The Effect of *Lucas v. South Carolina Coastal Council* on the Law of Regulatory Takings

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THE EFFECT OF LUCAS v. SOUTH CAROLINA COASTAL COUNCIL ON THE LAW OF REGULATORY TAKINGS

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Abstract: In Lucas v. South Carolina Coastal Council, the United States Supreme Court established a two-part takings analysis. The first step is an “economically viable use” threshold question, subject to a nuisance exception. The second step is a balancing test in which courts weigh the public and private interests involved. Although this two-part analysis differs in structure from most lower court takings analyses, most courts already apply a functionally equivalent test. Therefore, unless the Court alters the unit of land to which it applies, this new analysis will have little effect on the outcome of takings challenges to land use regulations.

All ownership and use of private property in the United States is subject to restrictions designed to protect the public interest. These restrictions may be imposed legislatively, as in zoning, or judicially under the doctrines of public nuisance and public trust. In many instances, the burden imposed on a property owner is outweighed by the benefits the owner receives from similar restrictions on others. For example, although residential zoning may limit the uses of private property, the similar restrictions on nearby owners often raise the market value of the land. In some instances, however, a regulation can force an individual owner to bear an extreme burden. Under these circumstances, the regulation may effect a Fifth Amendment taking, entitling the property owner to compensation.

While the principle of government compensation to prevent unfair hardship is generally accepted, determining when a regulation “goes too far” has been an inexact process. In recent years, the United States Supreme Court has formulated two tests to identify when a taking has occurred. In the first, courts balance the state’s interests against the hardship imposed on an individual property owner. In the second, the courts separately consider two factors: the legitimacy of the regulation’s purpose and the economic viability of the remaining uses for the property. During the 1980s, the Supreme Court often referred to the second test, but it did not interpret the “economically

1. The Fifth Amendment states, in part, “nor shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.
2. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (explaining that the question is one “of degree,” which “cannot be disposed of by general propositions”).
viable use" factor. Moreover, the Court did not explain the relationship between the two tests.

The Supreme Court addressed these issues in *Lucas v. South Carolina Coastal Council*.\(^5\) In this case, David Lucas challenged a regulation that prohibited all permanent construction on his beachfront property. He claimed that the regulation deprived him of all economically viable use of his land, and that it therefore amounted to a taking. The trial court found that the regulation indeed rendered the Lucas property "valueless," and this finding was not contested. On appeal, the United States Supreme Court addressed (1) whether a finding of "valuelessness" constitutes deprivation of economically viable use and (2) whether a regulation that removes all economically viable use necessarily effects a taking.

In resolving these issues, the Supreme Court clarified the role of the "economically viable use" test within a takings analysis that also includes a nuisance exception and the balancing test. This Note examines the structure and application of the *Lucas* takings analysis, focusing on the role and application of the "economically viable use" test. Although *Lucas* will have little practical effect on takings challenges, this decision may signal a future change in the property unit to which the analysis applies. If adopted in a later decision, the change suggested in *Lucas* would limit the region of land considered in the analysis, greatly increasing the number of successful takings challenges.

I. TAKINGS DOCTRINE PRIOR TO *LUCAS*

For over a century, courts have struggled to develop an analysis that identifies the point at which a land use restriction effects a Fifth Amendment taking. During this time, the Supreme Court addressed this question with vague, and sometimes inconsistent, formulations. Nonetheless, in the last decade, most lower courts have settled on a common approach to takings challenges. This consistency among the lower courts extends even to the critically important determination of the unit of land to which the test applies.

A. The Structure of the Takings Analysis

Early in this century, the Supreme Court's takings analysis was a poorly defined "economic impact" test. Under this test, a regulation could effect a taking if it caused severe individual hardship. Subsequently, the Court developed two distinct tests, each with an economic

component. The first was a balancing test in which the Court weighed
the interests of the public and the affected property owner. The sec-
ond was a two-part test in which the Court separately evaluated the
purpose of the regulation and the economic impact on the property
owner. Prior to Lucas, the Supreme Court repeatedly endorsed both
tests, but did not incorporate them into a single takings analysis.

1. The Original "Economic Impact" Formulation

In the late nineteenth century, most courts applied the Fifth
Amendment Takings Clause only to cases involving government
acquisition or physical occupation of property. States could prohibit
uses of private property that were "injurious to the health, morals, or
safety of the community," as long as the effect was not "arbitrary or
unreasonable." Even a severe economic impact on an individual
landowner did not, by itself, render a regulation unreasonable.

In spite of the breadth of this regulatory power, the primary focus of
nineteenth century state regulations was the prohibition of nuis-
ances. By the early twentieth century, however, state regulations
had expanded to include zoning, which allowed the restriction of
activities that were merely "nuisance-like." Perhaps intending to
limit this expansion, the Supreme Court reinterpreted the Takings
Clause in Pennsylvania Coal Co. v. Mahon to require compensation
when a regulation goes "too far" and causes a severe diminution in
the value of private property. The Court did not, however, define
the severity of economic hardship necessary to constitute a taking.
Although the Court also questioned whether the public interest served
by the regulation warranted the interference with individual property

6. DANIEL R. MANDELKER, LAND USE LAW 16 (2d ed. 1982); see, e.g., Mugler v. Kansas,
123 U.S. 623, 668–69 (1887) (stating that a prohibition on the use of property is not a taking).
7. Mugler, 123 U.S. at 669.
8. E.g., Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Reinman v. Little Rock, 237 U.S.
171, 177 (1915).
9. E.g., Hadacheck, 239 U.S. at 405 (holding that a 92.5% diminution in value did not
amount to a taking); Mugler, 123 U.S. at 657 (holding that no taking occurred where a regulation
"very materially diminished" the property value).
10. Catherine R. Connors, Back to the Future: The "Nuisance Exception" to the Just
11. E.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 387–89 (1926) (stating that zoning may
restrict commonplace uses, such as businesses or apartment houses, to specified areas); Reinman,
237 U.S. at 176 (holding that the state may "declare that in particular circumstances and... localities a livery stable shall be deemed a nuisance").
13. Id. at 415.
14. Id. at 413.

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rights, the Pennsylvania Coal takings analysis did not expressly require a balancing of public and private interests.

2. The Penn Central Balancing Test

Throughout the middle of the twentieth century, takings jurisprudence did not progress beyond, or clarify, the vague “too far” test of Pennsylvania Coal. In the 1970s, however, the increasing number of restrictive regulations, often environmentally based, triggered additional takings challenges and highlighted the deficiencies in the “too far” test. The Supreme Court responded with new formulations of the takings analysis.

In Penn Central Transportation Co. v. City of New York, the Court’s test was an “ad hoc, factual inquiry” into the fairness of the regulation. This test required analysis of both the public interest furthered by the regulation and the economic impact on the affected property owner. To evaluate the public interest, the Court considered the nature of the regulation, including its purpose, its effectiveness, and the necessity of the harm to the landowner. The Court acknowledged that a state interest could justify the complete destruction of a property interest.

To determine the economic impact on the individual, the Court has examined three factors. First, the Court has looked to the effect of the regulation on the market value of the land. Although any diminution in market value is relevant, even a large decrease in value has not

15. Id.
16. But see Frank I. Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165, 1190–91 n.53 (suggesting that “some kind of a ‘balancing’ test may be intended”). Some commentators have suggested that such balancing renders the analysis a question of due process, rather than one of takings, e.g., William B. Stoebuck, San Diego Gas: Problems, Pitfalls and a Better Way, 25 WASH. U. J. URB. & CONTEMP. L. 3, 33 (1983). The role of due process in these analyses is, however, beyond the scope of this Note.
20. Id. at 124–25.
21. Id. at 127.
22. Id. at 129 (explaining that the restriction must be an “appropriate means of securing the purposes”); see also Nollan v. California Coastal Comm’n, 483 U.S. 825, 837 (1987) (stating that “constitutional propriety disappears . . . if the condition . . . utterly fails to further the end advanced as the justification for the prohibition”).
23. See Penn Central, 438 U.S. at 127 (stating that a restriction “may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose”).
24. Id. at 125.
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been conclusive. Second, the Court has examined the uses that remain for the property after the regulation takes effect. Although the Court has not required compensation for the loss of the most profitable use, it has indicated that compensation may be required when a landowner is deprived of all reasonable remaining uses. Third, the Court has considered the owner's reasonable "investment-backed expectations" of land use and profitability. The primary such expectation is the continuation of preexisting uses. In addition, this element may preclude compensation when the owner can achieve a reasonable return on his or her investment.

The Penn Central Court did not define a level of economic impact that triggers the compensation requirement. Instead, it used an analysis of the economic impact and the state interest to determine whether "justice and fairness" require compensation. Although this approach does not involve a strict weighing of interests, the evaluation of these factors is commonly referred to as a balancing test.

3. The Agins Two-Part Test

In Agins v. City of Tiburon, the Supreme Court established a second takings test. This two-part test required separate consideration of the state interests and the economic viability of the remaining uses. According to Agins, "[t]he application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." This test does not suggest a balancing of interests. Instead, a court must first examine whether the regulation substantially furthers a legitimate state interest. If it does not, the regulation effects a taking. Otherwise, the court proceeds to

26. Id.
27. Penn Central, 438 U.S. at 138 (considering whether the regulation permits "reasonable beneficial use").
29. See Penn Central, 438 U.S. at 137 n.36.
30. Id. at 127 (stating that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'").
31. Id. at 136.
32. Id. at 136, 137 n.36.
33. Id. at 123.
36. Id.
determine whether an economically viable use remains for the property. The Agins Court's use of the conjunction "or" indicates that a regulation that furthers a legitimate purpose may still effect a taking if it denies economically viable use of the property.

The Agins Court, however, did not invalidate the Penn Central balancing test. Instead, the Court affirmed the test by observing that "no precise rule determines when property has been taken, . . . [and] the question necessarily requires a weighing of private and public interests."38 The Court did not explain the relationship between the Agins test and the Penn Central balancing approach. Furthermore, the Supreme Court did not explain the criteria for evaluating economic viability. In subsequent cases, the Court has merely restated the test without applying the "economically viable use" portion.39 Consequently, the lower courts have received minimal guidance in the application of the "economically viable use" element of the Agins test.

B. Recent Lower Court Approaches to Takings Decisions

Since 1980, most lower courts have applied the Agins two-part test in their own takings analyses. These courts have defined the term "economically viable use" to include nearly any use that alters the land's natural state. Because of this approach, most land use regulations have withstood takings challenges.

1. Application of the "Economically Viable Use" Test

In the last decade, most lower courts have applied the Agins two-part test, either alone or in combination with the Penn Central balancing test, to resolve takings challenges.40 Most courts have applied the two-part test exclusively, holding that there is no taking if both parts of the test are satisfied.41 When a regulation furthers a legitimate state

40. But see Sadowsky v. City of New York, 732 F.2d 312, 317 (2d Cir. 1984) (describing the entire takings inquiry as a balancing of interests); Rowe v. Town of North Hampton, 553 A.2d 1331, 1334 (N.H. 1989) (holding that the lack of economically viable use is not determinative).
interest, these courts have required plaintiffs in takings challenges to demonstrate the absence of remaining economically viable uses.\textsuperscript{42} Most of these courts have not expressly applied a balancing test, and the presence of any economically viable use has been sufficient to defeat a takings claim.\textsuperscript{43}

A few courts have applied the \textit{Agins} test in conjunction with the \textit{Penn Central} balancing test. In these courts, a regulation could not defeat a takings challenge unless it passed both tests.\textsuperscript{44} Using this approach, a court could find a taking even when the regulation furthered a legitimate state interest and the deprivation of value or use was less than complete. In these courts, as in the majority, a regulation that permitted no economically viable use effected a taking.\textsuperscript{45}

\section*{2. \textit{The Definition of "Economically Viable Use"}}

To determine whether an economically viable use remains, lower courts have looked to the three economic factors developed by the Supreme Court for use in the \textit{Penn Central} balancing test.\textsuperscript{46} First, the courts have looked to the effect of the regulation on the market value of the land. While most courts have held that diminution in value is relevant, even a significant loss of value, alone, has not amounted to a deprivation of economically viable use.\textsuperscript{47} Because a loss of market value is rarely complete, this factor has not generally been sufficient,

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Cincinnati, 526 N.E.2d 1350, 1357 (Ohio 1988); Jones v. Zoning Hearing Bd., 578 A.2d 1369, 1372 (Pa. Commw. Ct. 1990); City of Virginia Beach v. Virginia Land Inv. Ass’n No. 1, 389 S.E.2d 312, 314 (Va. 1990); \textit{see also} Richard G. Wilkins, \textit{The Takings Clause: A Modern Plot for an Old Constitutional Tale}, 64 NOTRE DAME L. REV. 1, 32, 32 n.222 (1989) (stating that most courts only find a taking when the owner is deprived of all value or use).


43. \textit{E.g.}, \textit{Kaiser Dev.}, 913 F.2d at 575–76.


45. \textit{E.g.}, McNulty, 727 F. Supp. at 608; \textit{St. Lucas}, 571 N.E.2d at 875.


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by itself, to establish a taking. Second, courts have generally required regulations to permit uses of the land beyond those uses available in the natural state. Regulations that permit some construction have been consistently upheld, even when the level of construction was minimal, as in a golf course, nursery or dude ranch. Most courts have also found agricultural uses to be economically viable. Third, courts have considered the owner's expectations of land use and profitability. As in the Penn Central balancing test, the most important factor in assessing these expectations is the use prior to the regulation. Even without improvements, courts may consider a prior use to be economically viable. In most cases, analysis of these factors has supported a finding of an economically viable use unless the regulation forced the land to remain in its natural state.

C. The “Piecemealing” Problem: Identifying the Unit of Land in the Takings Analysis

Because the existence of some remaining value and use for the property may defeat a takings challenge, the unit of land chosen for the analysis is critically important. Although the Supreme Court has not provided a clear definition of the appropriate unit of property for a takings analysis, it has indicated that, at a minimum, courts are not to

51. Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977, 982 (9th Cir. 1987), cert. denied, 109 S. Ct. 79 (1988).
53. See supra note 31 and accompanying text.
54. E.g., MacLeod v. Santa Clara County, 749 F.2d 541, 547 (9th Cir. 1984), cert. denied, 105 S. Ct. 2705 (1985).
55. E.g., id. (stating that holding for investment with interim use as a cattle ranch is an economically viable use); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893, 902 (Cal. Ct. App. 1989) (identifying camping as an economically viable use), cert. denied, 110 S. Ct. 866 (1990); Hall v. Bcaed of Envtl. Protection, 528 A.2d 453, 456 (Me. 1987) (viewing renting a mobile home as economically viable); Shopco Group v. City of Springdale, 586 N.E.2d 145, 150 (Ohio Ct. App.) (holding that a park is economically viable), cert. dismissed, 563 N.E.2d 302 (Ohio 1990).
57. See infra note 117 and accompanying text.
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divide a single piece of property into multiple estates.\textsuperscript{58} In addition,
the Court has considered ownership rights attached to separate pieces of
land when determining the economic impact on the property
owner.\textsuperscript{59} Accordingly, at least in some cases, the appropriate unit of
land for the takings analysis may extend beyond the boundary of the
affected plot.

Most lower courts have similarly rejected “piecemealing” of a single
plot into multiple interests or portions. These courts have held that
the appropriate unit of land for a takings analysis is all contiguous
land with a common owner.\textsuperscript{60} In these jurisdictions, a regulation may
deprive an owner of all uses of a portion of the land, as long as an
economically viable use remains for the rest of the property. For
example, a regulation that prohibits construction on 75\% of a piece of
property does not necessarily effect a taking.\textsuperscript{61} Similarly, a state may
prevent an owner of two contiguous lots from building more than one
house without providing compensation.\textsuperscript{62}

In special circumstances, some courts have “piecemealed” land into
smaller units, creating exceptions to the general rule that contiguous
land is considered as a whole. For example, courts have sometimes
considered mining rights separately from surface rights.\textsuperscript{63} Occasion-

\textsuperscript{58} See Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987) (holding that
the support estate and mineral estate are not viewed separately, and making no distinction
between coal that could, and could not, be mined); Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) (holding that air rights and surface rights are not separate interests); see also
Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part I — A Critique

\textsuperscript{59} Penn Central, 438 U.S. at 130–31, 137 (considering the transferability of air rights above
the terminal to the owner’s other parcels in the vicinity).

\textsuperscript{60} E.g., Bevan v. Brandon Township, 475 N.W.2d 37, 43 (Mich. 1991) (holding that two
contiguous lots, with separate tax numbers and purchased at different times, are viewed as a
whole), cert. denied, 112 S. Ct. 941 (1992). In rare instances, where the plots were linked by the
owner’s actions, some courts have also considered noncontiguous plots as a unit. E.g., Ciampitti
v. United States, 22 Cl. Ct. 310, 320 (1991) (holding that the owner’s view of the parcels as
“linked” justifies evaluation of the noncontiguous parcels as a whole); see also Deltona Corp. v.
United States, 657 F.2d 1184, 1192 (Cl. Ct. 1981) (considering contiguous tracts of land and
regions within the affected tracts), cert. denied, 102 S. Ct. 1712 (1982). But see J.M. Scott &
Assoc., Inc. v. Inland Wetlands and Water Conservation Comm’n, Nos. 0054193 to 0054195,
1991 WL 172832, at *5 n.3 (Conn. Super. Ct. Sept. 3, 1991) (stating that “there is no authority
allowing the Commission to force plaintiff to treat its three lots as one building lot”).

\textsuperscript{61} Keith v. Town Council of West Hartford, No. CV-90-3748015, 1992 WL 139183, at
*6–*7 (Conn. Super. Ct. June 5, 1992); see also Jones v. Zoning Hearing Bd., 578 A.2d 1369,
1371–72 (Pa. Commw. Ct. 1990) (holding that a landowner may be prevented from building on
70\% of property).

\textsuperscript{62} Bevan, 475 N.W.2d at 46–47.

\textsuperscript{63} Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1174 (Fed. Cir.), cert. denied, 112
(finding no taking when mining interests were restricted, because surface rights have value);
ally, courts have viewed the appropriate unit as the portion affected by
a zoning restriction.64 One court has even allowed the complaint to
determine the appropriate unit of land.65 These instances of
"piecemealing" are, however, exceptions to the general rule.

II. LUCAS v. SOUTH CAROLINA COASTAL COUNCIL

In 1986, David Lucas paid nearly one million dollars for two vacant
lots near the coast of a South Carolina barrier island.66 Two years
later, the South Carolina legislature enacted the Beachfront Manage-
ment Act,67 which prohibited all permanent habitable construction in
a coastal region that included the Lucas lots.68 Mr. Lucas sued for
compensation under the Fifth Amendment, claiming that the Act
completely destroyed the value of his land.69 In response, the South
Carolina Coastal Council denied that compensation was due, because
the regulation was "enacted to prevent serious public harm."70 The
South Carolina Supreme Court agreed with the Coastal Council. In
spite of the trial court's uncontested finding that the regulation ren-
dered the Lucas property "valueless,"71 the South Carolina Supreme
Court held that the economic harm did not require compensation.72

On appeal, the United States Supreme Court reversed, holding that
regulations that deny "all economically beneficial or productive use of
land" are subject to "categorical treatment."73 This treatment entitles
landowners to compensation unless the restriction "inhere[s] in the

(considering surface rights when determining the effect of restriction on removal of stone).
64. E.g., Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 154 (1990) (viewing the
wetland portion of property separately from the whole); Corrigan v. City of Scottsdale, 720 P.2d
528, 539 (Ariz. Ct. App. 1985) (considering only the largest of three contiguous parcels when
evaluating the economic effect), aff'd in part, 720 P.2d 513 (Ariz.), cert. denied, 107 S. Ct. 577
(1986); Twain Harte Assoc., Ltd. v. County of Tuolumne, 265 Cal. Rptr. 737, 744 (Cal. Ct. App.
1990) (explaining that the nature of the land use regulation may create separate parcels for taking
purposes).
65. Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031, 1031 n.6 (3d Cir.)
(explaining that the court need not address the question of the appropriate unit because the
complaint only alleged a taking of a portion of the property), cert. denied, 107 S. Ct. 2482
68. Lucas, 112 S. Ct. at 2889-90.
69. Id. at 2890.
71. Lucas, 112 S. Ct. at 2890.
72. Lucas, 404 S.E.2d at 898.
73. Lucas, 112 S. Ct. at 2893. The Court suggested that this treatment may not apply
to personal property. Id. at 2899-2900.
title itself." Under this analysis, David Lucas is entitled to compensation unless the state demonstrates, on remand, that home construction on his lots falls within the exception.

The Court used traditional nuisance law to define the uses that were not originally part of the owner's title. The exception does not include restrictions that are "newly legislated," unless they are grounded in the "background principles of the State's law of property and nuisance." Thus, to determine whether a given use falls within the exception, a court must consider the harm caused by the use, the social value of the use, and the existence of other means to prevent the harm. If this analysis indicates that the prohibited use is a nuisance, the exception applies and the owner is not entitled to compensation.

In dicta, the Supreme Court also indicated the role of the "economically viable use" test within the general takings analysis. The Court noted that an owner who does not suffer enough hardship to claim the benefit of the "categorical formulation" may still recover under the general takings analysis. This general analysis entails further examination of the economic impact on the property owner. Thus, failure to qualify for relief under the "economically viable use" test does not preclude recovery in a takings challenge.

III. THE LUCAS DOCTRINE AND ITS EFFECT ON TAKINGS DECISIONS

In resolving Lucas, the Court applied the "economically viable use" test and suggested a general analysis that will apply to all takings decisions. Although this approach differs in structure from the tests applied in most lower courts, it is functionally equivalent to most lower court analyses and thus will not affect the outcome of most decisions. On the other hand, the Court also suggested a change in the unit of land to which the analysis applies. If adopted in a future ruling, this change could significantly increase the number of successful challenges to land use regulations.

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74. Id. at 2900.
75. Id. at 2901-02.
76. Id. at 2900.
77. Id. A legislated regulation must "do no more than duplicate the result that could have been achieved in the courts... under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." Id. By "otherwise," the Court stated that it meant "cases of actual necessity," where the state acts "to forestall... grave threats to the lives and property of others." Id. at n.16.
78. Id. at 2901.
79. Id. at 2895 n.8.
80. Id.
A. The Structure of the Lucas Takings Doctrine

The Lucas Court incorporated the "economically viable use" test, along with a nuisance exception and the balancing test, into a single takings analysis. The Court's "categorical treatment" of regulations denying economically beneficial use indicates that the "economically viable use" test is a threshold question. This test determines the subsequent analysis. When a regulation fails to permit an economically viable use, a court must determine whether the state is exempt from the compensation requirement under a nuisance exception.

If a regulation satisfies the threshold test, it is further analyzed under the Penn Central balancing test. Although the Court did not refer to this test by name, this conclusion is implicit in the majority's discussion of the "takings analysis generally." The Court described this general analysis as one in which courts reconsider the economic impact on the property owner. The only other Supreme Court takings analysis that includes this factor is the Penn Central balancing test. Therefore, the balancing test is an element of the Lucas takings analysis, and applies to regulations that pass the threshold "economically viable use" test.

B. The Effect of the Lucas Takings Analysis

The Lucas analysis will have no significant effect on lower court takings decisions because most courts currently apply an analysis that produces equivalent results. First, nearly all lower courts use the "economically viable use" test in a manner consistent with Lucas. Second, most courts effectively, if not expressly, perform a balancing test. Third, the nuisance exception added by the Court will have little substantive effect because nearly all of the regulations that fail the "economically viable use" test will also fail to qualify for the exception. Therefore, although Lucas altered the structure of the takings analysis, it will not affect the outcome of most takings decisions.

1. The Effect of the Court's Endorsement of the "Economically Viable Use" Test

Although Lucas is the first Supreme Court decision based on the "economically viable use" test, lower courts have routinely applied
this test. Most courts currently decide takings challenges using the Agins two-part test, either exclusively or in combination with the Penn Central balancing test. Under either approach, courts apply the “economically viable use” test, and a regulation that deprives a landowner of economically viable use effects a taking. Therefore, the Lucas Court’s holding that deprivation of “all economically beneficial uses” constitutes a taking will have no effect on the majority of takings claims in the lower courts.

2. The Effect on the Definition of “Economically Viable Use”

The Lucas Court indicated two factors that are relevant to determining whether property has an economically viable use. The first is the remaining market value of the land. If a regulation renders property “valueless”, then no economically viable use remains. However, a severe diminution in market value, such as 95%, does not, by itself, constitute deprivation of economically viable use. The second factor is the remaining uses available to the landowner. The Court gave little specific guidance for the application of this factor, but did indicate that a regulation that requires land to be left substantially in its natural state deprives the owner of economically viable use.

The Court’s discussion of these two factors is consistent with lower court definitions of “economically viable use.” When a regulation furthers a legitimate state interest, most courts have not found a taking unless the regulation forces the land to remain in its natural state. Because the regulation at issue in Lucas kept the property in its natural state, the Court did not determine whether regulations that allow some development might also deny economically viable use. Consequently, nothing in the Court’s opinion suggests a change in the lower court approach. Economically viable uses should continue to include

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85. See supra notes 40–42 and accompanying text.
86. See supra note 43 and accompanying text.
87. See supra note 73 and accompanying text.
88. For the few states that have not been using the Agins test, or that have modified it through a sweeping insulation doctrine, Lucas will require a significant change. See, e.g., Powers v. Skagit County, 67 Wash. App. 180, 190, 835 P.2d. 230, 234, (1992).
90. Id. (stating that at least in some cases, a landowner suffering a 95% loss will get nothing).
91. Id. at 2893 (stating that a regulation may not deny “productive use of land”).
92. Id. at 2894–95 (explaining that regulations that leave the owner without economically viable use are typically those that require the land to be left substantially in its natural state); see also id. at 2894 n.7 (implying that a regulation leaving 90% of a piece of property in its natural state deprives the landowner of all economically viable use of 90% of the property).
93. See supra notes 48–56 and accompanying text.
94. Lucas, 112 S. Ct. at 2895.
all uses, including agriculture and home construction, that allow alteration of the land's natural state.  

3. The Effect on the Outcome of Lower Court Decisions  

The courts that use the Agins two-part test as the entire takings analysis should convert the “economically viable use” test into a threshold question and add an express balancing step. Under this modification, a determination that a regulation substantially furthers a legitimate purpose and does not deny all economically viable use will no longer be sufficient to defeat a takings challenge. Instead, a court must subsequently examine the regulation according to the Penn Central balancing test. In spite of this analytical change, Lucas will have no practical effect on takings decisions because (1) courts have often considered the same factors in applying the Agins two-part and Penn Central balancing tests and (2) courts have generally used a balancing approach in applying the Agins test.

a. Similarity of Factors Between the Agins Two-Part and Penn Central Balancing Tests  

Modifying the Agins analysis will not require courts to consider new factors in their takings decisions. Both the Agins two-part test and the Penn Central balancing test require consideration of two broad issues: the nature of the state interest served by the regulation and the economic impact on the individual landowner. In the lower courts, the factors that are relevant to these issues are the same, regardless of which test a court applies.

The lower courts generally interpret the first element of the Agins test, substantial furtherance of a legitimate state interest, as requiring consideration of the same factors as the “state interest” element of the Penn Central balancing test. These courts consider the purpose of the regulation when they examine the “legitimacy” of the state interest. In addition, they consider the effectiveness and necessity of the

95. See supra note 56.
96. See supra note 41.
97. See supra notes 21–23 and accompanying text.
regulation when they examine whether the regulation “substantially furthers” its purported purpose.\(^9\) Thus, the structural change in the analysis will not alter the “state interest” factors in the lower courts’ approach.

Similarly, the *Penn Central* balancing test and *Agins* “economically viable use” test contain the same “economic impact” factors. Courts have considered all of the economic elements of the *Penn Central* balancing test when determining whether the second requirement of the *Agins* test is met.\(^10\) Furthermore, the interpretation of these factors is the same in the two tests because courts generally have transferred Supreme Court language regarding the balancing test to the context of the “economically viable use” test. For example, when discussing the diminution in value, many courts cite *Penn Central* or *Keystone*, and state that diminution in value, while relevant, is not sufficient to establish a taking.\(^11\) Therefore, the addition of a balancing test to lower court analysis under *Lucas* will not result in the consideration of new “state interest” or “economic impact” factors.

b. *Application of the Agins Test as a Balancing Process*

A balancing test is, in theory, different from separate consideration of the state interest and the economic impact. This distinction, however, has no practical effect because courts commonly, if not expressly, apply the *Agins* test as a balancing test.\(^10\) A few courts have interpreted the *Agins* two-part test as another form of the *Penn Central* balancing test.\(^10\) These courts have expressly used the *Penn Central*

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\(^10\) See supra note 46.


\(^10\) See Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court’s Takings Doctrine and South Carolina’s Coastal Zone Statute*, 79 CAL. L. REV. 205, 258 n.257 (1991); see also 1 EDWARD H. ZIEGLER, JR., *RATHKOPF’S THE LAW OF ZONING AND PLANNING* 6-29 to -30 (1992) (The reasonable use test “is essentially a crystallization and narrowing of the broader ‘balancing of interests’ analysis . . . “).

\(^10\) E.g., *Deltona*, 657 F.2d at 1192 (explaining that the *Agins* two-part test requires a weighing of public and private interests); *Corrigan v. City of Scottsdale*, 720 P.2d 528, 535 (Ariz.
balancing approach to determine whether an economically viable use exists. In their analysis, they have made no distinction between the two takings tests. Other courts have allowed the *Agins* “state interest” determination to affect the “economically viable use” analysis, but have not acknowledged the balancing process. These courts are less likely to characterize the allowable uses as economically viable when they find no legitimate state purpose. For example, when a regulation furthers an improper purpose, such as lowering the value of land prior to condemnation, some courts have held that a preexisting agricultural use was not economically viable, despite nearly universal holdings to the contrary. Even residential uses may fail the “economically viable use” test when the regulation does not further a legitimate state interest. Thus, courts consider a deficiency in the legitimacy of the state interests when making the “economically viable use” determination.

This process results in an effective balancing of competing interests. The addition of an express balancing test will only make the current procedure explicit. This modification does not add a new analysis to the lower court regulatory takings doctrine, and thus will not alter the outcome of most takings challenges.

c. *The Minimal Effect of the Nuisance Exception*

The nuisance exception to the “economically viable use” test should exclude regulations that restrict uses that were, or could have been, declared nuisances at common law. According to the current law of nuisance, this exception will exclude nearly all of the regulations that fail the “economically viable use” test. Therefore, the *Lucas* nuisance exception will have little immediate effect on takings decisions.

The nuisance exception should apply only to common law nuisances. Although the *Lucas* Court did not explicitly restrict the

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104. E.g., Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1174 (Fed. Cir.) (holding that farming was not an “economically viable use” when the state’s purpose was to acquire the land), *cert. denied*, 112 S. Ct. 406 (1991); Ripley v. City of Lincoln, 330 N.W.2d 505, 508 n.3 (N.D. 1983) (holding that growing hay was not an “economically viable use” when the state purpose was the eventual acquisition of the land at a depreciated price).

105. *See supra* note 52.


exception in this manner, the Court's limitation of the legislative power to "newly define" nuisances\textsuperscript{108} has this effect. The Court acknowledged the power of legislatures to "abate nuisances," but it indicated that this power extends only to uses that could have been declared nuisances judicially, under common law principles.\textsuperscript{109} Therefore, the nuisance exception should permit legislative prohibition, without compensation, of uses that pose an unreasonable present threat to use and enjoyment of property.\textsuperscript{110} For these purposes, a threat is unreasonable if a reasonable person would think that its severity outweighs the utility of the conduct, or if the public harm caused by the conduct could be diminished without materially decreasing the benefits to the property owner.\textsuperscript{111}

Determining whether statutorily prohibited conduct constitutes a nuisance under this exception is highly fact-dependent. Courts must consider the nature and extent of the harm caused, the ability of the person harmed to avoid that harm, the suitability of the use for the location, and the burden on the acting person if the conduct is prohibited.\textsuperscript{112} Most uses may, depending on the precise situation, constitute nuisances under this analysis. Courts should, however, generally exclude home construction from the exception, except in rare instances where a reasonable person would consider such a use unreasonable in the location.\textsuperscript{113} The severe burden on the landowner and the existence of similar uses on indistinguishable pieces of property in the vicinity will weigh against a nuisance determination in such cases.\textsuperscript{114} Thus, a prohibition of home construction, at least in populated areas such as that in \textit{Lucas}, is not likely to be exempt from compensation under the nuisance exception.

Because courts should rarely consider home construction a nuisance, the exception excludes the very regulations most likely to fail the threshold test. Of the regulations that pass the first element of the \textit{Agins} test, furthering a proper state purpose, the "economically viable

\textsuperscript{108} See \textit{supra} note 77 and accompanying text.
\textsuperscript{109} See \textit{supra} note 77 and accompanying text.
\textsuperscript{110} \textit{Restatement (Second) of Torts} § 822 (1977); \textit{see also} Connors, \textit{supra} note 10, at 183. A similar definition has also appeared in prior Supreme Court opinions. \textit{E.g.}, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).
\textsuperscript{111} W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 630–31 (5th ed. 1984). This definition also includes threats of future injury. \textit{Id.} at 620.
\textsuperscript{112} \textit{Restatement (Second) of Torts} §§ 827–28 (1977).
\textsuperscript{113} \textit{Lucas} v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) ("It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land . . . .").
\textsuperscript{114} KEETON ET AL., \textit{supra} note 111, at 633.
use” test will affect only those that effectively prohibit construction, agriculture, and all other profitable uses. An otherwise proper regulation that leaves the landowner able to pursue one of these activities allows an economically viable use, and the threshold test will not affect such regulations. Because most land is suitable for either construction or agriculture, the large majority of regulations that fail the threshold test will be those that explicitly restrict both of these activities.

Such regulations will rarely fall within the nuisance exception. Neither construction nor agriculture currently meets the test of “grounding” in “background principles of nuisance and property law.” This is because both are commonly practiced and viewed as appropriate activities, and the prohibition of either generally results in a severe burden for the landowner. Only in rare situations where the public problem is severe enough to alter public perceptions of reasonable land use should courts invoke the exception and eliminate the requirement for compensation. Therefore, the nuisance exception does not cover the majority of regulations that will fail the “economically viable use” test, and it will have little immediate effect on the application of the “economically viable use” test.

C. The Effect of Permitting “Piecemealing”

Although the Lucas doctrine will have no significant immediate effect on takings decisions, the Lucas Court also suggested a decrease in the unit of property that courts should consider in the takings analysis. If this change is made in the future, it could radically alter the doctrine, rendering many currently acceptable regulations violations of the Fifth Amendment.

Because of the courts’ focus on remaining value and uses, the selection of the unit of property for analysis may determine the outcome of a takings challenge. If a court “piecemeals” property into narrowly defined interests, it is more likely to find a taking. For example, a regulation could deny an owner economically viable use of two acres out of a ten-acre plot. If a court looks only at the affected portion, a taking under the Agins test has occurred. However, if the court looks

115. See supra notes 48–52. A regulation may prohibit all economically viable use without explicitly restricting construction or agriculture, if the land is not suitable for such uses. Thus, a mining restriction may remove all economically viable use if the surface of the land has been rendered unsuitable for construction or agriculture by mining activity before promulgation of the regulation. See, e.g., Hernandez v. City of Lafayette, 643 F.2d 1188, 1197 n.17 (5th Cir. 1981), cert. denied, 102 S. Ct. 1251 (1982).
116. See supra note 77.
at the entire plot, and 80% of the value and use remains, then the “economically viable use” test would not indicate a taking.

The state and lower federal courts generally accept the view that the appropriate unit of land for a takings analysis is all contiguous land with a common owner. After *Lucas*, however, the Supreme Court may take the position that the “economically viable use” test should be applied to smaller portions of the owner’s property. The *Lucas* Court dismissed *Penn Central’s* consideration of the owner’s other holdings in the area as “unsupportable.” It suggested instead that the appropriate unit should be determined by the owner’s expectations, based on interests in land that the particular state specifically recognizes. This view is in agreement with previous dissenting statements by Chief Justice Rehnquist, and this dicta in *Lucas* suggests that the current majority may have adopted Rehnquist’s view.

If a future holding incorporates this change, it will drastically alter the takings analysis applied to land use regulations. Regulations that deprive an owner of the use of a legally recognized portion of land, defined by deed or, perhaps, by zoning boundaries, could result in a taking of that portion. For example, in *Bevan v. Brandon Township*, the plaintiff owner of contiguous lots was denied compensation, even though he was only permitted to build one house on the combined property. This plaintiff might, in the future, be able to demonstrate a taking by showing that no construction could proceed on one of the lots.

In addition, the suggested change would undermine state protection for wetlands and other environmentally sensitive regions. Under the current approach, a state may designate a portion of an owner’s property a wetland, subject to severe building restrictions, as long as economically viable use remains for the rest of the property. Under the formulation suggested in *Lucas*, this designation could effect a taking of the wetland portion. The adoption of the suggested approach, in

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118. See supra note 60.
120. Id.

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conjunction with the "economically viable use" test, could effectively prevent building restrictions on any portions of land.

IV. CONCLUSION

The Supreme Court's decision in *Lucas* incorporated the *Penn Central* balancing and the *Agins* two-part tests into a single analysis. According to this analysis, courts will first determine whether an economically viable use remains for the regulated land. If such a use exists, the courts will evaluate whether the public benefit justifies the hardship to the landowner. If the regulation permits no economically viable use, the courts will then determine whether the regulation falls within the nuisance exception. Although this new doctrine represents a structural change in the Court's analysis, *Lucas* will have little substantive effect on the outcome of takings challenges in the lower courts. However, if the Court permits "piecemealing" of property interests, the takings doctrine in future years may require compensation for a far greater number of land use restrictions.