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FROM LUCAS TO PALAZZOLO: A CASE STUDY OF TITLE LIMITATIONS

BRITTANY ADAMS*

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I. INTRODUCTION

The right to own property is one of the most important individual rights that the Constitution guarantees the American people.[1] The Founders of the Constitution believed in a Lockean approach to the concept of property,[2] which is espoused in the Fifth Amendment to the Constitution.[3] They believed that the right to own property without government interference was essential to the success of a democratic government, and it gave people the power to

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1. U.S. Const. amend. V. *See also, e.g.*, W. Blackstone, COMMENTARIES *134 (Stanley N. Katz ed., Univ. of Chicago Press 1979) (1765) ("The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.").

2. *E.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 7–31 (1985) (examining the Lockean view of property and its influence on the Founders of the Constitution); *see also* JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (J.M. Dent & Sons 1962) (1690).

3. U.S. CONST. amend. V ("No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

pursue liberty.[4] This idea has been upheld through the years by the courts.[5]

Although it is true that the government has the right to regulate the use of property for the safety and welfare of the people, this does not mean that it has the right to take property without compensation. In fact, the Fifth Amendment guarantees that "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[6] It is important to remember that the government must give just compensation when it takes land. There are critics today that embrace a more lenient standard of takings and would allow the government to regulate property in such a way that it denies the owner the use of the land, but does not have to compensate the landowner because it is for public benefit.[7] While I readily admit that the government has the right —even the duty —to protect the public, it cannot do so at the expense of the individual.

Throughout the history of private property the idea arose that not only was an *appropriation* of property a taking, but in some cases, a *regulation* of property could constitute a taking.[8] However, it has been extremely difficult for courts to determine when a regulation has regulated a property in such a way that requires just compensation. In *Lucas v. South Carolina Coastal Council*,[9] the Court announced a new rule that categorically required compensation when the property owner had been deprived of all economically beneficial use of the property. It included an exception: When background principles of state property or nuisance law would have limited the use of the land in the same way, there was no taking that

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4. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) ("The protection of [property] is the first object of the Government."); Noah Webster, *An examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia* ... (Philadelphia, 1787) *in* PAUL L. FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–88, at 60, 61 (DA CAPO PRESS 1968) (1888) ("Let the people have property, and they *will* have power.").

5. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that denying a landowner all economically beneficial use of the land results in a taking that must be compensated); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the commission could not require a landowner to grant an easement across his land without compensation); Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (explaining that if a regulation goes too far it will require compensation).

6. U.S. CONST. amend. V.

7. *See, e.g.*, Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (arguing that the government's police power is more important than property rights).

8. *E.g.*, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).

9. 505 U.S. 1003 (1992).

required compensation.[10] Both nuisance and property law are governed by state law, so this decision left to state courts the difficult determination of when a regulation amounts to a taking.

The courts have had almost nine years to interpret and apply this rule and its exception. This Note examines what state courts and lower federal courts have found to be "background principles" of property and nuisance law that fit into the *Lucas* exception. The Note examines recent case law that applies the *Lucas* exception to determine how the law has developed.[11] The Note then explains the facts of *Palazzolo v. Rhode* Island[12] and discusses how the Court should rule on the issues in light of the difficulty the courts have had in applying *Lucas*. The Note concludes that the Court must consider the importance of the right to own property in America. The Court should take a firm stance to protect property rights—and democracy—by making sure that the government follows the Constitutional mandate to pay just compensation when it regulates property in a way that results in a taking.

II. BRIEF OVERVIEW OF TAKINGS LAW THROUGH *LUCAS*

A. Prior to Lucas

The courts have had a difficult time deciding which regulations of private property should require compensation.[13] Although courts faced many issues, this brief history focuses only on the cases that influenced the Supreme Court's determination that a regulation depriving an owner of all value of the land is always a taking.

The Fifth Amendment to the United States Constitution states, "private property [shall not] be taken for public use, without just compensation."[14] This provision has come to be known as the "Takings Clause." Initially, the Takings Clause only applied when there was a direct appropriation of property.[15] In *Pennsylvania Coal*

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10. *Id.* at 1022–23.

11. This Note only addresses cases that apply the Takings clause of the U.S. Constitution. It does not examine cases that are decided under state constitutional takings clauses.

12. 746 A.2d 707 (2000), *cert. granted*, 121 S. Ct. 296 (2000).

13. *See* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 525 (1999) (suggesting that the Supreme Court was divided over what direction to take in takings jurisprudence; therefore, it accepted regulatory cases after *Penn Central* but did not decide them).

14. U.S. CONST. amend. V.

15. *See Lucas*, 505 U.S. at 1014; *see also* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) (arguing that the

v. Mahon,[16] however, the United States Supreme Court decided that a government regulation of private property may result in a taking that requires compensation.[17] Justice Holmes explained that local and state government regulations could be so intrusive that they have the same result as a direct appropriation of property.[18] He stated that a regulation of private property could be compensable under the Fifth Amendment when the regulation goes "too far."[19] However, he and the Court provided little guidance as to the meaning of "too far."

The Supreme Court elaborated on this principle in *Penn Central Transportation Co. v. New York*.[20] The Court explained that there is no set formula in determining how far is too far; a court should look at the facts in the particular case and "engage in ... essentially ad hoc, factual inquiries ...."[21] The Court listed three factors to consider when making this determination: the economic impact of the regulation on the property owner, the extent to which the regulation interferes with investment-backed expectations, and the character of the government action.[22] The consideration of these factors became known as the *Penn Central* balancing test.

This long awaited decision had little effect on the courts at first.[23] In fact, for a decade after this decision courts avoided deciding takings cases on the merits by developing procedural thresholds to decide cases.[24] When the courts attempted to decide the merits of a takings case, the part of *Penn Central* that was utilized to guide their decisions was the requirement that the court conduct ad-hoc, factual inquiries.[25]

In the 1980s, one bright line rule emerged concerning takings that applied to cases involving a permanent physical intrusion. In *Loretto*

Takings Clause was only intended to be applied to appropriations of property and that it never should have been applied to regulation of land uses).

16. 260 U.S. 393 (1922).

17. *Id.* at 415–16.

18. *Id.* at 416 ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

19. *Id.* at 415

20. 438 U.S. 104, 123–24 (1978).

21. *Id.* at 124.

22. *Id.*

23. *See* Roger Marzulla & Nancie Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549, 552–53 (1991).

24. *See also* Callies, *supra* note 13.

25. Marzulla & Marzulla, *supra* note 23, at 552.

v. Teleprompter Manhattan CATV Corp.,[26] the Supreme Court held that when a government regulation requires a permanent physical intrusion on the property it is a "per se" taking that always requires compensation, regardless of how minor the intrusion.[27] The Court explained that a physical intrusion on the property destroys the "bundle" of property rights.[28]

The Supreme Court also addressed the issue of regulatory takings in *Agins v. City of Tiburon*,[29] and for the first time, the Court stated (in dicta) that a regulation resulted in a taking if it deprived the owner of all economically viable use of the land. The appellants claimed that the City's zoning ordinances completely destroyed the value of their property.[30] The Court avoided the issue of whether all value was destroyed because the owners still had the opportunity to develop part of their property.[31] In holding that the ordinance was not a taking the Court stated, "the 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."[32] The Court reiterated its analysis by saying that "no precise rule determines when property has been taken," and then it weighed the public and private interests as required by the *Penn Central* balancing test.[33]

The Supreme Court decided several other cases during the time between *Penn Central* and *Lucas*.[34] However, the above cases are the most relevant to the determination in *Lucas* that a regulation that denies the owner of all economically beneficial use of the land is a categorical taking.

B. Lucas v. South Carolina Coastal Council

This Part first explains the facts and the holding in *Lucas*. Next it discusses the effect that *Lucas* had on takings jurisprudence and some potential concerns about these effects.

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26. 458 U.S. 419 (1982).
27. *Id.* at 435, 441.
28. *Id.* at 435.
29. 447 U.S. 255 (1980).
30. *Id.* at 258.
31. *Id.* at 260.
32. *Id.*
33. *Id.* at 260–63.
34. For a history of the important Supreme Court cases between *Penn Central* and *Lucas*, see generally Callies, *supra* note 24.

1. Facts

David Lucas bought two residential lots on a South Carolina barrier island in 1986, on which he planned to build single family houses.[35] In 1988, the South Carolina Legislature passed the Beachfront Management Act,[36] which prohibited construction seaward of a line drawn twenty feet landward of the baseline, with no exceptions.[37] The baseline was determined by connecting the landward-most points of historical erosion.[38] Lucas' lots were seaward of this line; therefore, he was prohibited from constructing any permanent habitable structures on his two lots.[39] He filed suit claiming that this provision was a taking of his property without just compensation.[40] The trial court found that the Act "deprived Lucas of any reasonable economic use of the lots ... and rendered them valueless."[41] The trial court concluded that there had been a taking that required just compensation.[42] The South Carolina Supreme Court reversed, stating that the regulation was designed to prevent serious public harm; therefore, no compensation was required.[43]

The United States Supreme Court disagreed with the South Carolina Supreme Court. The Court briefly discussed the history of takings law and proceeded to define two instances when a regulation was compensable without the necessity of balancing the public and private interests.[44] First, if the regulation requires the owner to suffer a permanent physical invasion of property, he should be compensated, regardless of how minor the intrusion is or the public purpose behind it.[45] Second, the Court found that "where regulation denies all economically beneficial or productive use of the land" categorical treatment was appropriate.[46] The Court cited *Agins* as authority for this rule. One reason the Court espoused was that a regulation of this type was the "equivalent of a physical appropriation."[47] The Court clarified that when all economic value

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35. *Lucas*, 505 U.S.1003 at 1007.
36. Beachfront Management Act, #0634, June 7, 1988 (codified as amended at S.C. CODE ANN. § 48-39-250 (Supp. 1990)).
37. *See Lucas*, 505 U.S. 1003 at 1008–09.
38. *Id.* at 1009 n.1
39. *Id.* at 1009.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1010.
44. *Id.* at 1014–15.
45. *Id.* at 1015.
46. *Id.* at 1015–16.
47. *Id.* at 1017.

of the property was not lost, the analysis should follow the guidelines set out in *Penn Central*.[48]

Although the Court found that loss of all economically beneficial use of the property was a categorical taking, it formulated an exception to this rule. The government can resist compensation only if the "proscribed use interests were not part of his title to begin with."[49] The Court explained:

> Any 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. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) 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.[50]

The Court gave several examples that would fit into this exception: 1) an owner would not be entitled to compensation for denial of a permit that would allow him to flood another person's land; and 2) the Court would enforce a preexisting easement on the property.[51] The Court also listed factors typically analyzed when determining whether the use of the land is a nuisance.[52] Referring to the Restatement of Torts,[53] the Supreme Court directed courts to look at the degree of harm to adjacent public and private lands, the social value of the activities, and the relative ease with which the harm can be avoided.[54] Additionally, if other owners who are similarly situated have engaged in the contested use, it suggests the lack of a common law prohibition.[55]

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48. *Id.* at 1019 n.8 (citing 438 U.S. 104 (1978)); *see also supra* text accompanying note 20.
49. *Id.* at 1027.
50. *Id.* at 1029.
51. *Id.* at 1028–29.
52. *Id.* at 1030–31.
53. RESTATEMENT (SECOND) OF TORTS §§ 826–31 (1977).
54. *Lucas*, 505 U.S. at 1030–31.
55. *Id.*

The Court remanded the case to the South Carolina Supreme Court to determine whether there were any background principles of law that would have prohibited Lucas from building on the land.[56] It instructed the lower court that it must do more than just find that Lucas' use of the land is inconsistent with public policy—it must find background principles of property or nuisance law that would prevent Lucas from building houses.[57] On remand, the South Carolina Supreme Court found no background principles of property or nuisance law that would prohibit Lucas from building houses on his property.[58] Therefore, the court found a taking which required compensation.[59]

2. *Implications*

The Court in *Lucas* developed a new, categorical taking when the regulation deprives an owner of all economically beneficial use of the land. Although the Court said that it derived the rule from *Agins*,[60] it is not at all clear that *Agins* supports this proposition. In *Agins*, the Court simply applied the *Penn Central* balancing test stating that no precise rule determines when property has been taken.[61] The Court in *Lucas* ignored that part of *Agins* and relied solely on the sentence that there is a taking if the regulation deprives the owner of economically viable use of his land.[62] Justice Blackmun explained that this "in no way suggest[s] that the public interest is irrelevant if total value has been taken."[63] The Court took a single sentence, out of context, to formulate this new rule.

Several difficulties have arisen as courts apply the *Lucas* analysis. First, the Court stated that it is rare that a regulation will deprive a property owner of all economically beneficial use of his property.[64] The Court admitted that the deprivation of the economically beneficial use rule was imprecise because the rule did not clarify what property interests the loss of value was to be measured

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56. *Id.* at 1031.
57. *Id.*
58. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).
59. *Id.*
60. *See Lucas*, 505 U.S. at 1015–16 (citing Agins v. City of Tiburon, 447 U.S. 255 (1980).
61. *See* Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980).
62. *See Lucas*, 505 U.S. at 1049 n.11 (Blackmun, J., dissenting) (pointing out that the majority's precedent does not support its ideas).
63. *Id.*
64. *Id.* at 1018.

against.[65] Consequently, lower courts have had difficulty determining what constitutes loss of all value of property.[66]

The other problem courts have had is applying the "exception" to the rule. The Supreme Court announced a bright line rule that, at first glance, appears easy to apply. However, the nuisance exception muddles this bright line rule. The Court shifted the analysis from a balancing of public and private interests to an analysis of what constitutes a nuisance in a state's common law. Justice Blackmun's dissent pointed out that the Court was trying to move away from an analysis of whether the use of the land is harmful or beneficial, but examining the common law of nuisance basically does the same thing.[67] The difference is that we are looking at what judges decided long ago instead of today.[68] He argues that judges today can identify a harm just as well as judges from the past.[69] Finally, he points out that it is very difficult to find a principle of the common law of nuisance.[70]

An important principle that courts must consider is that although the state's law determines what limits are inherent in the title due to nuisance and property law, a state may not "deny rights protected under the Federal Constitution ... by invoking nonexistent rules of state substantive law."[71] In other words, the State cannot make up a law and retroactively apply it to take away a property right.

III. HOW STATES HAVE DEFINED "BACKGROUND PRINCIPLES" OF PROPERTY AND NUISANCE LAW

Lower courts have relied on *Lucas* and applied the loss of all economically beneficial use rule and its exceptions. Some courts have strictly applied the exception, looking at only common law and

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65. *Id.* at 1016 n.7. The Court gave the following example:

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

Id.

66. *See, e.g.*, Machipongo Land & Coal Co., Inc. v. Commonwealth of Pennsylvania, 719 A.2d 19, 26–28 (Pa. Commw. Ct. 1998) (discussing what property interests should be considered when determining whether a regulation deprived the owner of all value economically beneficial use of the land).

67. *Lucas*, 505 U.S. at 1054–55 (Blackmun, J., dissenting).

68. *Id.*

69. *Id.*

70. *Id.*

71. Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1334 (1994).

background principles of property law. Other courts have gone substantially further and considered any regulation existing when the owner obtained the property to be a background principle of property law that fits into the *Lucas* exception. Finally, some courts have begun applying the nuisance exception even though all value of the land has not been destroyed. The following sections discuss cases that apply *Lucas* in each of these ways. They also address whether these are correct applications of *Lucas* and whether *Lucas* should be interpreted in these ways.

A. Limitations Inherent in Title from Common Law of Nuisance

It is clear under *Lucas* is that if a state could have replicated the effect of the regulation by using the state's common law of nuisance, then the regulation does not constitute a taking that is compensable. This part discusses cases that have addressed the issue of whether common law nuisance prohibits the use of the property in a particular way.

Department of Health v. The Mill[72] was one of the first cases to use the *Lucas* exception to find the use of the land was proscribed by nuisance law.[73] The property was subject to regulations by the Colorado Department of Health (CDH) because the property was used as a uranium mill tailings disposal site.[74] In 1978, Congress passed the Uranium Mill Tailings Radiation Control Act,[75] which required the cleaning-up of uranium disposal sites, and the Mill property qualified for clean-up under the Act.[76] Subsequently, the CDH placed restrictions on the mill yard that effectively denied any reasonable economic use of the land.[77] Although the mill was authorized for unrestricted use when it was acquired, the CDH sent copies of the regulations to the owners for the maintenance of uranium mill tailings when they purchased the property.[78]

The case began in 1983 and went back and forth in the courts until it finally ended up in the Colorado Supreme Court after *Lucas* was decided. The court found that all economically beneficial use of the property was destroyed, and then it applied the nuisance

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72. 887 P.2d 993 (Colo. 1994).
73. *Id.* at 1001–02.
74. *Id.* at 997–98.
75. Uranium Mill Tailings Radiation Control Act of 1978, 92 Stat. 3021 (1978).
76. 887 P.2d 993 at 997–98.
77. *Id.*
78. *Id.* The regulations included such things as posting warning signs, using gates to secure the tailings pile, and so on.

exception.[79] The court decided that under Colorado common law a landowner did not have the right to use the land in a way that created an unreasonable risk for others.[80] It also said that land uses that caused pollution constituted a nuisance and that radioactive materials in particular were treated as a nuisance under Colorado solid waste laws.[81] Therefore, the Mill's acquired title did not grant them the right to use the property in a way that was hazardous to public health by spreading radioactive contamination.[82] Thus, the limitations the CDH put on the property restricting the spreading of radioactive contamination did not constitute a taking.[83]

This case correctly applied the *Lucas* analysis. First, it found that all economically beneficial use of the property was lost. Then, it searched for background principles of Colorado law that may have prohibited using the land as a dumping ground for radioactive waste. Finding that radioactive materials can be considered a nuisance certainly makes sense and invites little controversy.

Three Florida cases produced conflicting applications of a common law of nuisance. The issue in all three cases involved apartment complexes that were closed temporarily due to pervasive drug use on the property. The Second District Court of Appeal, in *City of St. Petersburg v. Bowen*,[84] found a temporary loss of all se economically beneficial use.[85] The court stated that the closure of an apartment complex did not prevent any nuisance; it only prevented the use of the apartment building, and preventing the use of an apartment building was not a nuisance at common law.[86] The court explained that *Lucas* limited the nuisance exception to only *common law* nuisances.[87]

In contrast to the Second District's *Bowen* decision, the Third District Court of Appeal held the opposite in *City of Miami v. Keshbro, Inc.*[88] The court applied *Lucas* and found that the owners had been denied all economically beneficial use value of the property.[89]

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79. *Id.* at 1001–02.

80. *Id.* ("Under Colorado common law, landowners have a duty to prevent activities and conditions on their land from creating an unreasonable risk of harm to others.") (citing Moore v. Standard Paint & Glass, 358 P.2d 33, 36 (1960)).

81. *Id.* at 1002.

82. *Id.*

83. *See id.*

84. 675 So. 2d 626 (Fla. 2d DCA 1996).

85. *Id.* at 631.

86. *Id.*

87. *Id.*

88. 717 So. 2d 601 (Fla. 3d DCA 1998), *rev. granted*, 729 So. 2d 392 (Fla. 1999).

89. *Id.* at 604.

However, it then decided that the motel was essentially used as a drughouse and a brothel, and that brothels and drughouses acquired no protection at common law.[90] Therefore, it constituted a public nuisance, and the closure did not require compensation.[91] The court distinguished this case from *Bowen* by saying that the Second District Court of Appeal had not included a discussion of "inextricable intertwining of proscribed uses with other, valid, uses."[92]

After *Keshbro*, the Second District Court of Appeal again addressed this issue in *City of St. Petersburg v. Kablinger*.[93] The court found this case to be indistinguishable from *Bowen*; therefore, there was a compensable taking.[94] The court stated that although the court in *Keshbro* attempted to distinguish it from *Bowen*, the decisions were in conflict, and it certified that the decisions conflicted.[95] The Florida Supreme Court's grant of review of *Keshbro* will hopefully provide an opportunity for the court to resolve the conflict as to whether closing an apartment house due to drug use fits into the nuisance exception of *Lucas*.

Similarly, a Washington appellate court examined a drug nuisance statute to determine if an abatement order of a restaurant and lounge due to known drug problems resulted in a taking of the owners' property.[96] In this case the McCoys owned a restaurant and lounge, and they had worked with the police for many years to stop the drug activities that took place on the property.[97] Eventually, because the police resources were limited, the police quit helping the McCoys fight the drug problem.[98] As a result, the City of Seattle filed a complaint against the McCoys for violating the drug nuisance statute which prohibited permitting drug use on the property.[99] The restaurant was declared a drug nuisance, and the trial court ordered that it be closed for one year, explaining that the McCoys were not permitted to "re-enter [the restaurant] for any reason."[100]

The McCoys argued that all economic use of the property was taken; therefore, the City was required to pay them just

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90. *Id.*
91. *Id.* at 604–05.
92. *Id.* at 604 n.8.
93. 730 So. 2d 409 (Fla. 2d DCA 1999) *rev. granted*, 737 So. 2d 551 (Fla. 1999).
94. *Id.* at 410.
95. *Id.*
96. City of Seattle v. McCoy, 4 P.3d 159 (Wash. App. Ct. 2000).
97. *Id.* at 162–63.
98. *Id.* at 163.
99. *Id.* at 163–64.
100. *Id.* at 164.

compensation.[101] The court agreed that the closing of the restaurant denied them tem (temporarily) of all economic use of the land.[102] The City argued there was no taking because the restaurant was a nuisance.[103] The court reviewed the common law of nuisance in Washington and other states and determined that when an owner had taken reasonable steps to prevent the illegal activity (as they had in this case), there was no common law nuisance.[104] Based on this, the City had not met its burden in proving that there was a common law nuisance; therefore, there was a taking that required compensation.[105]

Each of these cases correctly applied *Lucas* and examined the common law of nuisance to see if the closure of an apartment complex or restaurant due to drug use is a nuisance; however, they arrived at different conclusions. This is a good example of how confusing nuisance law can be. For example, *Prosser and Keeton on Torts* states that "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'".[106] It is becoming increasingly clear that a state's law of nuisance is not a simple way of determining whether a regulation has resulted in a taking.

Other courts around the country have found that regulation of certain uses does not constitute a nuisance, and the loss of all economically beneficial use requires compensation. The Court of Appeals of Michigan addressed the issue in *K & K Construction, Inc. v. Department of Natural Resources.*[107] The plaintiff applied for a permit to build a restaurant on an area of wetlands, but the permit was denied because the property was protected under the Wetlands Protection Act (WPA).[108] The Court of Claims determined that the WPA denied the plaintiffs all economically beneficial use of the land.[109] The Court of Appeals applied *Lucas* and analyzed whether

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101. *Id.* at 166 (citing *Lucas* and a Washington case which outlined the framework for regulatory takings in Washington).

102. *Id.* (explaining that because the McCoys were not in possession of the property—i.e., they were not allowed to enter it for one year—they could not "put the property to any economically viable use").

103. *Id.* at 167.

104. *Id.* at 167–72.

105. *Id.* at 171–72.

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

107. 551 N.W.2d 413 (Mich. Ct. App. 1995).

108. Wetlands Protection Act, MICH. COMP. LAWS § 281.701 (2000); MICH. STAT. ANN. § 18.595(51) (Michie 2000).

109. *K & K Construction, Inc.*, 551 N.W.2d at 416.

building a restaurant on the land would have been considered a nuisance under common law.[110] The defendants claimed that the common law principle was found in the Michigan Constitution,[111] where it declared that conservation and development of natural resources of the state was a paramount public concern.[112] The court rejected this argument because in *Lucas* the Court said that a state must do more than rely on the legislature's declaration that the landowner's uses were inconsistent with public interests.[113] The court then determined there was no common law nuisance principle that would prohibit someone from building a restaurant on their land.[114]

However, this case was reversed in part when the Supreme Court of Michigan determined the denial of the permit had not destroyed all economically beneficial use of the land because the appellate court had incorrectly analyzed the wetlands portion of the land separately from the entire parcel.[115] The case was remanded to the lower court to perform a *Penn Central* balancing test.[116]

The Ohio Court of Appeals considered nuisance law principles in an unpublished opinion, *State ex rel. R.T.G. Inc. v. State*.[117] R.T.G. owned land on which it planned to mine for coal.[118] The Division of Mines and Reclamation petitioned that a majority of this land be declared unsuitable for mining.[119] After numerous appeals and direction from the Ohio Supreme Court, the Reclamation Board of Review determined that the entire 833 acres was unsuitable for mining because of the impact that the mining might have on the city's aquifer.[120] The plaintiffs filed a complaint alleging that this was a compensable taking.[121] The lower court granted the defendant's motion to dismiss, and the plaintiffs appealed.[122] The

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110. *Id.* at 416–17.

111. MICH. CONST. of 1963, art. IV, § 52.

112. *K & K Construction, Inc.*, 551 N.W.2d at 417.

113. *Id* (citing *Lucas*, 505 U.S. at 1030-31).

114. *Id.*

115. K & K Construction, Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 536–38 (Mich. 1998). The landowner owned four contiguous parcels of property, but the permit denial only applied to one of them. The lower court examined that parcel separately to determine that all value was gone. The Michigan Supreme Court stated that this was wrong according to long-standing principles of "nonsegmentation." Therefore all value was not lost. *Id.*

116. *Id.* at 538 (citing 438 U.S. 104 (1978)); *see also supra* text accompanying note 20.

117. No. 96 APE05-662, 1997 WL 142363 (Ohio Ct. App. 1997).

118. *Id.* at *1.

119. *Id.*

120. *Id.* at *1–2.

121. *Id.*

122. *Id.*

court decided that there were too many factual issues to be decided for the case to be dismissed.[123]

Although the court did not decide the issues, in dicta it gave the lower court some guidance when reconsidering the case. The court began by stating the categorical taking principle and the nuisance exception in *Lucas*.[124] It then discussed how Ohio courts have defined nuisances. A nuisance under Ohio law is an "unreasonable, unwarrantable, or unlawful use ... of ... property ... which produces material annoyance, inconvenience, discomfort or hurt."[125] The court cited *Cline v. American Aggregates Corp.*,[126] which found that draining another person's water supply was a nuisance.[127] Additionally, the court clarified that strip mining was a potential nuisance.[128] It stated that whether the use constituted a nuisance was a factual issue for the trial court to decide.[129] Finally, it directed the lower court to decide, as a threshold issue, whether there was a complete or partial taking before determining whether to apply *Lucas* or *Penn Central*.[130]

Recently, the Court of Appeals of Oregon dealt with the issue of whether timber harvesting was a nuisance under state law.[131] Boise Cascade (Boise) acquired timberlands in 1988.[132] In 1990, the State Forester adopted an administrative policy which precluded timber harvesting within a seventy-acre area around spotted owl nesting sites.[133] Boise submitted a harvesting plan, but it was not approved because it did not provide protection for an area where spotted owls nested.[134] Boise was prohibited from harvesting while spotted owls were nesting in this area.[135] Boise argued that this denial of a permit to log where the owls nested was a taking that required just compensation.[136] A jury found in favor of Boise and the state

123. *Id.*
124. *Id.* at *4.
125. *Id.* at *5.
126. 474 N.E.2d 324 (Ohio 1984).
127. *See* State *ex rel.* R.T.G., 1997 WL 142363 at *6.
128. *Id.*
129. *Id.*
130. *Id.* at *6–8.
131. Boise Cascade Corp. v. State, 991 P.2d 563 (Or. Ct. App. 1999).
132. *Id.* at 564.
133. *Id.*
134. *Id.* at 565.
135. *Id.*
136. *Id.*

appealed, claiming that the trial court should have dismissed the action and granted partial summary judgment to the state.[137]

The court of appeals stated that the court properly denied the plaintiff's motion to dismiss because Boise had a valid claim that the regulation denied Boise of all economically beneficial use of the land.[138] The trial court also struck down the state's defense that the logging would constitute a nuisance under Oregon law.[139] The court of appeals upheld this decision saying that knocking down a bird's nest on one's property has never been considered a nuisance.[140] Additionally, the court said that violating an environmental statute does not constitute a public nuisance.[141] The case was remanded on other grounds.

The U.S. Court of Federal Claims first addressed the nuisance exception issue in *Bowles v. United States*.[142] Bowles attempted to get a permit to fill his lot so that he could install a septic tank and build his home on the property.[143] His permit was denied by the Army Corps of Engineers because his property was considered a wetland.[144] All other property owners in his subdivision had been allowed to fill their properties and build, so he filed a complaint alleging a taking that deprived him of all economically beneficial use of the property.[145] The court analyzed the taking under the *Lucas* exception, but found that it had little relevance because building a home just as everyone else in the neighborhood had done was not a nuisance.[146] The court continued to analyze the case in the event that there had not been total deprivation of all economically beneficial use.[147] It then looked at the investment-backed expectations and still concluded that there was a compensable taking.[148]

Each of these cases followed *Lucas* by first determining whether the landowner has been deprived of all economically beneficial use of the land and then looking to state law for rules of nuisance law

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137. *Id.*
138. *Id.* at 569.
139. *Id.* at 570.
140. *Id.*
141. *Id.* at 571.
142. 31 Fed. Cl. 37 (Fed. Cl. 1994).
143. *Id.* at 40.
144. *Id.*
145. *Id.*
146. *Id.* at 46. ([The "so-called nuisance exception has little relevance. All Mr. Bowles wanted to do was the same exact use as his surrounding neighbors; build a home in a residential subdivision.")
147. *See id.* at 46–49.
148. *Id.* at 49–50.

that would prohibit the use anyway. The cases that look to common law principles are relatively uncontroversial. No one argues that this is the wrong interpretation of *Lucas*. The only argument is whether the use really was a nuisance at common law. This determination is left to each state to interpret its own common law. A good example is the split in the Florida courts about whether shutting down an apartment complex due to drug use is a valid application of nuisance common law.[149] There are good arguments on both sides of the issue as to whether this should be considered a nuisance. The state is the proper place to decide these issues, unless the state reaches beyond its power to violate Federal rights. The only instance where the Supreme Court might get involved with a state's determination of nuisance law is if the State had "made up" a rule of law and applied it retroactively to property owners. Then the Supreme Court would have the duty to determine whether the state is violating the Constitution by denying a person the right to property.[150]

B. Other Limitations Inherent in Title from Property Law

The Supreme Court instructed state courts to inquire not only into common law nuisance, but also into limitations on the land placed there by other background principles of property law. Often courts examine what rights a landowner obtains when acquiring the property. This Part of the Note examines other limitations of property law, excluding preexisting regulations.

The Court of Appeals of Oregon addressed the issue of what rights a property owner obtains when he acquires land. The plaintiff in *Kinross Copper Corp. v. State*,[151] leased unpatented mining claims from Amoco Minerals Co. and developed a plan to mine for copper ore.[152] The plan required the plaintiffs to discharge water pumped from the mine into the North Santiam River Basin.[153] This activity required an NPDES permit, but the plaintiff's application for the permit was denied because the new "Three Basin Rule" prohibited

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149. *See* 675 So. 2d 626 (Fla. 2d DCA 1996); 717 So. 2d 601 (Fla. 3d DCA 1998), *rev. granted*, 729 So. 2d 392 (Fla. 1999); 730 So. 2d 409 (Fla. 2d DCA 1999) *rev. granted* 737 So. 2d 551 (Fla. 1999); *see also supra* text accompanying notes 84 through 95.

150. *See, e.g.*, Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1334 (1994) (Scalia, J. dissenting).

151. 981 P.2d 833 (Or. Ct. App. 1999), *adhered to on reconsideration*, 988 P.2d 400 (Or. 1999), *rev. denied* 994 P.2d 133 (Or. 2000), *and cert. Denied*, 121 S. Ct. 387 (2000).

152. *Id.* at 835.

153. *Id.*

any new water discharges into the river.[154] The plaintiffs alleged that the denial of this permit rendered the unpatented mining claim worthless and constituted a per se taking.[155] The parties stipulated that all economically beneficial use was gone as a result of the denial.[156] The trial court granted the state's motion for summary judgment because the denial of the permit took no property right of the plaintiff.[157] The plaintiffs appealed, arguing that unpatented mining claims were recognized as a property right.[158]

The court analyzed the common law riparian rights in Oregon to determine if the right to discharge waste water into the river was a right that the plaintiffs acquired with the title. Originally, under mining customs, the landowner had a right to use the water in mining operations; however, this was changed with the enactment of the Mining Law of 1872[159] and the Desert Land Act of 1877.[160] The cumulative effect of these acts on Oregon mining water rights to unpatented mining claims was to establish that water rights were *not* granted as part of the claim.[161] Instead, they had to be "obtained as provided in the water rights laws of the state in which the site of the claim [was] located."[162] In 1909, the Oregon legislature declared that "'[a]ll water within the state ... belong[ed] to the public' .... The legislature ... [also] established a comprehensive permit system for appropriating water."[163] Therefore, when the plaintiff acquired the mining patent, it did not acquire any water rights; those rights had to be granted by the state.[164]

The right to interfere with the navigational servitude is another right that is not inherent in land title. The Third Circuit explained this in *United States v. 30.54 Acres of Land.*[165] The Army Corps of Engineers prohibited landowners from using their coal loading facility and tipple because it posed a threat to navigation.[166] The landowners alleged that this prohibition deprived them of all

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154. *Id.* The Three Basin Rule was an administrative rule promulgated by the Oregon Environmental Quality Commission. *Id.*
155. *Id.*
156. *Id.* at 836.
157. *Id.*
158. *Id.*
159. 30 U.S.C. §§ 22–47 (1994 & Supp. IV 1998).
160. 43 U.S.C. §§ 321–339 (1994).
161. *See Kinross Copper Corp.*, 981 P.2d 833 at 839.
162. *Id.* at 839.
163. *Id.* (quoting OR. REV. STAT. §537.110 (1999)).
164. *See Kinross Copper Corp.*, 981 P.2d at 840.
165. 90 F.3d 790 (3d Cir. 1996).
166. *Id.* at 792–93.

economic use of the remaining land.[167] The court held that navigational servitude was a preexisting limitation on riparian landowners' properties.[168] It quoted *Lucas* for this proposition because of the language it used to explain the exceptions: "[W]e assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."[169] The court concluded that the navigational servitude was just such a limitation as it was "almost as old as the Republic itself."[170] Even if the regulation denied the owners of all economically beneficial use of the land, it did not require compensation because the landowner had no right to interfere with the navigational servitude.[171]

Navigational servitude as a preexisting limitation in title was also recently addressed by the Federal Circuit Court of Appeals in *Palm Beach Isles Associates v. United States*.[172] The Army Corps of Engineers denied the landowner dredge and fill permits for a lake that was subject to the navigational servitude.[173] The government argued that although this denied the landowner of all economically beneficial use of the land, this was not a taking because the navigational servitude was a preexisting limitation on the landowner's title under *Lucas*.[174] The court had no difficulty holding that the "navigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject."[175] However, the court did not end the analysis there. Instead, the court also explained that the government's purpose for regulating must be related to navigation for the government to avoid paying compensation.[176] The court remanded the case because the issue of whether the government had a navigational purpose was a disputed issue of fact.[177]

These cases, like the common law nuisance cases, arouse little controversy. Again, the courts look to state law to determine limitations present when the landowner obtained the property. The Supreme Court intended state courts to look at the rights a

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167. *Id.* at 793.
168. *Id.* at 795.
169. *Id.* (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028–29 (1992)).
170. *30.54 Acres of Land*, 90 F.3d at 795.
171. *Id.*
172. 208 F.3d 1374 (Fed. Cir. 2000).
173. *Id.* at 1378.
174. *Id.* The Court of Federal Claims had agreed with the government. *Id.*
175. *Id.* at 1384.
176. *Id.*
177. *Id.* at 1386.

landowner did and did not obtain when he acquired the land. The Court explained that citizens acquire a "bundle of rights" when they obtain land.[178] The landowner has no claim for compensation for rights that were never acquired when he purchased the land.

The Oregon Supreme Court applied the exception in a unique way. The court applied the doctrine of customary use of public beach access to justify a limitation of the use of property without compensation. In *Stevens v. City of Cannon Beach*,[179] the plaintiffs owned two vacant lots on Cannon Beach.[180] The lots were zoned for residential or motel use, but they were subject to the Active Dune and Beach Overlay Zone.[181] Additionally, part of the property was located on the dry sand portion of the beach, and the City required a permit to make improvements on that portion of the beach.[182] The City denied the plaintiff's application to build a seawall because the eventual commercial use of the property conflicted with a goal of the Land Conservation and Development Committee.[183] The plaintiffs alleged this was a compensable taking.[184]

The court based its decision on *State ex rel. Thornton v. Hay*[185] in light of *Lucas*. In *Thornton*, the Oregon Supreme Court held that the state could prevent enclosures of dry sand areas of beaches because these areas were customarily used by the people.[186] The law of custom in the state applied because the public, historically, always used the beaches, and people reasonably believed they had a right to use the beaches.[187] Additionally, the fact that the public use was so notorious put landowners on notice of the custom.[188] Therefore, no person could interfere with the public's right to use the dry sand areas of the beaches in Oregon.[189]

After the explanation of *Thornton*, the court analyzed this common law right of the public to use the beach in light of the Court's decision in *Lucas*. Because of the common law doctrine of custom, the plaintiff never had the right to exclusively use the dry

178. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992).
179. 854 P.2d 449 (Or. 1993).
180. *Id.* at 450.
181. *Id.* at 451.
182. *Id.*
183. *Id.*
184. *Id.*
185. 462 P.2d 671 (Or. 1969).
186. *Id.* at 673.
187. *Id.*
188. *Id.* at 678.
189. *See id.*

sand portion of the beaches.[190] The court explained that this was not "newly legislated or decreed."[191] *Thornton* did not create a new law—it "merely enunciated one of Oregon's 'background principles of ... the law of property.'"[192]

The United State Supreme Court denied certiorari with a strong dissent by Justice Scalia.[193] He pointed out several problems with the Oregon Supreme Court's analysis. First, he took issue, procedurally, with the idea that the doctrine of customary use applied to every beach in Oregon, particularly because the Oregon Supreme Court had announced in a subsequent case that the doctrine of custom of the right to use the beach did not apply to the entire Oregon coast.[194] More importantly, he was concerned with the constitutionality of the decision. He disagreed with the Oregon Supreme Court that this was a background principle of law, instead he was concerned that it was a "new-found" doctrine—a potential pretext that unconstitutionally takes property without just compensation.[195]

Scalia is not the only one concerned about this application of *Lucas*. One author uses *Stevens* to point out flaws in the *Lucas* exception.[196] He argues that courts may take advantage of the exception and "contrive means to fit state common law doctrines within the nuisance exception."[197] This is a valid argument, especially considering the *Stevens* case. The plaintiff in *Stevens* acquired the property *before* the Oregon Supreme Court decided *Thornton* and thus reasonably expected to build on the property. The Oregon Supreme Court stated that *Thornton* did not create a new law—it merely applied an existing principle of easement. This leads to the concern shared by Scalia: when a property owner invests in the land with reasonable investment-backed expectations, it is unfair for a state to deprive the owner of all economically beneficial use by inventing a doctrine and pretending that it is preexisting common law.

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190. *See Thornton*, 854 P.2d 449, at 456–57 (Or. 1993).

191. *Id.* at 456.

192. *Id.* (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)).

193. *See* Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994).

194. *See id.* at 1209; *see also* McDonald v. Halvorson, 780 P.2d 714, 724 (Or. 1989) (explaining that there may be areas of dry-sand beaches in Oregon to which the doctrine of customs does not apply because there are no facts to show that the particular area was used by the public).

195. *Stevens*, 510 U.S. at 1213 (Scalia, J., dissenting).

196. *See* Peter C. Meier, Stevens v. City of Cannon Beach: *Taking Takings into the Post*-Lucas *Era*, 22 ECOLOGY L.Q. 413, 432–38 (1995).

197. *Id.* at 433.

C. *Existing Regulations When Owner Obtains Property*

An unsettling, recent interpretation of background principles of law is that they include any restrictions placed on the use of the land when the owner acquired it. At first glance, it makes sense, but it was not how courts originally interpreted *Lucas*, and it sometimes leads to unfair results. Given these concerns, there is a growing debate on whether this should be the interpretation.

The leading case on this issue is from the Virginia Supreme Court. In *City of Virginia Beach v. Bell*,[198] Seawall Enterprises, Inc. (Seawall) purchased two lots on the Chesapeake Bay Shore in 1979. The Bells owned fifty percent of the company, and intended to build residential houses on the property.[199] Seawall submitted a plan for development of the property to the City in 1979, but the City did not approve the plan.[200] In 1980, the City passed an ordinance that required developers to obtain a permit to use or change any sand dune in the city.[201] Seawall dissolved in 1982, and the Bells took title to the two lots by deed.[202] Mr. Bell submitted several plans to develop the two lots and was informed by the City that he must first obtain a dune permit.[203] He applied for the permit, but his application was denied.[204] After his appeal was also denied, he filed a motion against the city, alleging that the denial of the permit was a taking because it denied him of all economically beneficial use of the land.[205] A jury found in favor of the plaintiff and the City appealed.[206]

The Virginia Supreme Court evaluated the case in light of the decision in *Lucas*. The court admitted that all economically beneficial use of the land was gone; however, it found that the case fit into the narrow exception that *Lucas* created.[207] Because the ordinance predated the Bell's acquisition of the property, it was a background principle of property law.[208] In other words, the right to build on the

198. 498 S.E.2d 414 (Va. 1998).
199. *Id.* at 415.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 415–16. The Bells divorced and they transferred the property into the Bell Land Trust. Mr. Bell was the Trustee.
206. *Id.* at 416.
207. *Id.* at 417–18.
208. *See id.* "[T]he City, by enacting the [o]rdinance, took no property rights from Bell or the Trustee since they cannot suffer a taking of rights never possessed." *Id.* at 418.

land was not part of the "bundle of rights" that the Bell's acquired when they obtained the property.[209]

Other courts around the country have also applied the *Lucas* exception when a regulation was in place before the owner took title to the property. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,*[210] a complex case, involved regulations of private property around the Lake Tahoe Basin.[211] The plaintiffs wanted to build on property around the Tahoe Lake Basin; numerous restrictions (enacted over many years), prevented building around the basin because building caused sediment to enter into the lake and destroy its natural beauty.[212] The United States District Court consolidated the cases from Nevada and California[213] and determined that plaintiffs were deprived of all economically beneficial use of the land.[214] The court proceeded to the issue of whether the uses of the land would fit into the exception created by *Lucas*. The court stated that if a use would be considered a nuisance under state law then it would fit into the exception.[215] It also stated that most courts had accepted the idea that if restrictions existed before the property was purchased, then those restrictions can also be considered background principles of property law.[216]

The court found no law in Nevada that classified pollution a nuisance; therefore, there was no exception to the categorical takings rule.[217] In California, there was a law that considered water pollution a nuisance; however, the definition of water pollution, only included the direct discharge of waste into water, it did not include simply building a house.[218] The court, however, also said that if someone had purchased the property *after* the restrictions that prohibited the use of the land had been enacted, then they would not be entitled to compensation because they would have knowledge of the restrictions.[219]

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209. *See id.* at 417.
210. 34 F. Supp. 2d 1226 (D. Nev. 1999).
211. *Id.* at 1229. (This case began in the mid-1980s and has been on-going over the years.)
212. *Id.* at 1231–36.
213. *Id.* at 1237.
214. *Id.* at 1245.
215. *Id.* at 1251.
216. *Id.*
217. *Id.* at 1254.
218. *Id.*
219. *Id.* at 1255. The case was appealed to the Ninth Circuit Court of Appeals which held that the temporary moratorium was not a taking because all value was not lost during the moratorium. *See* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 216

The Supreme Court of Iowa addressed this issue in *Hunzicker v. State*.[220] The Iowa legislature passed a law in 1976 that gave the state archeologist authority to deny permission to people to "disinter" human remains which are found to have historical significance.[221] The plaintiffs purchased fifty-nine acres of land which they planned to develop.[222] They sold one lot, but were forced to refund the money and take the lot back when the state archeologist determined that there was a Native American burial mound on the lot, and thus he prohibited the disinterment of the mound.[223] The court determined that this denied the landowner of all economically beneficial use of the land. However, the court also decided that because the plaintiffs acquired the property after the Act was passed, the plaintiffs did not acquire the right to use the land in a way contrary to provisions in the Iowa code.[224] The state could have prevented disinterment at the time the plaintiff took title to the land; therefore, the restriction on the use of the land was inherent in the title.[225]

The Court of Appeals of New York also upheld the idea that regulations are inherent in property law in *Anello v. Zoning Board of Appeals*.[226] The Village of Dobbs Ferry enacted a steep slope ordinance in 1989.[227] The petitioner applied for a variance from this ordinance to build a house, but the permit was denied.[228] The court found that this was not a taking that required just compensation because the petitioner acquired the property two years after the ordinance went into effect.[229]

F.3d 764, 780–81 (2000). The court determined that because the moratorium was temporary, the landowners had future use and value of the land. *Id.*

This result seems to be an absurd way for the government to get around paying just compensation. For a period of time the land could not be used. Yet, the court stated that *future* use of the land gave it present value. The court distinguished it from *Lucas* because the law against building in *Lucas* was enacted to be permanent, but was repealed later, so a temporary taking was permitted. I fail to see the distinction. In both cases, the landowner was deprived of the right to use his property for a certain amount of time. If one is compensable, then the other should be as well.

220. 519 N.W.2d 367 (Iowa 1994).
221. *Id.* at 370.
222. *Id.* at 368.
223. *Id.* at 369.
224. *Id.* at 371.
225. *See id.*
226. 89 N.Y.2d 535, 539–40 (N.Y. App 1997).
227. *Id.* at 539.
228. *Id.*
229. *Id.* at 540.

Finally, the Federal Circuit has also addressed this issue. Originally, in *M & J Coal Co. v. United States*,[230] the court examined background principles of law and included *federal law* when looking at background principles of property and nuisance law.[231] When addressing whether the plaintiffs had a right to mine the land, the court looked at the national standards that were created by the Surface Mining Control and Reclamation Act of 1977[232] (SMCRA) that prohibited a person from mining in a way that would endanger the health and safety of the public.[233] The court explained that because of the SMCRA, M & J Coal Co. should have known that it did not have the right to mine in a way which endangered public health and safety.[234]

The Federal Circuit soon changed this rule in *Preseault v. United States*.[235] This case considered whether there was a taking of property under the Rails to Trails Act.[236] The plaintiffs had a fee simple interest in the property underlying the railroad tracks that had been placed there in 1899.[237] The issue was whether the Rails to Trails Act, which converted railways into recreational parks, was a taking of the plaintiff's property.[238] Although it was not a loss of all value case, the government argued that the court should use the *Lucas* analysis to search for background principles of law that would prohibit the owners the use of their land.[239] The government argued that the Preseaults' title included railroad regulatory statutes that were enacted in the early nineteenth century.[240] They should have known that the government had authority to use these easements even if they abandoned the railroad.[241] The court rejected this argument, and stated that *Lucas* stood for the proposition that the court should only consider state laws, not federal laws.[242]

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230. 47 F.3d 1148 (Fed. Cir. 1995) (discussed *infra* Part II.D).
231. *Id.* at 1154–55.
232. 30 U.S.C. §§ 1201–1328 (1988).
233. *See M & J. Coal*, 47 F.3d at 1154–55.
234. *Id.*
235. 100 F.3d 1525 (Fed. Cir. 1996).
236. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, Title II, 97 Stat. 42, 48 (codified at 16 U.S.C. § 1247(d) (1994)).
237. *Preseault*, 100 F.3d at 1531.
238. *Id.* at 1533.
239. *Id.* at 1538.
240. *Id.* at 1539.
241. *Id.*
242. *Id.*

D. *Cases that Apply* Lucas *to Partial Loss of Value*

Several states and the federal circuit have applied the *Lucas* nuisance exception to cases involving a regulatory taking that does not result in a loss of all economically beneficial use of the land. It is important to consider these cases and determine whether the court is correctly in applying *Lucas*.

In *Kim v. City of New York*,[243] the City placed fill next to the highway on a portion of the plaintiff's property.[244] The New York Court of Appeals interpreted *Lucas* in a different way. Instead of determining whether the regulation fit into one of the categorical takings, the court decided to first examine the owners' "bundle of rights" acquired with the property.[245] The court expanded the nuisance exception to include all laws that were in force when the owner acquired the property.[246] The court then concluded that the plaintiff had an obligation under New York common law and the City's Charter to preserve the lateral support of the highway.[247] Therefore, there was no compensable taking.

This case misinterpreted *Lucas*. This is a physical invasion case. The Supreme Court has made clear, numerous times, that no matter how minor the intrusion, a property owner is always entitled to compensation for a permanent physical intrusion on their property.[248] There are no exceptions to this rule. The nuisance exception only applies in cases where there is a deprivation of all economically beneficial use, which clearly did not happen in this case. The court misinterpreted *Lucas* and applied the exception incorrectly.

The South Carolina Supreme Court also confused the issue in *Grant v. South Carolina Coastal Council*.[249] Grant purchased land in a washout area and built a single family residence on the property.[250] Hurricane Hugo caused sand to overwash his property.[251] He obtained a permit to fill the land from the city, but he did not notify the South Carolina Coastal Council.[252] He was found in violation of

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243. 681 N.E.2d 312 (N.Y. 1997).
244. *Id.* at 313.
245. *Id.* at 314.
246. *Id.* at 315–16.
247. *Id.* at 316.
248. *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).
249. 461 S.E.2d 388 (S.C. 1995).
250. *Id.* at 389.
251. *Id.*
252. *Id.*

the Coastal Zone Management Act[253] by filling a critical area without a permit.[254] Grant alleged that prohibiting him from filling the land was a compensable taking.[255] Analyzing this under *Lucas*, the Supreme Court of South Carolina stated that no compensable taking occurs when the restriction on use was part of the original title.[256] The court ignored the first requirement of the *Lucas* analysis, which is to determine whether all economically beneficial use of the land was lost. Instead, the court said that Grant never had the right to fill critical areas without a permit because when he purchased the property the law required a permit.[257]

The Maryland Court of Special Appeals arrived at a similar decision in *Erb v. Maryland Department of the Environment*.[258] This case involved a landowner who desired to build a house on his property.[259] The Calvert County Health Department (CCDH) denied the permit for the septic system because it would pose a serious threat to public health.[260] Although this may have rendered the land valueless, the court noted that there was not substantial evidence to support that idea.[261] The court said that *Lucas* made clear the idea that "[t]o prevent by regulation that which is forbidden in the first instance under the laws relating to the use of private property is not a taking."[262] The court continued, saying the development of the property had been restricted to prevent a public harm, and a property owner had no right to use the property in a way that endangered the health and safety of others.[263] Therefore, there was not a taking because the regulation was preventing a nuisance.

The next important cases are the federal cases discussed *supra*, Part III.C. In *M & J Coal Co.*, the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM) had the power to regulate coal mining operations that endangered the health and safety of the public.[264] M & J Coal Co. began mining on its land without a permit.[265] When neighbors complained that these

253. S.C. CODE ANN. §§ 48-39-10 (1987 & Supp. 1994).
254. *Grant*, 461 S.E.2d at 389.
255. *Id.* at 390.
256. *See id.* at 391.
257. *Id.*
258. 676 A.2d 1017 (Md. Ct. Spec. App. 1995).
259. *Id.* at 1020.
260. *Id.*
261. *Id.* at 1026.
262. *Id.* at 1027.
263. *Id.*
264. M & J Coal Co. v. United States, 47 F.3d 1148, 1150 (Fed. Cir. 1995).
265. *Id.* at 1151.

activities damaged their properties, the West Virginia Department of Energy (WVDOE) issued a notice of violation against M & J Coal Co. for mining without a permit.[266] Subsequently, OSM officials visited the scene and conferred with the WVDOE.[267] The OSM officials found that M & J Coal Co.'s mining operations endangered the public and the OSM issued a cessation order.[268] Eventually, the OSM approved a subsidence control plan, allowing M & J Coal Co. to continue mining if it complied with the plan.[269] After M & J Coal Co. completed its mining it filed a takings claim because the plan deprived them of coal that they could have mined otherwise.[270]

The court acknowledged that this was not a complete deprivation of all economically beneficial use, but decided that the *Lucas* analysis was still useful because there could be no compensable taking if the use of the land was not permitted when the owner acquired the property.[271] The court adopted a "two-tiered" approach to takings claims.[272] First the court should determine whether the use proscribed by the government was inherent in the title to begin with, and then, if there is such an interest, the court should perform the *Penn Central* balancing test.[273] The court then found that M & J Coal Co. did not acquire the right to mine in a way that endangered public safety.[274]

The Federal Claims Court followed *M & J Coal Co.* in *Maritrans Inc. v. United States.*[275] The Oil Pollution Act of 1990[276] required all single hulled vessels be retrofitted with double hulls or they would be phased out of business. The plaintiff owned a fleet of tanks and alleged that the Act effectively deprived them of their use of the vessels; therefore, the Act constituted a compensable taking.[277] The court adopted the two-tier approach from *M & J Coal Co.* and proceeded to grapple with the state's contention that because it was a heavily regulated industry the plaintiffs did not have a Fifth Amendment property interest.[278] The court decided not to accept

266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 1152.
270. *Id.*
271. *See id.* at 1153–54.
272. *Id.*
273. *See id.* at 1154.
274. *Id.*
275. 40 Fed. Cl. 790 (Fed. Cl. 1998).
276. Pub. L. No. 101-380 § 4115, 104 Stat. 484, (codified at 46 U.S.C. § 3703a(a)–(c) (2000)).
277. *Maritrans*, 40 Fed. Cl. at 791.
278. *Id.* at 794.

this bright line rule and then proceeded to the second tier—the balancing test under *Penn Central*.[279] Similarly, the courts' decisions in *Preseault*[280] and *Store Safe Redlands*[281] use this analysis, although they do not call it the two-tiered approach.

The two-tiered approach is procedurally wrong. Although similar to the analysis in *Grant*[282] and *Erb*[283], the court does not confuse the all-value issue, it merely decided that it would change the way the Supreme Court phrased the issue and make the nuisance exception the *focus* of the inquiry instead of an *exception*. Under *Lucas*, a court needs to first determine whether the regulation deprives the owner of all value, and only then should it look to the nuisance exceptions. When all value is not lost, the court should perform the *Penn Central* balancing test.

Finally, one court has recently applied the *Lucas* analysis when there was not a complete taking, but 98.8% of the value was destroyed.[284] The Army Corps of Engineers denied the landowner a permit to alter wetlands.[285] The landowner and the government agreed that, as a result, the land value was diminished 98.8%.[286] The court decided that this constituted a categorical taking under *Lucas*.[287]

IV. *PALAZZOLO V. RHODE ISLAND*

Anthony Palazzolo was the President of Shore Gardens, Inc. (SGI), a Rhode Island Corporation.[288] Although there had been other shareholders in the past, he was the sole shareholder in 1978 when SGI's corporate charter was revoked.[289] SGI acquired seventy-four lots on the shore and near the shores of Winnipuag Pond, Rhode

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279. *Id.* (citing Penn Central Transportation Co. v New York 438 U.S. 104 (1978).
280. 100 F. 3d 1525 (Fed. Cir. 1996).
281. 35 Fed. Cl. 726 (Fed. Cl. 1996).
282. 461 S.E.2d 388 (S.C. 1995).
283. 676 A.2d. 1017 (Md. Ct. Spec. App. 1995).
284. Cooley v. United States, 46 Fed. Cl. 538 (Fed. Cl. 2000).
285. *Id.* at 540.
286. *Id.* at 547.
287. *Id.* (relying on Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (1994)). In *Florida Rock*, the lower court had determined that a 95% loss of value fit under *Lucas*' categorical taking. *Id.* at 1567. The Court of Appeals determined that the Federal Claim's Court had incorrectly calculated the fair market value and remanded the case for recalculation. *See id.* However, the court never directly said that a 95% reduction in value was a categorical taking. Instead, the court posed the question, "Does [the] reduction constitute a taking of property compensable under the Fifth Amendment?" *Id.* at 1568.
288. Palazzolo v. Rhode Island, 746 A.2d 707, 709 (R.I. 2000), *cert. Granted*, 121 S. Ct. 296 (2000).
289. *Id.* at 710.

Island, between the years of 1959–61, intending to develop a subdivision.[290] The majority of the property was wetlands, although there was at least one piece of property in an uplands area.[291] Beginning in 1962, Palazzolo filed applications with the Department of Harbors and Rivers (DHR) for permits to alter the property to create a recreational beach.[292] At that time, landowners had to gain approval from DHR to dredge and fill rivers, but were not required to obtain approval to fill coastal wetlands.[293] SGI's applications were denied because of lack of information.[294] In 1965, the Rhode Island legislature passed an act that gave DHR authority to restrict the filling of wetlands.[295] In April of 1971, DHR approved SGI's application to fill wetlands to construct a beach; however, that approval was revoked in November 1971.[296]

In 1971, the Legislature created the Coastal Resources Management Council (CRMC) and gave it authority to regulate coastal wetlands.[297] The CRMC promulgated regulations in 1977 that "prohibited the filling of coastal wetlands without a special exception from the CRMC."[298] Palazzolo again filed applications, in 1983 and 1985 (now with the CRMC), to fill the wetlands and construct the beach.[299] He appealed the last denial in 1986 and filed this case at the same time, claiming that the denial of the application resulted in a taking of property that required compensation.[300]

The Rhode Island Supreme Court explained that there were three issues to consider when determining a takings claim: (1) whether the claim is ripe for review; (2) whether there is a categorical taking under *Lucas* or the physical invasion cases; and (3) whether there is a taking under the *Penn Central* balancing test.[301] The court first addressed the ripeness issue and determined that the case was not yet ripe for review because Palazzolo had not submitted plans for a

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290. *Id.* at 709–10.
291. *Id.* at 710 & n.1.
292. *Id.* at 710.
293. *Id.*
294. *Id.*
295. *See* P.L. 1965, ch. 140, § 1 (codified at G.L. 1956 §§ 2-1-13 through 2-1-17); *see also Palazzolo*, 746 A.2d 707 at 710.
296. *See Palazzolo*, 746 A.2d at 710.
297. Coastal Resources Council Enabling Act, R.I. GEN LAWS §46-23-1 (2000); *see also Palazzolo*, 746 A.2d at 710–11.
298. *Palazzolo*, 746 A.2d 707 at 711.
299. *Id.*
300. *Id.*
301. *Id.* at 712–13.

less ambitious plan.[302] The court explained the importance of ripeness, stating, "[a] court must be able to ascertain 'the nature and extent of permitted development' on the subject property."[303] The court pointed to two United States Supreme Court cases as support. In the first, the claim was not ripe because *no* development plan had been submitted to the appropriate agency for consideration.[304] In the second, only one "grandiose" plan had been submitted.[305] In both cases, the claimants could not prove that "less ambitious plans also would be rejected."[306] The court found the *Palazzolo* situation to be analogous and considered two major facts. First, Palazzolo had only applied to fill the wetlands for the beach, he had not applied to develop the subdivision.[307] And second, Palazzolo had not filed any less ambitious development plans.[308] The court stated:

> Palazzolo has not sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel. There was undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill.[309]

Although the ripeness issue disposed of the case, the Rhode Island Supreme Court briefly addressed the merits of the case.[310] First the court discussed whether there was a per se taking under *Lucas*. The court determined that all beneficial use of the property was not lost because there was at least one lot (out of seventy-four) that was on upland property that could be developed because it did not require a fill permit. The court also said that the wetlands property had value as an "open-space gift" in the amount of around $157,500. Because of this, the court determined that the trial court

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302. *Id.* at 714.
303. *Id.* at 713. (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986)).
304. *Id.* (citing Agins v. City of Tiburn, 447 U.S. 255, 260 (1980)).
305. *Id.* (citing MacDonald, Sommer & Frates, 477 U.S. at 353 n.9).
306. *Id.* at 713–14.
307. *Id.* at 714.
308. *Id.*
309. *Id.*
310. *Id.*

judge was not wrong in finding that there was some value in the land that precluded a categorical takings claim.

The court also said that even if all value was lost, there was still not a taking because the right to fill in the land was not included in the title when Palazzolo acquired the land.[311] The lower court judge had determined that Palazzolo acquired the land in 1978 (even though SGI actually owned the property before this).[312] In 1977, the CRMC had already promulgated rules that required a special exception to fill wetlands.[313] Because of this preexisting regulation, under the *Lucas* nuisance exception, there was not a categorical taking.[314] Finally, the court applied the *Penn Central* balancing test and found that Palazzolo had no reasonable investment-backed expectations of developing the property.[315]

The U.S. Supreme Court granted *certiorari* on three issues: (1) where a land-use agency has authoritatively denied a particular use of the property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for less ambitious uses in order to ripen the takings claim;[316] (2) whether a regulatory taking claim is categorically barred whenever a regulation's enactment predates the claimant's acquisition of the property; and (3) whether

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311. *Id.* at 715–16.

312. *Id.*

313. *Id.* at 711.

314. *See id.*

315. *Id.* at 717.

316. This Note only examines substantive issues that have arisen since *Lucas* and will hopefully be addressed in *Palazzolo*. However, a brief discussion of the ripeness claim is in order, as the Court may not even reach the substantive issues if it decides the claim is not ripe for review.

For a claim to be ripe, the plaintiff must have a final administrative decision regarding the application of the regulations to the property at issue, and if the state has an adequate procedure for seeking just compensation, the landowner must have used the procedure. *See* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997). Rhode Island argues that this requires Palazzolo to file less ambitious plans before his claim can be ripe. In this situation, however, a less ambitious plan is not necessary for several reasons.

First, Palazzolo claims that he did file a less ambitious plan; his most recent plan sought to fill 11.2 acres of wetlands instead of all 18 acres as the original plan requested. *See* Petitioner's Brief on the Merits at 11, 2000 WL 1742033 (No. 99-2047). Additionally, there is evidence that shows that Palazzolo's application was denied because his purpose in filling the wetland was not for conservation or similar purposes and that all other purposes are prohibited. *See id.* at 11–12. It is a waste of time and money for Palazzolo to be required to continue to submit applications when, realistically, under the restrictions of his property, the Commission would never grant him permission to do as he asked with the property, whether it was less ambitious or not. This is not to say that every claim will be ripe for review without filing less ambitious plans. The Court needs to examine the facts in each case to determine ripeness. In this case, it seems useless for Palazzolo to file more plans because the Commission was not going to grant the permits.

the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.[317] The Court now has the opportunity to address these important issues left open after *Lucas*.

A. Are Preexisting Limitations Inherent in Property Law?

The first thing the Court must consider is that ownership and control of property is a fundamental right on which this country was founded. Although there is an abundance of literature on this topic,[318] there is also an innate feeling inside Americans that owning property is important. The average person does not understand the complex rules regarding eminent domain and takings; however, most people will probably tell you that the government has no right to tell them what to do with the property they own. This right must be balanced against the government's responsibility to use its police power to protect the safety, health, and welfare of the people.[319] It is imperative that the Court keep in mind the history of property rights when it determines the future of takings jurisprudence in *Palazzolo*. History leads to convincing arguments both for including statutes and for excluding statutes from the *Lucas* exception. Originally, most courts and scholars only considered common law principles to fit into the *Lucas* exception, not statutory regulations.[320] However, as the cases in Part II.C. illustrate, courts have recently begun to include regulations as a limitation in property law that fits in the *Lucas* exception.

In many ways, it makes sense to include regulations as an inherent limitation in title. From an economic standpoint, a person obtains the property with reasonable expectations. If there is a restriction on the property when the landowner acquires it, she does not have a reason to believe she can use the property in a way that would violate that restriction. Additionally, a buyer should already have been compensated for that restriction on the use of land by a lower purchase price. A buyer of property is responsible for learning what restrictions and easements are existing when he purchases the property. If he does not do this, it is not the government's

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317. On the Docket, Northwestern University, *at* http://www.medill.nwu.edu/docket (visited June 19, 2001).

318. *See, e.g.*, sources cited *supra* notes 1 & 2.

319. *See, e.g.*, Talmadge, *supra* note 7.

320. *See* Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 5–6 (1996).

responsibility to compensate him for his lack of investigation into the property and applicable law.

Another reason why existing regulations could be considered inherent limitations on the use of the land under the *Lucas* exception is because our ideas of property evolve over time.[321] Justice Stevens had deep concerns about this in his dissent in *Lucas*. He stated that property law needs to be revised as our concepts about property change.[322] He also pointed out that property laws need to be revised as we learn and evolve in both a moral and a practical sense.[323] He used the example of slavery to illustrate how concepts of property can radically change, and he felt that the courts should allow for that change.[324] Justice Stevens was also afraid that only looking at the common law would hamper legislatures' attempts to deal with problems in land use law—particularly environmental regulation.[325] For these reasons, he believed that not every regulation that involved a complete taking should be compensated.

Environmental legislation is a good example of this concern. This area has rapidly expanded in the past three decades. As Justice Stevens argued, legislatures need to be free to create laws that will conserve and protect our natural resources. A state will be required to compensate a current landowner if a regulation is enacted that takes away all value of the land. Any subsequent landowner acquires property with, at the very least, constructive notice that his rights are limited. By denying compensation to property owners who acquire the property after a regulation, the Court has created an entire class of people who are ineligible to claim a taking of their property.[326] As the years go by, fewer people will be able to make claims.[327] Many environmentalists see this as a positive development because instead of expanding takings jurisprudence, *Lucas* actually narrowed it.[328] Governments can create environmental legislation without as much concern over compensable takings.[329]

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321. *See id.* at 6.

322. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1069 (1992) (Stevens, J., dissenting).

323. *Id.*

324. *Id.*

325. *Id.* at 1070.

326. *See* Peter L. Henderer, *The Impact of* Lucas v. South Carolina Coastal Council *and the Logically Antecedent Question: A Practitioner's Guide to Fifth Amendment Takings of Wetlands*, 3 ENVTL. LAW. 407, 421 (1997).

327. *See id.*

328. *See id.* at 421—22.

329. *See id.*

There are also equally strong reasons *against* including preexisting regulations as inherent limitations in title. First, it violates the plain language of *Nollan v. California Coastal Commission*,[330] which the Court decided before *Lucas*. The Court held that the Commission's requirement of an easement on the plaintiff's property as a condition for issuing a permit required compensation.[331] The Court stated:

> Nor are the Nollan's rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.[332]

Judge Wesley, of the New York Court of Appeals, explained this point in his dissent in *Anello*.[333] He reiterates that owners transfer their full property rights when they convey a lot.[334] He contends, "If a prior owner cannot transfer a potential taking claim to a subsequent purchaser, then the property's value is destroyed by the transfer without the government having to pay compensation for it."[335] He thought a preexisting regulation that deprives an owner of all use of the land should be *not* considered a background principle of property law.[336] This turns a compensable taking into an uncompensable taking merely because the land is transferred.[337] Judge Wesley did not think this was what the Court meant when it said to look at background principles of law. The Court itself said to look at similarly situated owners to see if the use was prohibited at common law. This interpretation would allow one owner to use the land in one way, but prohibit his next door neighbor from doing the

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330. 483 U.S. 825 (1987).
331. *Id.* at 838–39.
332. *Id.* at 834 n.2.
333. Anello v. Zoning Board of Appeals, 89 N.Y.2d 535, 541–44 (N.Y. 1997) (Wesley J., dissenting).
334. *Id.* at 543 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987)).
335. *Id.*
336. *Id.* at 543–44.
337. *Id.* at 543.

exact same thing, only because he bought the land at a different time.[338]

Similarly, in *Store Safe Redlands Associates v. United States*,[339] the Federal Claims Court explained why a court should not look to preexisting statutes for background principles of property law. This case involved an amendment to the plaintiff's grazing permit which denied him the right to use the ditch irrigation system because the state reclaimed its water rights.[340] This is not a loss of all value case, but the court still applied the *Lucas* analysis. The court strongly disagreed with the idea that a preexisting regulation did not require compensation. The court stated that this was "illogical and inconsistent with well-established property law."[341] It proposed the hypothetical that Congress could pass a law stating that land owners could not build on their property.[342] After the land had passed hands once, landowners would not be able to build on their property, and no compensation would be required from the government.[343] The court also stated that property rights run with the land, they do not evaporate when the land transfers hands.[344] Therefore, a regulation does not take away the right of a subsequent owner just because the land changes hands.

There are several other concerns that arise from saying that just because a regulation was in place at the time the property was acquired, it is a background principle of law. First, and extremely important, it is not clear the Supreme Court meant to include preexisting regulations in *Lucas*. The Court stressed that the relevant inquiry was into *common law*.[345] In fact, the court instructed state courts to look at similarly situated owners to see if they are allowed to use the land in the way prohibited to determine if the use was prohibited at common law.[346] Justice Stevens seems to have thought the court intended to look only at common law because he strongly disagreed with this idea in his dissent.[347] Although he did not agree

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338. *See id.*

339. 35 Fed. Cl. 726 (Fed. Cl. 1996).

340. *Id.* at 731.

341. *Id.* at 735.

342. *Id.*

343. Although the court makes an interesting argument here, it forgets the first step of a takings analysis. The regulation must be a valid exercise of police power. It is unlikely that any rule such as this would pass this test.

344. 35 Fed. Cl. at 735.

345. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

346. *Id.* at 1031. However, it can be argued that other owners were not "similarly situated" if they did not have the same restrictions on their property when they purchased it.

347. *See id.* at 1068–1069 (Stevens, J., dissenting).

with the Court's rule, it is clear that he thought the exception applied only to common law nuisances, not recent legislation.

There is also a problem with the idea that legislation always puts an owner on notice that there are limitations on land. For example, in the *Hunzicker* case, the plaintiffs did not know there was a burial mound on the property that could not be disturbed.[348] This took away their property rights without compensation because of a development *after* they owned the property, merely because the statute was in place before they bought the property. If the court applied a balancing test, it would have to closely examine the facts of the case and thoroughly analyze the surrounding issues. This seems to be more equitable in a situation like this.

It is clear that *Lucas* does not provide certainty as to whether preexisting regulations should be included as an inherent limitation in the property owner's title. There are powerful arguments on each side of the issue. If the Supreme Court decides that *Palazzolo* is ripe and reaches this issue, it needs to closely examine these arguments. The most equitable approach to these fact-sensitive cases is to closely examine the issues surrounding each case. How long was the regulation in place? Did the landowner have notice? Did the landowner buy the property at a reduced price because of restrictions? Was it a sophisticated buyer who should have been aware of the regulation? Was there a development *after* the purchase of the property, which resulted in the loss of value, even though the regulation was preexisting?

For example, consider the facts in *Palazzolo*. In this case, the current owner previously owned the company that owned the property. He did not buy the property after the regulations were enacted, he had an interest in the property long before the wetlands regulations were enacted. The only reason he personally owns the property is because SGI's corporate charter was revoked, which happened after the regulations were enacted. So, it would seem that if the corporate charter had not been revoked in 1978, SGI would still own the property, and it would have a cause of action because it owned the property before the regulations were enacted. This does not seem to be a fair result. With a balancing of the facts, the courts will be able to account for these inequities instead of taking a blind bright-line approach. Although this is not the easiest way to handle the cases, it will produce the most equitable results. This also

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348. Hunziker v. State, 519 N.W.2d 367, 368 (Iowa 1994); *see also supra* text accompanying note 219.

follows the traditional notion of takings jurisprudence —that the courts should engage in essentially *ad hoc*, case specific analysis.[349]

B. *Should the* Lucas *Exception Apply When There Is Some Property Value?*

Palazzolo also gives the Court an opportunity to determine that the *Lucas* exception can apply even if the value of the land is not zero. Under *Lucas*, the nuisance exception should not be applied unless the landowner is deprived of *all* economically beneficial use of the land. A court should apply the *Penn Central* balancing test and weigh the rights of the landowner against the interests of the public if the land still retains some value.

But what if 80% of the value of the land is lost? 95%? What about 99%? Indeed it is very easy to argue for *any* piece of property that there is *some* value. For example, the Rhode Island Superior Court found that denial of a building permit did not deprive the owner of all economic value of the land because the property still had a "valuable recreational environment."[350] The court found that a natural environment could support public recreation for activities such as hunting, fishing, and bird watching.[351] If other courts follow this logic, it would seem that all economically beneficial use of the land is *never* completely lost.

The Court will have to address this problem if it reaches the merits in *Palazzolo*. The Rhode Island Supreme Court noted that there was one out of seventy-four lots that could be developed.[352] It also stated that the land had value as "open-space." Although *Lucas* seems to say that the value of the property must be zero, the Court did not address the question of whether, even though there was no *use* of the land permitted, there was still some residual *value*.[353] The Court used the words use and value interchangeably; however, from the subsequent cases, it appears that some land can have no "uses"

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349. *See* Penn Central Transportation Co. v. New York, 438 U.S. 104, 123–24 (1978); *see also supra* text accompanying note 20).

350. Emond v. Dufree, 1996 R.I. Super. Lexis 36, *14 (1996).

351. *Id.*

352. Palazzolo v. Rhode Island, 746 A.2d 707, 714 (R.I. 2000). This presents the issue of what part of a piece of property should be considered when determining if all value of the land has been taken. There is a debate whether, as in this case, one parcel should be considered as a separate piece of property or as part of the whole. This issue is an important issue; however it is an article in and of itself, and it is beyond the scope of this Note.

353. *See* Lucas v. South Carolina Coastal Council, 565 U.S. 1003, 1019 n.8. (1992). The Court admits that an owner who is deprived of 95% of the value of his land does not get the benefit of the categorical exception. Instead, he must rely on the *Penn Central* balancing test. *Id.*

permitted, but still retain some "value." This gives the Court the leeway it needs to expand the *Lucas* exception. The question is whether this is an appropriate expansion.

I suggest that it is appropriate to expand the categorical taking to situations where all economic *value* of the land is lost *or* when all *uses* of the land are prohibited. In other words, the landowner should have a categorical taking claim when he is required to leave his land in its natural state. This would alleviate some of the landowner's burden of having to prove that his land has "no" economic value. Instead, he would have to prove that the restrictions require him to leave his land in its natural state. This also avoids the problem of a government entity "making up" a value that is not really a benefit to the landowner, such as public recreational value. However, this expansion keeps the categorical taking in *Lucas* from becoming overly-broad or far-reaching. It remains within the spirit of *Lucas* and its predecessors—it merely clarifies that when a piece of property must be kept in its natural state, then all of its value has been taken by the government regulation and the landowner deserves just compensation. This will not solve all of the takings problems, but it is a step in the right direction.

V. CONCLUSION

It appears that instead of clarifying takings law in *Lucas*, the Supreme Court added complications. The Court now has a chance to alleviate some of this confusion. First, the Court needs to decide the case is ripe for review so that it can reach the merits of the case. Then the Court needs to thoroughly examine all of the complex issues surrounding the takings issues, keeping in mind the historical significance of property rights in the United States. The most equitable way for the Court to resolve the dispute about whether preexisting regulations should be included in the inherent limitations in title under the *Lucas* exception is to revert to a *Penn Central* type analysis of the facts involving the regulation. Additionally, the Court should clarify that a categorical taking includes those regulations that not only destroy all value of the property, but also those that prohibit all use of the land. The United States Supreme Court once again has the difficult challenge of protecting private property, while at the same time protecting American citizens, and its decision is sure to shape the future of individual property rights.