except by an act of the legislature," Clineburg and Krahmer understand this passage not to mean that this land can never be sold, but that title grants, which may include tidelands, are to be strictly construed against the grantee. Support for this position comes from the 1950 decision, *Rice Hope Plantation v. South Carolina Public Serv. Authority*. In *Rice Hope*, the court cited to *Cape Romain*, but then stated that "we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners. . ." In *Hardee*, the court supported the position stated by Clineburg and Krahmer.

While South Carolina allows the sale of land held in the public trust under certain conditions, South Carolina has always recognized that the unauthorized obstruction of navigable waters is unlawful. In *State ex rel. Medlock v. South Carolina Coastal Council*, the court determined that the Coastal Council's permit to allow filling of land that was partly under the high water mark and the majority of which was regularly flooded by normal tide action was illegal because it would destroy land that was held under the public trust. "The Coastal Council does not have the authority to authorize the complete blockage of navigable streams and waterways. . ."
This protection of land held in the public trust is also found in *Carter v. South Carolina Coastal Council.* In *Carter,* the court held that a regulation denying the filling of a coastal wetland was not a taking. While the *Carter* court does not state that this property was protected under the public trust, the court makes reference to the public trust doctrine in a footnote: "[a] private wetland does not have to be under the navigable water of the state or below mean high tide . as long as it borders on tidal water, is subject to some tidal action, and supports aquatic growth." If the wetland meets these requirements it can be regulated the same as land held under the public trust.

The *Carter* court also cites to a Wisconsin case, *Just v. Marinette County,* which held that the destruction of public trust land is a nuisance and can therefore be regulated and enjoined. This is not a novel theory. This is a traditional common law action with origins found in the dissent of Judge Best in the English Case, *Blundell v. Catterall.* Judge Best held that the seashore’s only purpose was as a boundary and as an approach to the sea and therefore it should be common to all those who wanted to use the sea. Further, he argued, the interference with the public’s right to use the sea was a public nuisance because it deprived something essential to human nature.

While Justice Best was referring to the prevention of the public’s use of the sea for fishing and navigational purposes, the public’s use of the beach has been extended to include recreation and conservation. In cases like *Carter,* *Marks,* *Just,* and *Matthews,* the courts have held that interference with lands held in the public trust is a nuisance and can be regulated or enjoined. The reasoning employed by these cases led one commentator to suggest that “public trust law is perhaps the strongest contemporary expression of the idea that the legal rights of nature and of...
future generations are enforceable against contemporary users.”

Lucas’ property is not under the high tide mark on a tidal navigable stream. Lucas’ property is not public trust land. However, his property is adjacent to land held in the public trust and his land is necessary to gain full use of the public trust land. By building on his land and by building devices to protect against erosion, Lucas and others are causing the diminishing of land held in the public trust. This interference with the public trust is a nuisance.

In *State ex rel. Templeton v. Goodnight*, a landowner had erected a fence that made entrance to the beaches impossible. The Texas Supreme Court held that even though the fences were not on the public land but on private land, this was a nuisance and a purpresture. “In so far as the fences alleged in the petition interfere with the sale or lease of public lands, the petition shows an injury to the public as an aggregate public body; they affect all alike.” Thus, while Lucas’ property is not public trust land, because of its location and because of its effects on the land held in trust, building on Lucas’ property is a nuisance.

C. Protection of the Environment: A Nuisance Against the Land Itself

Justice Holmes once stated that “a river is more than an amenity, it is a treasure.” For many years, Holmes words were forgotten. The natural resources in this country were pillaged without concern of the effects of such use. However, for the last twenty-five years, people have become more knowledgeable about environmental issues, and the legislatures of many states have responded to this concern. In 1967, Marinette County in Wisconsin adopted a shoreline zoning ordinance in order to protect the wetlands. The regulation restricted certain uses of the land including relocation of any watercourse, filling, draining, or dredging the wetlands and removal of topsoil. The Justs, who had purchased the land several years before the regulation was passed, brought a suit claiming

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192. 11 S.W 119 (Tex. 1888).
193. *Id.*
194. A purpresture is “an encroachment upon public rights and easements by appropriation to private use of that which belongs to the public. It is not necessarily a public nuisance. [A] purpresture may exist without putting the public to any inconvenience whatever.” *Black’s Law Dictionary* 1236 (6th ed. 1990). South Carolina recognizes an action in purpresture but the case law is limited and the cases revolve around people who build structures on land owned by the state that is adjacent to highways. See *Anknim v. South Carolina State Highway Dep’t*, 159 S.E.2d 911 (S.C. 1968). The author has chosen not to discuss the possibility that Lucas’ proposed structure would be a purpresture. For a more extensive discussion of purpresture law, see Finnel, *supra* note 169.
197. *Just*, 201 N.W.2d at 764.
198. *Id.* at 766 n.3.
that their property was taken without compensation after Ronald Just was fined for filling in the property without obtaining a permit.\textsuperscript{199} The court addressed the taking claim, framing the issue as a conflict "between the public interest in stopping the despoliation of natural resources and an owner's asserted right to use his property as he wishes."\textsuperscript{200}

In addressing the question of whether there was a taking, the court asked the larger question: "Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?"\textsuperscript{201} Instead of giving the typical answer, that a prohibition on the use of property that causes injury to the community cannot be deemed a taking, the court went one step further. "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."\textsuperscript{202} Although this property may have greater economic value as habitable property, it may not be developed.\textsuperscript{203}

In a similar case, the Maryland Court of Appeals held that a prohibition barring dredging in the marshlands was not a taking because the activity was a nuisance and a prohibition to abate a nuisance cannot be a taking.\textsuperscript{204} Just and the line of cases that follow it stand for the principle that building on wetlands, floodplains, woodlands and beaches and other ecologically sensitive lands is a nuisance. But why is this development a nuisance? As previously stated, it is a nuisance to build on land unsuited for development. It is also a nuisance to interfere with lands held for the public trust. However, Just and its progeny also stand for a greater principle. To destroy these ecologically sensitive lands is a nuisance to the land itself.

In 1984, the South Carolina Supreme Court had the opportunity to decide whether the state's policy of controlling and restricting the filling of wetlands was an unconstitutional taking.\textsuperscript{205} Citing Just, the court held that the regulation was not a taking.

While unquestionably respondent's wetland would have greater value to him if it were filled, "[a]n owner of the land has no absolute right to

\textsuperscript{199.} Id. at 766.
\textsuperscript{200.} Id. at 767.
\textsuperscript{201.} Id. at 768.
\textsuperscript{202.} Id.
\textsuperscript{203.} Id.
\textsuperscript{204.} Potomac Sand and Gravel Co. v. Governor of Maryland, 293 A.2d 241 (Md.), cert. denied, 409 U.S. 1040 (1972). Many state courts have followed the rationale of Just and Potomac in deciding that statutes preventing certain land development are not unconstitutional takings of property. See Maple Leaf Investors v. State Dep't of Ecology, 565 P.2d 1162 (Wash. 1977) (regulation prohibiting human dwellings in floodplain was not a taking but a valid exercise of police power); Turnpike Realty Co., Inc. v. Dedham, 284 N.E.2d 891 (Mass. 1972) (flood plain zoning was necessary to reduce the damage to life and property caused by flooding), cert. denied, 409 U.S. 1108 (1973); Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978) (nuisance to build in floodplain because erosion increases the risk of flooding), cert. denied, 440 U.S. 936 (1979).
change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.\textsuperscript{206}

Thus, under the common law of South Carolina, development of environmentally protected property is a nuisance. Lucas' proposed construction on the Isle of Palms is a nuisance per se and can be regulated without compensation.

\section*{IV Conclusion}

\subsection*{A. The Decision in Favor of Lucas}

On remand, The South Carolina Supreme Court stated that the "Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas’ desired use of his land; nor has our research uncovered any such common law principle."\textsuperscript{207} There are three possible reasons for the court's decision in favor of Lucas. As previously discussed, Lucas came down from the Supreme Court with what seems to be strict instructions that the South Carolina Supreme Court was not to find background common law principles supporting the State's position.\textsuperscript{208} Given these instructions, the court was not likely to hold in favor of the Coastal Council. Instead, the court took an intermediate position, finding only that a temporary taking had occurred.\textsuperscript{209} The damages suffered by four years of delay are not likely to reach the level of damages initially found by the trial court. Lucas had not even started construction on the two houses in 1988.

Beyond this "damage control" theory, there is a more substantial reason why the court felt that South Carolina was unable to show background principles of common law nuisance. In 1990, as a result of Hurricane Hugo, the state amended the BMA to allow property owners to appeal Coastal Council decisions. The BMA had originally prevented all new construction and all rebuilding of destroyed houses. There were no exceptions. However, after Hurricane Hugo, the State was faced with thousands of potential takings claims by property owners whose homes had been destroyed, claims which the Coastal Council felt would bankrupt the state.\textsuperscript{210} Instead of enforcing the law, "the Coastal Council ruled that more than ninety percent of the beachfront houses that were seriously damaged could be repaired or rebuilt."\textsuperscript{211}

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\item\textsuperscript{206} Id. at 329 (quoting Just, 201 N.W.2d at 768.).
\item\textsuperscript{207} Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, LEXIS 236, at *4-5 (S.C. 1992).
\item\textsuperscript{208} See supra note 95.
\item\textsuperscript{209} Lucas, LEXIS 236 at *5.
\item\textsuperscript{210} Mary T. Schmich, \textit{After Hugo, Residents Rebuild in Spite of Law}, CHI. TRIB., Apr. 15, 1990, at C12.
\item\textsuperscript{211} Id. In addition, the South Carolina Supreme Court has nullified tests set up by the Coastal Council that would have prevented certain rebuilding because these tests interfere with the permit application process. "Coastal Council's damage assessment test has
In *Lucas*, Justice Scalia wrote that it was unlikely that the BMA was enacted for safety purposes because in application, the BMA did not prevent the construction of many houses on the beach.

Justice Blackmun [who relies on the harm-preventing characteristics of the BMA, sees] no significance in the fact that the statute permits owners of existing structures to remain (and even to rebuild if their structures are not “destroyed beyond repair,”) and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition.\(^{212}\)

Why should one property owner be prevented from constructing a house when his neighbors are allowed to live in their houses? The same safety justifications exist for all of the lots.

The setback program, as envisioned, made sense so long as it was uniformly applied. New houses were not going to be built, and as the existing buildings aged or were destroyed by storms, the owners were not going to be able to rebuild. This was a cost-efficient program because the state would not have to compensate the landowners. If there was to be any compensation, it would come from the insurance companies for the destruction of property resulting from storms.\(^{213}\) Thus, over a thirty year period, the setback plan would clear the homeowners off the beach. This plan was more “just” than the two alternatives: (1) conceding that the beaches were lost; or (2) forcibly removing the property owners from their property and destroying the houses. However, South Carolina was unable to apply the law consistently, and it became impossible, if not hypocritical, to argue that preventing one landowner from building was in the interest of public safety. For this reason, the South Carolina Supreme Court was forced to concede that the primary purpose of the BMA was not to prevent a nuisance.

It is also important to note the personnel change in the South Carolina Supreme Court and the effect of this change on the case. The first South Carolina Supreme Court decision was decided by a 3-2 majority. Were this majority intact, the author believes that the court, on remand, would have held for the Coastal Council. The majority felt that the facts in *Lucas* were similar to those in *Carter*, and the court was not prepared to overrule *Carter*.\(^{214}\) Further, the language of the opinion indicates that the court felt that the BMA was enacted to prevent serious risks to life and property. Most important, however, was the court’s recognition that the public trust doctrine may present a means “to regulate [the] private property immediately adjacent to the public property which sits below

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\(^{212}\) Lucas, 112 S. Ct. at 2898 n.11 (citations omitted).

\(^{213}\) The property owners presumably would take their settlement money and move to where their homes could not damage the environment.

\(^{214}\) Lucas, 404 S.E.2d at 901.
the mean highwater mark.”

The 3-2 majority no longer existed when the case was decided on remand. Shortly after the decision, Chief Judge Gregory, a member of the majority, left the court and the Chief Judge position was filled by Judge Harwell, one of the dissenters. There is no doubt that this change was instrumental in the decision on remand.

B. The Future of Environmental Regulations

In 1968, one writer analogized environmental degradation to the communal use of a grazing pasture. A pasture can only handle a certain number of cows. But in what he called the “tragedy of the commons,” Hardin wrote that each person wishing to utilize the common grazing pasture will try to add more cows to his herd even though the commons will be diminished. The herdsman that does so will receive the full value of one cow but the detriment will be shared equally by all herdsmen. Therefore all herdsmen are encouraged to add more cows and must continue to add cows in order to remain in competition. The result is that the common resource is destroyed. Hardin concludes that “[f]reedom in a commons brings ruin to all.”

Like Hardin’s herdsmen, Lucas and the other beachfront property developers built beyond the beaches’ capacity. When they realized that the beaches were eroding, the developers built erosion controls and brought in sand to nourish the beach. But these erosion controls did more damage than good and the erosion worsened. The common was quickly being destroyed. In 1988, the State of South Carolina recognized that its program to protect the beaches and dunes had failed. By enacting the Beachfront Management Act, the State was continuing a program that it had started over ten years before. South Carolina was committed to restoring its beaches. The series of Lucas cases may have ended beach conservation in South Carolina.

Lucas presents serious stumbling blocks for states that seek to amend their environmental protection statutes or to create new statutes. Many states have their own setback programs, each designed to prevent the harms described by the South Carolina General Assembly. However, Lucas provides one exception in regulatory takings cases. Where the regulation is to prevent a common law nuisance, the state can regulate to the point even where there is no economic value.

This Comment has identified three forms of nuisance that states can

215. Id. at 896 n.1.
216. Garrett Hardin, Tragedy of the Commons, 162 Sci. 1243, 1244-45 (1968) (While focusing on population control, Hardin discusses the problem of the unlimited use of commons such as the western ranges and the oceans).
217. Id. at 1244.
218. Id.
219. Id.
220. Id.
identify in order to meet the Lucas test: (1) the beach is an inappropriate place to build a house. This construction causes the dunes to erode, leading to the loss of life and property; (2) the beaches are lands held in the public trust, and the destruction of these lands is a nuisance; and (3) the destruction of the wetlands and the dunes is a nuisance to the land itself. The first two theories are well founded in law. The third theory represents this author’s belief that it is unconscionable to destroy the remainder of the precious resources that still exist in this country. While this theory is based on a loose reading of certain common law cases, it also rests on no lesser authority than Locke who understood that “nothing was made by God for man to spoil or destroy.”

Under these three theories, states will be able to regulate the use of certain threatened lands as long as they apply the law uniformly. If protecting the public safety is the justification for the law, the regulation must be tailored to meet this justification. On remand, the South Carolina Supreme Court decided that the regulation on Lucas’ property was a taking, but the fight to preserve the beaches does not end with this decision. It is no longer affordable to disregard the dangers of uncontested expansion and to presume that all property is developable. To do so would be to destroy the commons, gaining profit for no one.

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