

# ***Lucas* and Takings of Farm Lands: Unfavorable Winds**

## INTRODUCTION

The United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*<sup>1</sup> has fueled heated debate about the limits of a state's power to restrict or regulate land use without having to provide the owner compensation under the Fifth Amendment as proponents line up on both sides of the issue—those supporting individuals' rights to acquire and develop property as they see fit and those supporting states' rights to limit that power. *Lucas* is the Court's most recent expression regarding its Takings jurisprudence; however, the Court has failed to resolve continuing uncertainty over exactly what elements a property owner must show in order to establish that a state has exceeded its power to regulate so that a court will find a Taking<sup>2</sup> worthy of Just Compensation.<sup>3</sup>

Takings jurisprudence over the last century leaves little doubt that an actual physical invasion of property by the government constituted a Taking of property,<sup>4</sup> but considerable debate continues to exist regarding when state statutes and regulations go so far as to deprive an individual of property under the Fifth Amendment. In *Lucas*, the Court attempted to sweep together much of its reasoning from past cases con-

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<sup>1</sup> *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).

<sup>2</sup> Although many people think of the Fifth Amendment of the United States Constitution as pertaining to self incrimination, it also holds in relevant part that "[n]o 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." U.S. CONST. amend. V.

<sup>3</sup> "Compensation which is fair to both the owner and the public when property is taken for public use through condemnation (eminent domain)." BLACK'S LAW DICTIONARY, 863 (6th ed. 1990).

<sup>4</sup> "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." 112 S.Ct. 2893.

"Where 'permanent physical occupation of land' is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved." *Id.* at 2900.

cerning regulatory takings.<sup>5</sup> Since the 1920's, the Court has shown an increasing willingness to uphold valid exercises of police power<sup>6</sup> to the point at which a regulation will be found to constitute a Taking only when it "denies an owner economically viable use of his land . . . ."<sup>7</sup> The Court thereby seemingly set a bright line of 100 percent diminution in land value as the necessary threshold before compensation can be obtained.

However, in *Lucas*, the Court ruled that other factors must also be considered,<sup>8</sup> and consideration of these factors enables advocates to argue in terms other than diminution of value alone, but whether introduction of these factors serves to raise a new standard required for obtaining compensation is unclear.

Ironically, while those on both sides of the issue of autonomy of land use proclaim *Lucas* as a victory for their respective ideas and future litigation relying upon the language contained in *Lucas* is assured, two things are clear from the Court's decision: 1) the Court has not rejected a State's ability to exercise validly its police power to advance a state interest, and 2) the Takings jurisprudence clock has not entirely been turned back to the 19th century when a state could escape paying compensation for property taken by merely showing that the property was used in a way that threatened the health, safety, or welfare of citizens.

This comment explores, in a light applicable to agribusiness, the possible pitfalls for those property owners who may eventually face a regulatory Taking. Many potential traps remain for farmers and ranchers (and those who represent them) seeking to avoid severe losses from a regulatory Taking, and the cases discussed will show the evolution of

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<sup>5</sup> " 'Harmful or noxious use' analysis was, in other words, simply the progenitor of [the Supreme Court's] more contemporary statements that 'land-use regulation does not effect a taking if it substantially advance[s] legitimate state interests' . . . ." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2897 citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 834, (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>6</sup> Culminating in *Penn Central Transportation Co. v. City of New York*, 43 U.S. 104, 138 n.36 (1978).

<sup>7</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>8</sup> "The 'total takings' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, e.g., *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., *id.*, §§ 827(e), 828(c), 830." 112 S.Ct. at 2901.

the Court's Takings jurisprudence through this century, leading to a better understanding of what *Lucas* actually means, especially to those involved in agriculture. Thus, this examination will clarify the difficult terrain of the Supreme Court's Takings jurisprudence should clouds of pending litigation appear on the grower's<sup>9</sup> horizon.

## I. GRASS WILL GROW IN THE STREETS:<sup>10</sup> THE GRADUAL ACCEPTANCE OF POLICE POWER.

### A. *Historical Overview of Takings Jurisprudence.*

An historical context for the United States Supreme Court's Takings jurisprudence and its evolution provides insight into the significance of *Lucas* for farming.<sup>11</sup>

#### 1. *Mugler v. Kansas*<sup>12</sup>

In 1887, Peter Mugler manufactured beer at his brewery located in Salina, Kansas<sup>13</sup> in spite of the fact that in 1880, the constitution of the state of Kansas was amended<sup>14</sup> to incorporate the following provision: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this state, except for medical, scientific, and mechanical purposes."<sup>15</sup> Understandably, Mugler claimed that this regulation effected a Taking of his property, for he was no longer able to use his land to brew beer. Having established that his facility was unsuited to produce

<sup>9</sup> Grower is generally said to be synonymous with producer, meaning anyone who produces a commodity or who has a proprietary interest in the commodity.

<sup>10</sup> "Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms, and grass will grow in the streets of every city in the country." William Jennings Bryan "Cross of Gold" speech. The speech was delivered in 1869 at the Democratic National Convention during the first of Bryan's two unsuccessful Presidential attempts.

<sup>11</sup> The *Lucas* impact on farming is treated in a direct discussion in section II.

<sup>12</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887). Although nuisance law/principles are ultimately very important to the *Lucas* Court, an extensive discussion of nuisance law and its development is outside the scope of this comment. Nevertheless, any examination of the Court's consideration of Takings Clause cases should begin with the prominent case of *Mugler v. Kansas*.

<sup>13</sup> Mugler had erected the brewery at considerable cost while it was still legal to produce beer within the state. 123 U.S. at 623-24.

<sup>14</sup> Embodied later by KAN. CONST. art. 15, § 10. The amendment was adopted by the people on November 2, 1880.

<sup>15</sup> This provision was later codified, effective May 1, 1881, as Chapter 128, § 5 of the LAWS OF KANSAS.

alcohol in the limited ways set out in the Kansas constitution, *Mugler* argued that he had suffered significant financial loss and was thereby entitled to Just Compensation. The Court disagreed, holding that the state had the power to protect citizens' health, safety, and welfare from possible injury flowing from the noxious use of property.<sup>16</sup> The Kansas legislature, finding that brewing beer posed such a threat, empowered the state to act under its police powers, exempt from Fifth Amendment strictures. Thus, *Mugler's* claim was deemed not to warrant compensation.

The state of Kansas had determined through its legislative process that the sale and manufacture of intoxicating liquors was injurious to the public's health, safety, and morals. This is something akin to nuisance. The issues of 1) whether or not there was a physical invasion of the property by the government, and 2) if there was no physical invasion, what percentage of the value of the owner's property has been denied to the owner because of a regulation or statute, were never reached in *Mugler*. Accordingly, in Takings actions subsequent to *Mugler*, parties focused much of their efforts on establishing or defending the issue of whether or not the use was noxious or harmful to the community.

The holding in *Mugler* has proven enduring. As the "noxious or harmful use" theory has been revisited by the Court as recently as 1978,<sup>17</sup> the government need not compensate a property owner who makes a noxious use of his property.<sup>18</sup> Recently, Chief Justice Rehnquist expressed the Court's view that the brewery was not rendered valueless.<sup>19</sup> Undoubtedly, the fact that the brewery had retained some

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<sup>16</sup> The Court held: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests . . . . The power which the states have of prohibiting such use . . . cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." 123 U.S. at 668-69 (1887).

<sup>17</sup> *Penn. Central Transportation Co. v. New York City*, 43 U.S. 104, 144-45 (1978).

<sup>18</sup> Additionally, the government's power to prohibit activities that are entirely legal and beneficial remains intact as well, as discussed *infra*.

<sup>19</sup> "[W]e have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation. Thus, in *Mugler v. Kansas* . . . the prohibition on manufacture and sale of intoxicating liquors

residual value amounted to little consolation for Mr. Mugler;<sup>20</sup> nevertheless, Justice Rehnquist's view is that the nuisance exception to the Fifth Amendment's Takings Clause embodies a narrow exception which recognizes that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."<sup>21</sup>

The enduring lesson that growers may derive from *Mugler* is that if a farming activity or mode of operation is deemed to be a nuisance, its continuance may be enjoined by the government without paying compensation to the farmer. For those defending farming interests, distinguishing *Mugler* and its progeny can be important, for as the country's population continues to grow, agricultural lands will be continually pressured by urban encroachment.<sup>22</sup> With increasing numbers of towns and residents in areas that were exclusively agricultural regions only a few years ago, new and extensive regulations inevitably will be passed in order that some sense of rational planning and land use be maintained. Farmers will be forced to adjust their operations to conform with increasing regulation,<sup>23</sup> i.e., of pesticides, fertilizers and water, as well as the very use to which they put their lands, and while farmers may try to seek protection in "right to farm" laws,<sup>24</sup> those who represent farming interests must be prepared to distinguish modern farm-

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made the distiller's brewery 'of little value' but did not completely extinguish the value of the building." *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting).

<sup>20</sup> The issue of whether or not some viable economic value is left in the owner's land is an issue directly addressed in *Lucas*, 112 S.Ct. at 2899-900.

<sup>21</sup> *Mugler v. Kansas*, 123 U.S. at 665.

<sup>22</sup> "Approximately three million acres are converted each year from agricultural to nonagricultural uses, with one-third of that coming from the nation's cropland base." Randall Wayne Hanna, "Right To Farm" Statutes—*The Newest Toll in Agricultural Land Preservation*; 10 FLA. ST. U.L. REV. 415, 415 (1982) (citing the National Agricultural Lands Study, 1981 Final Report 8 (1981))." The 'cropland base' is the number of acres of land in America that is suitable for growing crops." *Id.* n.1

<sup>23</sup> "Kenny Evans, vice president of the Arizona Farm Bureau, said that increasing regulation started chasing farmers from California to Arizona as early as 10 years ago." Maria L. LaGanga, *Drought Spells Big Changes On The Farms*, L. A. TIMES, Feb. 8, 1991, § A, at 3.

<sup>24</sup> "No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began." CAL. CIV. CODE § 3482.5(a)(1) (1991).

ing activities from those activities that might be deemed noxious or harmful to the health or safety of the community.

## 2. *Pennsylvania Coal Co. v. Mahon*<sup>25</sup>

Roughly three decades after *Mugler*, the Court held that the elements of an action in public nuisance must be solidly established by the state before the Court would be willing to uphold a legislative act that prohibited coal mining, which was likely to cause subsidence<sup>26</sup> of dwelling houses. Because the Fifth Amendment expressly provides that compensation be paid when private property is taken, the Court recognized that when government takes property, "the existence of such a public purpose is . . . a necessary prerequisite to the government's exercise of its taking power."<sup>27</sup> *Pennsylvania Coal* is often cited<sup>28</sup> because of the Court's attention to the actual size of diminution in property value in an action challenging a statutory Taking.

When the Mahons purchased their house, they knew that coal lay underneath and that eventually the owners of the mineral rights would wish to extract it.<sup>29</sup> They also knew that some degree of future soil subsidence would probably result from those mining operations,<sup>30</sup> but when the coal company gave notice of its intent to mine underneath their house, the Mahons sought to enjoin this activity, claiming that an intervening Act of the Pennsylvania legislature, commonly known as the Kohler Act<sup>31</sup>, had eliminated the coal company's right of extraction.<sup>32</sup>

Writing for the majority, Justice Oliver Wendell Holmes pointed out that the Mahons had purchased the property with full knowledge, thereby accepting the risk that their home might eventually be damaged or destroyed by the extraction process.<sup>33</sup> Additionally, the Court found

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<sup>25</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>26</sup> "Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal." *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 474 (1987).

<sup>27</sup> 480 U.S. at 511.

<sup>28</sup> See note 43 *infra*.

<sup>29</sup> 260 U.S. at 412.

<sup>30</sup> These factors were expressly stated in the deed and agreed to when the Mahons purchased the house. *Id.*

<sup>31</sup> Pennsylvania Law 1198, approved May 27, 1921.

<sup>32</sup> "The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation . . . ." 260 U.S. at 412-413.

<sup>33</sup> *Id.* at 412.

that because ownership of mineral rights is inherently intertwined with the right of extraction, the Taking of the right of extraction becomes tantamount to Taking of the ownership interest in those minerals.<sup>34</sup> The Court held that the Contract Clause<sup>35</sup> of the United States Constitution protects the coal company's right to mine its minerals.<sup>36</sup> Finding that the Mahons' house alone was threatened by this mining activity, the Court held that extracting coal from a mine could not be deemed a public nuisance<sup>37</sup> under the facts of the case before it, and if the Act deprived the coal company of its right of extraction, the coal company deserved compensation.<sup>38</sup> In essence, the legislation effected a Taking of the coal company's property to such a degree that upholding it would essentially prevent the company from carrying on its business.

Perhaps the most enduring aspect of *Pennsylvania Coal* was its statement that each case must be decided on its individual facts.<sup>39</sup> Anyone representing a property owner, including those representing farming interests, must engage in a fact-specific analysis of the particular situation when pleading and presenting the case. Those facts will become the foundation for the court's analysis as to whether a nuisance exists or compensation is justified. Therefore, complete and detailed records should be kept by those farming operations coexisting with nearby residential areas or businesses,<sup>40</sup> for those records may determine whether or not a farming operation is regarded as a nuisance by the court, and correspondingly, whether or not compensation is in order.

*Pennsylvania Coal* held that when diminution in property value resulting from government regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain"<sup>41</sup>

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<sup>34</sup> *Id.* at 414.

<sup>35</sup> U.S. CONST. art. I, § 10.

<sup>36</sup> Citing *Commonwealth v. Clearview Coal Co.*, the Court reasoned that "[f]or practical purposes, the right to coal consists in the right to mine it. 100 Atl. 820, 820 (1917). What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 414-15.

<sup>37</sup> 260 U.S. at 413-14.

<sup>38</sup> The Court implied that if there had been a public nuisance in this case, its holding might have been different. "This is the case of a single private house." *Id.* at 413.

<sup>39</sup> *Id.*

<sup>40</sup> *E.g.*, records of pesticide spray applications and field cultivation should be kept to answer potential complaints about unfavorable pesticide drift or dust.

<sup>41</sup> "The power to take private property for public use by the state, municipalities, and private persons and corporations authorized to exercise functions of public charac-

and compensation to sustain the act."<sup>42</sup> While the deprivation in value of the coal company's interests may not have been total, it certainly reached the necessary level for the Court, based upon the particular facts of *Pennsylvania Coal*. The mining company's inability to operate at a profit was a significant element in the Court's decision.<sup>43</sup>

Finally, the current Court's increased attention to historical analysis makes *Pennsylvania Coal* perhaps the most often cited case in the Court's Takings jurisprudence.<sup>44</sup> The reasoning contained in both the majority and dissenting opinions about whether or not subsidence was a public nuisance in this case was clearly based upon how the Justices perceived the particular facts of the situation.<sup>45</sup> In dissent, Justice Brandeis argued that extracting the coal would constitute a nuisance, that the state legislature determined as much when passing the Kohler Act, and as a nuisance per se, the mining should be enjoined and no compensation need be paid.<sup>46</sup> Justice Brandeis was unconcerned that if the Kohler Act were upheld, *Pennsylvania Coal* would be effectively barred from using its property,<sup>47</sup> for he interpreted the coal company's right to extract its coal as being subject to the state's authority to make legislative findings about whether an activity constituted a danger to the public's health, safety, or welfare.<sup>48</sup> The fact specific analysis by both the majority and dissenting opinion in arriving at their respective positions is a method of inquiry still conducted by courts in deciding Tak-

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ter." BLACK'S LAW DICTIONARY, 523 (6th ed. 1990).

<sup>42</sup> 260 U.S. at 413.

<sup>43</sup> 260 U.S. at 414-415. The ability to operate at a profit, in the light of the later cases, appears to be only one of many factors that the Court looks at to determine if the complainant is being forced individually to bear an unjust burden because of the regulation at issue.

<sup>44</sup> *E.g.*, see *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 n.7; *Nollan v. California Coastal Commission*, 483 U.S. 825, 853 (Brennan, J., dissenting); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 473 (Brennan, J., dissenting).

<sup>45</sup> As stated, Justice Holmes failed to find a public nuisance and determined that the coal company was unable to operate at a profit. 260 U.S. at 413 and 260 U.S. at 414-15.

<sup>46</sup> "But restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking." 260 U.S. at 417 (Brandeis, J., dissenting).

<sup>47</sup> "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." 260 U.S. at 418 (Brandeis, J., dissenting).

<sup>48</sup> "One whose rights, such as they are, are subject to state restriction cannot remove them from the power of the state by making a contract about them." 260 U.S. at 421 (Brandeis J., dissenting) (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).

ings cases. Thus, as so much of a grower's farming activities may also be subject to the state's authority to regulate, *Pennsylvania Coal's* admonition that each case will be decided on its own particular facts still rings true today.

### 3. *Miller v. Schoene* <sup>49</sup>

Seven years after *Pennsylvania Coal*, the Court decided *Miller*, involving property owners who had been ordered to destroy their rust<sup>50</sup> infested cedar trees.<sup>51</sup> The property owners argued that they had a significant property interest in the trees, but the Court indicated that the public interest in safeguarding the state's valuable apple crop outweighed whatever private interest in land that was to be sacrificed.<sup>52</sup> Thus, the state's decision to destroy the trees was deemed to be a valid exercise of the state's police power and thus noncompensable.<sup>53</sup>

*Miller* is significant for farmers because the Court did not decide whether the trees constituted a nuisance,<sup>54</sup> a state employee determined that the cedar trees threatened the state's apple crop, and this rather

<sup>49</sup> *Miller v. Schoene*, 276 U.S. 272, (1927).

<sup>50</sup> The Cedar Rust Act of Virginia, Va. Acts 1914, c. 36, as amended by Va. Acts 1920, c. 260, now embodied in Va. Code (1924) as §§ 885 to 893 was the statute at issue. "The Virginia statute presents a comprehensive scheme for the condemnation and destruction of red cedar trees infected by cedar rust. By § 1 it is declared to be unlawful for any person to own . . . any red cedar tree which is or may be a source . . . [for a] . . . plant disease known as cedar rust . . . . Section 2 makes it the duty of the state entomologist, "upon the request in writing of ten or more reputable freeholders of any county . . . to make a preliminary investigation of the locality to ascertain if any red cedar trees . . . are the source . . . for the said disease . . . and . . . to direct the owner in writing to destroy the trees . . . ." 276 U.S. at 277.

<sup>61</sup> . . . "holding that the Takings Clause did not require the State of Virginia to compensate the owners of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource . . . . [I]t was clear that the State's exercise of its police power to prevent impending danger was justified, and did not require compensation." *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 491 n.12 (1987).

<sup>62</sup> "[T]he Court spoke of the preferment of the public interest over the property interest of the individual, 'to the extent even of its destruction.'" *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2912 (Blackmun J., dissenting) (quoting *Miller v. Schoene*, 276 U.S. 272, 280).

<sup>63</sup> The statute at issue directed the state to issue a statement of facts to the property owner. Additionally, the statute provided for the circuit court of the county "to hear the objections" and "pass upon all questions involved." 276 U.S. at 278.

<sup>64</sup> "We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law." 276 U.S. at 280.

than an application of state nuisance law was the basis for the exercise of the state's police power.<sup>55</sup> Therefore, a state's application of its police powers is a legislatively sanctioned administrative action intended to avoid a perceived threat to the health and safety of the citizens.

A unanimous Court indicated that a state may exercise its police power when it perceives a threat to the general welfare and weighs the public and private interests involved. Thus, it is crucial for agribusiness to be politically involved<sup>56</sup> whenever the state undertakes such an evaluation of public and private interests to insure that the state action taken will truly advance the public interest that is to be protected.

## II. A LITTLE PLAY IN THE JOINTS:<sup>57</sup> A MODERN PERSPECTIVE OF TAKINGS JURISPRUDENCE

### A. *Keystone Bituminous Coal Ass'n. v. DeBenedictis*<sup>58</sup>

Over time, the Court has continued to decide cases based upon each's unique set of facts, reaching "the result it wanted without inflicting . . . damage upon . . . [its] Takings Clause jurisprudence,"<sup>59</sup> that is, without reversing the Court's inclination to allow states to exercise liberally their police power to protect public health and safety. The Court heard *Keystone* nearly 65 years after *Pennsylvania Coal* had been decided, and once again, a coal company was required by a state regulation not to mine some of its coal in order to prevent soil subsidence.<sup>60</sup>

In *Keystone*, the coal company established at trial that it was deprived of the ability to mine 2 percent of its coal reserves. However, on appeal to the United States Supreme Court, the majority found that this deprivation was not great enough to establish a Taking. Because the regulation required that one-half of the coal located under structures be kept in place, the Court distinguished the Act challenged in

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<sup>55</sup> The *Lucas* Court again establishes a standard under which the State "must identify background principles of nuisance and property law that prohibit the uses" at issue. 112 S.Ct. at 2901-2902; see also note 9 *supra*.

<sup>56</sup> Farmers should, whenever possible, participate in all public hearings pertaining to changes in preexisting regulation or zoning.

<sup>57</sup> "The interpretation of constitutional principles must not be taken too literally. We must remember that the machinery of government would not work if it were not allowed a little play in the joints." Oliver Wendell Holmes, *Bain Peanut Co. v. Pinson* 282 U.S. 499 (1931).

<sup>58</sup> *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987).

<sup>59</sup> 112 S.Ct. at 2904 (Blackmun J., dissenting).

<sup>60</sup> The facts of the two cases were remarkably similar as noted by Justice Scalia in footnote 7 of *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2894.

*Pennsylvania Coal*, which could be interpreted as prohibiting all mining under structures. Additionally, the Court noted the coal company had failed to show that it was unable to operate at a profit, and the Court felt that this was a distinguishing factor between the two coal cases. The *Keystone* Court distinguished the statutes in the two cases, finding the Kohler Act in *Pennsylvania Coal*, unlike the subsidence statute in *Keystone*,<sup>61</sup> "served only private interests, not health or safety."<sup>62</sup> The Court reasoned that the subsidence statute in *Keystone* "was an exercise of the Commonwealth's police power,<sup>63</sup> justified by [the state's] interest in the health, safety, and general welfare of the public."<sup>64</sup> Four justices dissented,<sup>65</sup> claiming that because there were almost no factual differences between *Keystone* and *Pennsylvania Coal*, the majority's attempts to distinguish the two cases eroded the clarity of the Court's Takings jurisprudence, and served to undermine the impact of *Pennsylvania Coal*.<sup>66</sup>

*Keystone's* significance for farming is that the Court looked to facts surrounding the activity of coal mining in Pennsylvania in the 1970's rather than decide the case in terms of coal mining as it was understood in the 1920's when *Pennsylvania Coal* came before the Court. Concern for the environment, in particular, the detrimental effects of subsidence were of particular importance to the Court. Such concerns over the state of the environment and how coal mining affected the surrounding area were unknown issues when *Pennsylvania Coal* was decided. Thus, *Keystone* represents the Court's willingness to reverse a particular policy when new facts are uncovered.<sup>67</sup>

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<sup>61</sup> Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, §§ 4 and 6: PA. STAT. ANN., tit. 52, at 1406.1 *et. seq.* (Purdon Supp. 1986).

<sup>62</sup> 480 U.S. at 484.

<sup>63</sup> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria." *Nollan v. California Coastal Commission*, 483 U.S. 825, 843 n.1, (1987) (Brennan J., dissenting).

<sup>64</sup> 480 U.S. at 479.

<sup>65</sup> Among the dissenters was Justice Scalia, the author of both *Nollan v. California Coastal Commission* and *Lucas v. South Carolina Coastal Council*. Yesterday's dissenters do sometimes become today's majority.

<sup>66</sup> 480 U.S. at 507, (Rehnquist J., dissenting).

<sup>67</sup> "The fact that a particular use has long been engaged in by similar situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, *see* Restatement (Second) of Torts, § 827, § g." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901 (1992).

Farmers, therefore, may not successfully insulate themselves from changing political winds or scientific discoveries, for farming activities that were thought harmless decades ago may no longer be permitted in spite of the existence of "right to farm" laws.<sup>68</sup>

B. "Dern the dern fog:"<sup>69</sup> *The Scope of Examination*

In deciding *Penn Central Transportation Co. v. City of New York*,<sup>70</sup> the Court provided guidance as to how much property should be examined when determining if a Taking worthy of compensation has occurred.<sup>71</sup> A property owner possessing a single parcel of land can point to that piece of property and claim that a certain percentage of the piece has been taken as the result of some regulation that has been enacted. However, the determination of how much property has been taken from a particular individual becomes more difficult when the property owner has title to several pieces of property in one general vicinity. In *Penn Central*, the Court suggests that other parcels of land owned by the railroad in the vicinity of Grand Central Station may be included in the analysis.<sup>72</sup> This notion is rejected by the *Lucas* Court,<sup>73</sup> but still, the issue of a partial Taking has not been addressed by the Court.<sup>74</sup>

<sup>68</sup> An extensive discussion of right to farm laws is outside the scope of this comment. However, see Randall Wayne Hanna, "Right To Farm Statutes"—*The Newest Toll in Agricultural Land Preservation*; 10 FLA. ST. U.L. REV. 415 (1982).

<sup>69</sup> Words repeatedly spoken by everyday men lost, alone, and adrift in the fog while attempting to navigate the river. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN*, Harper & Row Inc., New York (1959), page 121.

<sup>70</sup> *Penn. Central Transportation Co. v. New York City*, 488 U.S. 104 (1978).

<sup>71</sup> "In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights of the parcel as a whole . . ." *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> "For an extreme—and, we think, insupportable—view of the relevant calculus, see *Penn. Central Transportation Co. v. City of New York*, 42 N.Y.2d 324, 333-334, 397 N.Y.S.2d 914, 920, 366 N.E.2d 1271, 1276-1277 (1977), *aff'd*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity. Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 n.7.

<sup>74</sup> "In any event, we avoid this difficulty in this present case . . ." *Id.* at 2894, n.7. Additionally, "the Court left open how the categorical takings rule set forth in its opinion applies to situations in which a part of a landowner's property is rendered unusable by a regulation." *Reahard v. Lee County* 968 F.2d 1131, 1134 n.5.

Footnote 7 in *Lucas*, implies that the Supreme Court remains reluctant to fully embrace the 100 percent diminution of value standard.<sup>76</sup> It also suggests that the issue of partial Takings will be decided by looking to many of the same factors weighed in total deprivations. Therefore, challenges of the all-or-nothing standard will surely follow in an attempt to gain compensation for land owners who have suffered partial Takings.<sup>76</sup> Admittedly, determining some arbitrary level of property value deprivation caused by a regulation, beyond which compensation must be paid, is a difficult task, but not one that legislatures entirely seek to avoid.<sup>77</sup> In a rebellion against the all-or-nothing standard, some states are beginning to consider when standing should be granted to individuals who have suffered a partial Taking. Vermont, for example, has considered a 50% standard.<sup>78</sup> Such attempts to provide a standard that is substantially less than the 100 percent all-or-nothing standard<sup>79</sup> promulgated by the Supreme Court reflects the perception that land owners' rights have not been adequately protected by the Court's notion that the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or

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<sup>76</sup> 112 S.Ct. at 2894.

<sup>76</sup> Noted land-use lawyer Michael Berger of Berger and Norton in Santa Monica has noted that the Court's struggle with the standard may be seen in "[f]ootnote 7, which suggests in a hypothetical that taking 90 percent of a property's use may be sufficient to require compensation. But what about 80 percent? That's an open question in my opinion. [That] . . . is a tantalizing footnote that is going to result in years of litigation." Richard C. Reuben, *Taking Cover*, CALIFORNIA LAWYER, January, 1993, at 32.

<sup>77</sup> "In an attempt to provide legal standing in Vermont for a partial regulatory taking, Senator John McClaughry, R-Caledonia, introduced bill S-120 during the last legislative session. McClaughry's bill would have mandated that a property owner be compensated automatically in the event that regulations devalued a property by more than 50 percent or more." Kathleen Hentcy, *When Is A State Regulation A Land Taking?* VERMONT BUSINESS MAGAZINE, November 1992, § 1, at 18.

*Also see*, "[a] bill that would have required the state to compensate property owners whose land is devalued by environmental regulations won't become law this session as legislators voted to study the issue. A Senate committee voted Thursday to have an advisory committee study the bill . . . . The advisory committee would determine how much the owner's property value would have to be lowered before the property would be considered 'taken' by government action." John C. Van Gieson, *State Pay For Devalued Land Is Shelved For More Study*, ORLANDO SENTINEL TRIB., March 9, 1993, § B, at 6.

<sup>78</sup> Kathleen Hentcy, *When Is A State Regulation A Land Taking?*, VERMONT BUSINESS MAGAZINE, November, 1992, § 1, at 18.

<sup>79</sup> The "categorical takings rule" is found in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2895 n.8, and at 112 S.Ct. 2886, 2899.

denies an owner economically viable use of his land."<sup>80</sup> Such attempts to codify the requirements for standing in a partial Takings cases indicates that differences of opinion exist regarding when a landowner should and should not be able to seek compensation for a partial Taking, and advocates for property rights will surely attempt to use these differences of opinion to an advantage.

The Court may continue for some time to be reluctant to step out upon that slippery slope and hand down a decision mandating compensation when only 80 or 90 percent of value has been taken through regulation.<sup>81</sup> Instead, the Court has clung to a 100 percent scarp while admitting that in at least some cases "the landowner with 95 percent loss will get nothing, while the landowner with a total loss will recover in full."<sup>82</sup> Evidently, the Court is remembering the warning of Justice Holmes that "[g]overnment hardly could go on if to some extent value incident to property could not be diminished without paying for every such change in the general law."<sup>83</sup>

While the time may be nearing when the Court addresses the issue of partial Takings, growers must remain mindful that regulatory Takings can deprive them of some of the use of their lands without compensation.

For illustration's sake, suppose that a farmer owns a 100 acre farm, 97 acres of which is planted to cotton.<sup>84</sup> The remaining three acres are a low lying swampy area that at one time comprised nearly half of the farm's total acreage. For generations, the farmer's family has filled and graded some small part of the swamp annually in order to increase the tillable acreage on the farm. With only three acres remaining, federal wetlands preservation legislation is passed which now precludes any further conversion of the three acres to row crop land.<sup>85</sup> The statute that forbids development of the three acres significantly interferes with

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<sup>80</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>81</sup> This has been echoed by Boalt Hall professor Joseph Sax: "[t]he signals, including those from *Lucas*, are that the justices don't want to unravel the whole skein of regulatory government that has developed over time. They want to do something, but they can't figure out how to get at the problem without, in a sense, opening a Pandora's box." Kathleen Hentcy, *When Is A State Regulation A Land Taking?*, VERMONT BUSINESS MAGAZINE, November, 1992, § 1, at 32.

<sup>82</sup> 112 S.Ct. at 2895 n.8.

<sup>83</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>84</sup> The choice of the commodity is entirely arbitrary; corn or soybeans would do just as well. Any governmental influence in the form of price supports or set-aside programs, *i.e.*, acreage diversion programs, should be ignored for the benefit of this illustration.

<sup>85</sup> 16 USCS §§ 1301 et. seq. Lawyers Cooperative Publishing (c) 1993.

the farmer's plans to make his farm as productive as possible.

As a preliminary issue, regardless of which method is used for determining what percentage of the farmer's property has been taken, the farmer has sustained a truly measurable loss through the governmental mandate that wetlands be preserved, for his farm will forever consist of 97 acres of tillable land. Clearly the three acres cannot be converted to cotton growing farmland, and since the farmer grows a crop that requires specialized planting and harvesting equipment, every acre of land that can be planted in cotton increases his efficiency as a farmer. The exclusion of three acres results in measurable damages to the farmer no matter how it is weighed.

In determining how much of the farmer's land has been taken, disagreement remains over what parcel of land should be examined. There are two possibilities: 1) one hundred percent of the three acres have been taken, or 2) three percent of the farmer's property has been taken through a regulatory restriction. Each will be discussed in turn.<sup>86</sup>

### 1. All of a Little

In examining the three acres as potential cotton growing land, apart from the rest of the farm, 100 percent of the earning potential has been eliminated from those three acres. There can be little debate that there is an important state interest in preserving the nation's wetlands; hence, the regulation probably advances a legitimate state interest, and a *Nollan* challenge, which attacks the validity of a statute by establishing that a legitimate state interest is not advanced by the condition imposed on the land owner<sup>87</sup> will surely fail. However, other uses of those remaining three acres might be possible without destroying the quality of the swamp-like land, and such use would indicate that not all economically viable use of the land has been removed as a result of the regulation. Dissenting in *Lucas*, Justice Blackmun raises this specific issue: "[p]etitioner can still enjoy other attributes of ownership,<sup>88</sup> such as the

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<sup>86</sup> Footnote 7 in *Lucas* firmly rejects the notion put forth by the Court at the end of *Penn. Central*, 438 U.S. 104, that other land holdings in the vicinity may also be included in the relevant calculus of determining how much deprivation the farmer has suffered. The choice remaining is between weighing all 100 acres or 3 acres as a part distinct from the rest.

<sup>87</sup> In this case, prohibiting the filling of wetlands (the condition) logically advances the state interest in preserving low lying lands that temporarily hold water for a few weeks in periods of heavy rain.

<sup>88</sup> Justice Blackmun further noted that people can often picnic, camp, fish, and swim in lands that are restricted in some manner; "[s]tate courts frequently have recognized that land has economic value where the only residual economic uses are recreation or

right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"<sup>89</sup> Thus, the farmer may be hard pressed to demonstrate that he has been deprived of all economic use of his three acres if he falls within one of those jurisdictions which equate recreational use with economic value.<sup>90</sup> Additionally, if such recreational uses are equated with economic value, most farmers will be precluded from seeking compensation, for few will be able to show that their undeveloped lands remain unusable from year to year. Only if the farmer can establish that he, his family and all his employees failed to enter the undeveloped land in the last few years can he be sure that some recreational use will not be found that may be equated with an economic value that remains in the land.<sup>91</sup> If any economic value remains, the farmer's position becomes seriously compromised.<sup>92</sup>

The favored approach of the Supreme Court is that compensation must be paid if there is a physical invasion of a land owner's property<sup>93</sup> or if the regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."<sup>94</sup> Apart from the notion that recreational use can be equated with economic value, the question for the cotton farmer is whether or not the regulation denies him the economically viable use of his land. As a cotton grower, the regulation surely deprives him of the economically productive activity of converting the three acres to crop land and harvesting cotton. One-hundred percent of the value of those three acres has been taken as a result of the regulation. If the lesson of *Keystone Bituminous Coal* were followed in this situation, the farmer is prevented from farming three percent of his total land holding just as the coal company was prevented from mining two percent of its coal. The farmer would undoubtedly be unable to show that the regulation made it unprofitable for him to grow cotton on his farm examined as a whole, for he is

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camping." 112 S.Ct. 2886, 2908 (Blackmun J., dissenting).

<sup>89</sup> *Lucas v. South Carolina Coastal Commission* 112 S. Ct. 2886, 2908, (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, (1979)).

<sup>90</sup> *Turnpike Realty Co. v. Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972) cert. denied, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed.2d 689 (1973); *Turner v. County of Del Norte* 101 Cal.Rptr. 93 (1972); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987).

<sup>91</sup> *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2908 (1992).

<sup>92</sup> *Id.*

<sup>93</sup> An invasion of airspace was found a physical invasion in *United States v. Causby*, 328 U.S. 256, 264 (1946).

<sup>94</sup> *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980).

actually farming the same number of acres as he was farming last year at this time. The regulation has not affected his productivity at all; rather, it has affected his future productivity and production levels because he is now precluded from bringing those three acres into production at some time in the future.

## 2. A Little of it All

Examining the three acres as being only a small part of the farmer's entire farm, the farmer's expectation as to future productivity has been affected, but not to a great extent. The devaluation of the farm as a whole is not very great, and certainly the economically viable use of the farm has not been affected greatly because of this partial Taking; however, the farmer's ability to borrow against his land has also been altered. Each year the farm added to its tillable soil through the process of filling in some of the low-lying swamp land. As such, the farm carried a potential for increase in its value in those acres remaining undeveloped. The farm consisted of a certain amount of tillable soil with the balance of the acres being undeveloped, the development potential of which had been firmly established through years of conversion to crop land. With the passage of the regulation, not only is the farmer precluded from developing the land, which affects his future productivity and production levels, but he is also disadvantaged with respect to borrowing against the farm as a whole because land with development potential is of higher value and thus allows for larger loans than land with no development potential. Also, prior to the passing of the regulation, the three acres remaining to be developed acted, in one sense, as a hedge against price declines in the price of cotton. If prices declined for the farmer's cotton, he could respond by developing some or all of the three acres as a way to offset the loss.

This analysis reveals several points: 1) the land represented more than three percent of the farm to the farmer; 2) the three acres represented a) a potential for increasing his future productivity, b) the potential to borrow against that increase in productivity, and c) a hedge against a drop in the price of cotton.

With these points in mind, it must be recalled that *Keystone Bituminous Coal Ass'n. v. DeBenedictis* indicates a landowner's distinct investment-backed expectations should be considered when determining if a statute has gone so far as to constitute a Taking,<sup>96</sup> but whether or not the farmer can prove his plans for the development of those three acres

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<sup>96</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1978).

as being investment-backed expectations worthy of a court's attention will be a question of fact.<sup>96</sup> A farmer who keeps meticulous records tracking the development and changes on his farm, like a diary recording the farmer's impressions about changes, will be best equipped to offer such proof. When actions such as land leveling certain sections of the farm often take years to accomplish, only farmers who have kept extensive records will be able to establish that plans for development were indeed investment-backed expectations.<sup>97</sup> " 'Some day' intentions—without any description of concrete plans, or indeed even any specification of when the someday will be—do not support a finding of the 'actual' or 'imminent' injury that our cases require."<sup>98</sup>

There will be little disagreement among farmers facing regulatory Takings of their property that the harm they have suffered is "actual" or "imminent". Nevertheless, growers must recognize the justifications for such regulatory Takings are firmly grounded in the Court's nuisance and police power jurisprudence. Moreover, farmers may remain hopeful that while some perceive those justifications as being surrounded in fog, refreshing breezes are being repeatedly directed upon the issue of Takings as the Court revisits the topic from time to time.

### C. *Nollan v. California Coastal Commission* <sup>99</sup>

Decided within months of *Keystone*, *Nollan* provides the next step in the Court's development of its Takings jurisprudence.

For years, the Nollans had rented a small house on the California coast with an option to buy. Wishing to exercise their option and erect a larger house similar to all the other homes in the area, they applied for a building permit. They were informed<sup>100</sup> the approval of their permit to build the new house would be made conditional upon their granting an easement to the public, allowing pedestrians to walk across the beachfront side of their lot. The Coastal Commission maintained

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<sup>96</sup> "Investment-backed expectations" remained undefined in *Keystone* and has apparently continued to elude definition.

<sup>97</sup> Careful record keeping can serve a grower in other ways as well. "Many farmers would have a hard time defending themselves if they were sued for polluting ground water, because they don't keep enough records of how they use farm chemicals . . . ." Dan Looker, *Environmental Laws Can Be A Nightmare For Farmers*, GANNET NEWS SERVICE (quoting *What Farmers Need To Know About Environmental Laws*, Neil Hamilton, head of Drake University's Agricultural Law Center).

<sup>98</sup> *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2908 n.5 (1992) (Blackmun J., dissenting).

<sup>99</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, (1987).

<sup>100</sup> By California Coastal Commission staff.

the Nollans' construction of a new home would block the public's view of the ocean and the beach, and as a result, the new building would increase a "psychological barrier"<sup>101</sup> created by the location of a continual line of homes located side-by-side along the beach. Because of this continual string of homes, the public would not be able to see the beach and therefore might conclude that the beach was no longer open to the public, which was not the case. The Commission argued at trial that since their outright denial of a permit to build would not constitute a Taking, the attachment of some condition to the grant of a building permit could not constitute a Taking,<sup>102</sup> and the trial court agreed with the logic of this statement.<sup>103</sup>

Focusing upon the terms of the condition, the Supreme Court reasoned that "a height limitation, a width restriction, or a ban on fences" would have amounted to a constitutional imposition of a condition.<sup>104</sup> However, Justice Scalia, writing for the majority, found no logical connection between the state's interest in enabling the public to view the ocean and beach from the road and the condition forcing the Nollans to allow the public to walk across their property.<sup>105</sup> The Court held that a nexus must exist between 1) the state interest that a regulation supposedly advances, and 2) the condition that is actually exacted<sup>106</sup> from the property owner. The Court decided that the condition of an easement in this case was unrelated to the state interest in enabling the public to view the ocean and the beach from the street. The dissent rejected this conclusion, implying that it strayed dangerously close to becoming a new finding of fact, something often best left for the lower courts or the legislature.<sup>107</sup>

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<sup>101</sup> Nollan, 483 U.S. at 835.

<sup>102</sup> *Id.* at 837.

<sup>103</sup> *Id.* at 836.

<sup>104</sup> Justice Scalia's point is that the state interest in enabling the public to view the beach from the street would logically be enhanced as a result of such limitations. *Id.* at 839.

<sup>105</sup> *Id.* at 838.

<sup>106</sup> "Exaction" in this sense is the state's act of calling for a necessary, appropriate, or desirable act or fee on the part of the property owner.

In an Eminent Domain proceeding, "exaction" is indistinguishable from "condemnation," a Taking for which the state must pay compensation.

<sup>107</sup> "State legislatures and city councils, who dealing with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require." Nollan v. California Coastal Commission, 483 U.S. at 846 (Brennan J., dissenting) (quoting *Gorieb v. Fox*, 274 U.S. 603, 608). Perhaps a view of the Nollans' lot would bear out the Court's decision that there was no nexus between the easement condition

In dissent, Justice Brennan vigorously attacked the Court's required nexus, reminding the Court that its role was not to legislate public policy for the states.<sup>108</sup> In part, his comments answer the majority's contention that their analytical approach has been often taken by state courts, and what is often done is often right.<sup>109</sup> The dissenters' reasoning focuses upon one aspect of state's rights and federalism,<sup>110</sup> implying that California should be free to legislate in the best interests of its citizens<sup>111</sup> as long as such legislation does not violate the Federal Constitution.

For farmers and those representing farming interests, two principles from *Nollan* are particularly relevant: first, a claimant must present facts to disprove that the imposition of the condition advances the state interest. This may be done by presenting facts which indicate the state interest is not threatened: "[T]his Court always has required plaintiffs challenging the constitutionality of an ordinance to provide 'some factual foundation of record' that contravenes the legislative findings."<sup>112</sup>

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and the state interest in enabling the public to view the beach from the street. However, the case was not remanded, nor was a view ordered.

<sup>108</sup> "Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare . . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of public welfare." 483 U.S. at 843 n.1, (Brennan J., dissenting), quoting *Daybrite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

<sup>109</sup> "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 438 U.S. at 839.

<sup>110</sup> "The *Nollans'* development blocks visual access, the Court tells us, while the Commission seeks to reserve lateral access along the coastline. Thus, it concludes the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. 'To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 846 (Brennan J., dissenting) (quoting *Sproles v. Binford*, 286 U.S. 374, 388, (1932) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, n. 21).

<sup>111</sup> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." 483 U.S. at 846, (Brennan J., dissenting) (quoting *Gorieb v. Fox* 274 U.S. 603, (1927)).

<sup>112</sup> *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2909, (Blackmun J., dissenting) (quoting *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251, 258, (1932)).

Second, it is vital to attack the logic of the legislation at issue, showing it ineffectively advances the state interest it was conceived to promote or protect.<sup>113</sup> By requiring a nexus, the Court has conceivably created an Achilles' Heel to attack a regulation.

In *Nollan*, the Supreme Court demonstrated its willingness to overturn the decision of state legislatures in favor of protection of an individual's right to property if there is a weak logical connection between the legitimate state interest purportedly advanced by the legislation and the restriction, diminution in property value, or exaction the regulation requires from the property owner.<sup>114</sup>

The state's ability to exercise its police power in order to advance a legitimate state interest remains intact, and few would argue that it should be limited as long as a state interest is actually being advanced by a regulation. However, regulations are at times perceived by the farming community as being nonsensical, as advancing no apparent state interest.<sup>115</sup> This point of view goes largely unshared by the non-farming public, and farmers must strive to stay informed about the issues of concern to the public in order to tailor their farming practices as much as reasonably possible so as to avoid engaging in potential nuisance-creating activity. Accordingly, farming interests must continually inform the public of the challenges faced by agribusiness, both in the world market and in a world that is becoming increasingly crowded. Agribusiness must attempt to show that issues which are important to farmers are also issues that are important to society as a whole. Only then will citizens fully realize that when a state exercises its police powers to take agricultural lands or restrict agricultural practices, the state's police power is being brought to bear on the citizenry as a whole. Additionally, the agriculture lobby must impress upon the media and the legislature that the area surrounding an agricultural opera-

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<sup>113</sup> "[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial governmental purpose." 483 U.S. at 834, (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260, (1980)), (also citing *Penn. Central Transportation Co. v. City of New York*, 438 U.S. 104, 127, (1987)).

<sup>114</sup> "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>115</sup> *E.g.*, regulations that restrict the use of dairy waste water for irrigation purposes on dairy property. See § 13304 of the California Water Code, "[a]nimal confinement areas, manure storage areas, lagoons, disposal fields and crop lands shall not create a nuisance."

tion will undoubtedly be affected on some small level,<sup>116</sup> as would the area surrounding any light manufacturing concern. Therefore, society should recognize that farming must be allowed to continue as a necessary and desirable activity, governed by reasonable restrictions, but unfettered by the notion that a farmer's mode of operation<sup>117</sup> must somehow be undetectable to his neighbors.<sup>118</sup>

#### IV. *Lucas*: A CHANGE IN THE WIND'S DIRECTION

*Lucas* represents the Court's refusal to extend further the states' ability to exercise their police power to take private property through regulation without paying compensation. Writing for the majority, Justice Scalia recalled the reasoning set forth in *Pennsylvania Coal Co. v. Mahon*<sup>119</sup> but also noted that "*Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment."<sup>120</sup> *Lucas* attempts to provide that insight.<sup>121</sup>

In 1986, David Lucas purchased two lots on a South Carolina barrier island with the intention of building two single family homes upon them. With the passage of the Beachfront Management Act,<sup>122</sup> he was prohibited from doing so.<sup>123</sup> Lucas did not claim that the regulation

<sup>116</sup> ". . . a party cannot call upon the law to make that place suitable for his residence which was not so when he selected it . . ." *Gilber v. Showerman*, 23 Mich. 448, 455.

<sup>117</sup> "Mode of operation" is those activities that collectively constitute the running of the farm.

<sup>118</sup> "If one lives in a rural farming community, he must suffer some annoyances from the carrying on of the various farming operations which are properly located and carried on in his immediate vicinity, and which are necessary for the public trade, commerce, and general welfare of the public at large." *First Ave. Coal & Lbr. Co. v. Johnston*, 171 Ala. 470, 54 So. 598.

<sup>119</sup> "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 112 U.S. at 2893 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>120</sup> 112 U.S. at 2893.

<sup>121</sup> Justice Scalia noted that over the 70 years of succeeding Takings jurisprudence the Court had resisted adopting any set formula "for determining how far is too far." *Id.* at 2893.

<sup>122</sup> The Beachfront Management Act was enacted by the South Carolina Coastal Council, which was itself created as a result of the Coastal Zone Management Act, enacted by the South Carolina Legislature (S.C. Code § 48-39-10 et seq. (1987)), in response to Congress's passage of the federal Coastal Zone Management Act of 1972 (86 Stat. 1280, as amended, 16 U.S.C. § 1451 et seq.). 112 U.S. at 2889.

<sup>123</sup> Arguing that the regulation had rendered his land valueless, he sued and was awarded \$1.2 million in the state trial court. The State Supreme Court reversed, ruling

failed to advance an important state interest; rather, he argued that the ban on building effected a Taking of his property because the ban denied him all economically viable use of his property.<sup>124</sup>

In overruling the South Carolina Supreme Court and deciding for Lucas, the Court echoed *Pennsylvania Coal*, holding that there must be some limit to the exercise of a state's police power, beyond which compensation must be paid.<sup>125</sup> In so doing, the Court harkens back to nuisance-type factors<sup>126</sup> used in *Mugler v. Kansas* that should be analyzed to determine when "a regulation that declares 'off limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate . . . ."<sup>127</sup> The Court felt that whether or not "common law principles [of nuisance] would have prevented the erection of any habitable or productive improvements on [Lucas's] land"<sup>128</sup> was a "question of state law to be dealt with on remand."<sup>129</sup> But it is beyond question that these factors should have been considered in determining whether or not Lucas had suffered a Taking worthy of compensation.<sup>130</sup>

In so ruling, the Court reasoned that South Carolina must do more than offer legislative findings that prohibition of further development of the coastline for residential uses would advance an important state interest.<sup>131</sup> Rather, "South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found."<sup>132</sup>

that under *Mugler v. Kansas*, 123 U.S. 623, when a regulation is designed to prevent a harmful or noxious use, no compensation need be paid under the Fifth Amendment, regardless of the regulation's effect on the property's value. 112 U.S. at 2890.

<sup>124</sup> 112 S.Ct. at 2890.

<sup>125</sup> "The South Carolina Supreme Court's approach would essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power." 112 S.Ct. at 2899.

<sup>126</sup> See note 9 *supra*.

<sup>127</sup> 112 S.Ct. at 2901.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Additionally, the Court held that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so), see Restatement (Second) of Torts *supra*, § 827, comment g. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Id.*

<sup>131</sup> "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest . . . ." *Id.*

<sup>132</sup> "Only on this showing can the State fairly claim that, in proscribing all such

As the political center of the Court has shifted in recent years,<sup>133</sup> background principles of nuisance have once again become central to the Court's determination of "when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment."<sup>134</sup> The significance of *Lucas* for agribusiness is that the case signals the Court's movement away from nearly unquestioning acceptance of the states' far sweeping exercise of their police power and back toward a nuisance-type standard similar to that employed in 1887 in *Mugler v. Kansas*.<sup>135</sup> Thus, *Lucas* represents a change in the Court's "total taking"<sup>136</sup> analysis to once again include background principles of nuisance and property law.<sup>137</sup> In so doing, *Lucas* in essence places parameters upon the scope of argument in a Taking action.

In dissent, Justice Blackmun is unable to balance a state's power to exercise its police powers based upon legislative findings with the Court's "new scheme"<sup>138</sup> that is based upon "background common-law nuisance or property principle[s]."<sup>139</sup> Justice Blackmun notes that in spite of "the absence of a challenge from petitioner,"<sup>140</sup> regarding the constitutionality of the legislative findings, "the Court decides the State has the burden to convince the courts that its legislative judgments are correct."<sup>141</sup>

For growers who may face litigation involving a Taking, *Lucas* provides palpable factors of nuisance<sup>142</sup> which may be used to argue that a regulation has indeed gone so far as to constitute a Taking. Of course, use of background principles of nuisance in litigation can also work against a grower, for the state will attempt to argue that the grower's activities constitute a nuisance, e.g., the nature of the neighborhood around the grower's property has changed to such an extent that the

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beneficial uses, the Beachfront Management Act is taking nothing." *Id.* at 2902.

<sup>133</sup> For a good discussion contending that the Supreme Court's takings doctrine is shifting with the political center of the Court, see Natasha Zalkin's *Shifting Sands and Shifting Doctrines: The Supreme Court's Takings Doctrine Through and South Carolina's Coastal Zone Statute*, 79 CAL. L. REV. 207 (Jan. 1991).

<sup>134</sup> 112 S.Ct. at 2893.

<sup>135</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887).

<sup>136</sup> 112 S.Ct. at 2901.

<sup>137</sup> *Id.* at 2901-2902.

<sup>138</sup> *Id.* at 2909.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> "The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could." *Id.*

<sup>142</sup> *Id.* at 2901.

grower must be prohibited from continuing the use at issue.

The effect of the reinjection of nuisance factors in Takings jurisprudence is presently unclear. Property rights advocates see background elements of nuisance as factors that may be used as a shield<sup>143</sup> in the form of right to farm laws,<sup>144</sup> while those who would promote land use regulation would use the same elements as being a sword.<sup>145</sup>

Clearly, background elements of nuisance can be used to protect or attack a farming operation. As such, growers need to be mindful of their existence as they apply to farming activities that take place on the grower's property.<sup>146</sup> Growers should attempt to view their farming activities in light of the elements of nuisance to determine whether or not a particular activity affects surrounding property in a way that may lead to litigation.<sup>147</sup> Before challenging a regulation and undertaking

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<sup>143</sup> See, *Knoff and Heine v. American Crystal Sugar Company*, 380 N.W.2d 313 (1971) where farmers sued in nuisance to enjoin the use of defendant's waste-water lagoons on adjacent land that caused plaintiffs to experience crop losses.

See also, *Woody v. Machin*, 380 N.W.2d 727 (1986) where plaintiff alleged soil erosion and waste water run-off from a coal mine on defendant's property created a nuisance that damaged plaintiff's adjacent farm.

<sup>144</sup> See, e.g., a Vermont Statute, VT. STAT. ANN., tit. 12, § 5753 (Supp. 1981) provides: "[a]gricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to non-agricultural activities, shall be entitled to a rebuttable presumption that the activity is reasonable and does not constitute a nuisance. If an agricultural activity conducted in conformity with federal, state, and local laws and regulations, it is presumed to be good agricultural practice not adversely affecting the public health and safety. This presumption may be rebutted by a showing that the activity has a substantial adverse effect on public health and safety." "Right To Farm" Statutes—*The Newest Tool in Agricultural Land Preservation*, by Randall Wayne Hanna, 10 FLA. ST. U.L. REV. 415, page 433.

Also see, ORLA. STAT. ANN. tit. 50, § 1.1 (West Supp. 1981-82); ARIZ. REV. STAT. ANN. § 3-1061 (Supp. 1981-82).

<sup>145</sup> "[I]f a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house." *Yeager & Sullivan, Inc. v. O'Neill*, 324 N.E.2d 846, 851 (Ind. Ct. App. 1975) (quoting Blackstone's Commentaries at 217).

<sup>146</sup> Farming activities taking place off the farmer's property also fall subject to the same nuisance analysis. See *Draffin v. Massey*, 92 S.E.2d 38 (Ga. 1956), "a farmer has the same right to the use of the highways of this State, whether on foot or in a motor vehicle, as any other citizen, and this includes the right . . . to herd his livestock from one place to another . . ." See also *Burback v. Butcher*, 355 P.2d 981 (Wash. 1960), *Green v. Biles-Coleman Lumber Company*, 362 P.2d 593 (Wash. 1961).

<sup>147</sup> See *Stottlemyer v. Crampton*, 200 A.2d 644 (1963) where defendant/farmer chose to drive his cattle to pasture on a public highway through the village of Antietam Furnace (as he had done for 35 years) rather than use a lane on his own property. It was held that no damage was caused to the village, and the existence of the lane was

the time and expense of a lawsuit, a grower and his counsel should 1) evaluate whether or not the regulation advances a legitimate state interest and 2) formulate a defense utilizing background elements of nuisance.

## V. *Lucas* AND DIRECTIONS FOR FAMILY-RUN AGRIBUSINESS

### A. Downwind of *Lucas*

In a case decided after *Lucas*, *Nelson v. Wood*,<sup>148</sup> the Court of Appeals of Oregon heard the appeal of a landowner denied the privilege of building a home on his farmland.<sup>149</sup> At issue was a county regulatory restriction designed to preserve farmland<sup>150</sup> by preventing building of non-farm structures on prime farmland.

The Oregon court held that "[t]he fact that the property cannot be farmed as an economically self-sufficient farm unit is irrelevant if it is otherwise suitable to produce farm crops and livestock."<sup>151</sup> Thus, the ability to operate at a profit, a factor that was of considerable importance to Justice Holmes in *Pennsylvania Coal*,<sup>152</sup> has fallen significantly (at least in some state courts) as a crucial factor when analyzing whether or not a Taking has occurred. In *Keystone* and *Pennsylvania Coal*, the coal companies argued that eliminating their right of extraction essentially prohibited them from operating their businesses. The situation presented in *Nelson* differs from those of the coal companies, for a coal company can do little else with a coal mine if it is not allowed to mine. However, farmland that is required to be kept as farmland can still be farmed; the farming mode of operation may be changed so that the farm can become profitable, e.g., other crops may be planted, permanent crops like trees or vines, or animal husbandry can be conducted on the property. The *Nelson* holding is unexpected when recalling the Supreme Court's admonition that "the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expecta-

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immaterial.

<sup>148</sup> *Nelson v. Wood*, 839 P.2d 233 (Ore. App. 1992).

<sup>149</sup> James Nelson wanted to build a house on 1.37 acres of farmland. Mr. Nelson argued that such a small farm could not be operated at a profit and that he was being denied the right to live on land that he owned.

<sup>150</sup> The county's statute parallels that in ORS 215.283(3)(d), that non-farm dwellings be located on land that is generally unsuitable for agricultural production.

<sup>151</sup> *Nelson v. Wood*, 839 P.2d 233 (1992).

<sup>152</sup> "What makes the right to mine coal valuable is that it can be exercised at a profit." 260 U.S. at 414.

tions' are keenly relevant to takings analysis generally."<sup>153</sup> Noting appellant's failure to cite any case authority, the *Nelson* Court refused to recognize his inability to live on the land as an ipso facto Taking, declaring that "[t]here are many viable economic and beneficial uses of the land other than residential use."<sup>154</sup>

Difficulty arises in determining if a Taking has occurred when courts begin weighing factors that are often valued subjectively.<sup>155</sup> While it may be a simple task to determine the economic value of a farm if it were sold on the open market, it's difficult to weigh that economic value against the subjective value of a piece of property to a farmer whose family may have worked the farm for generations. No attempt to balance these two notions of valuation<sup>156</sup> can be made without precisely defining those terms as they apply to the facts of the case at bar.<sup>157</sup> The notion of "use" has often been an important factor to the Court, yet the term's definition is often not entirely clear from a reading of Takings cases.<sup>158</sup>

One of the primary implications of *Lucas* is that the Court's Takings jurisprudence has not yet fully evolved to a point where lower courts can effectively resolve regulatory Takings disputes in terms of an "economically ascertainable standard"<sup>159</sup> so that parties can leave a county courthouse with some sense of finality in the trial court's decision. The Supreme Court remains committed to the view that Takings claims are best reviewed on a case by case basis,<sup>160</sup> in fact, the Court recognized

<sup>153</sup> *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886, 2895 n.8 (quoting *Penn. Central Transportation Co. v. City of New York*, 438 U.S. 104, 124).

<sup>154</sup> *Id.*

<sup>155</sup> "People have an almost mystical attachment to their lands, and when you take that land away from people, they die inside." Desmond Tutu. *This Is My Land*, produced by Catherine Olian, (CBS 60 Minutes, May 16, 1993).

<sup>156</sup> "You can take a good deal less than 100 percent of the use of a piece of property and take all economic value out of it." Richard C. Reuben, *Taking Cover*, CALIFORNIA LAWYER, January, 1993, at 31, (quoting Michael Berger).

<sup>157</sup> A regulation may effect a taking if "[i]t is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use,—an attribute of its ownership,—one which goes to make up its essence and value. To take it away is practically to take his (the owner's) property away . . ." *Id.*

<sup>158</sup> *Curtin v. Benson*, 222 U.S. 78, 86 (1911).

<sup>159</sup> Kathleen Hentcy, *When Is A State Regulation A Land Taking?*, VERMONT BUSINESS MAGAZINE, November, 1992; § 1, at 18, (quoting Vermont State Senator John McCloughry).

<sup>160</sup> In *Penn. Central Transportation Co. v. New York City*, 438 U.S. 104, 124, the Court held that takings decisions depend largely upon the particular circumstances in each case and that each case is to be decided on an ad hoc, factual basis. This position echoes Justice Holmes' position that ". . . the question depends upon the particular

that it has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by publication be compensated by the government, rather than remain disproportionately concentrated on a few persons."<sup>161</sup> This reluctance to create a rigid formula for determining how much diminution in value is enough to warrant compensation is evidence of the Court's struggle in balancing the government's need to regulate land use and the citizens' right to own and develop land free from undue governmental restrictions.<sup>162</sup> As the Court struggles to strike that balance, growers who find that regulations are Taking their property must try to follow the scent left wafting on the breeze that originates in the Supreme Court.<sup>163</sup>

### B. *Inherit The Wind*:<sup>164</sup> Problems With Just Compensation

The implications of *Lucas* for farming across the United States are many, for so much of a farming operation's capital is directly linked to land. This capital is not easily valued when determining the worth of a particular parcel of acreage. Much of a farming operation's profits are often reinvested in the land itself through soil building techniques<sup>165</sup> that contribute to increased productivity in future years, similar to the type of reinvestment in plant and equipment so common among manufacturing concerns. The distinction, however, is evidenced in the fact

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facts." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413.

<sup>161</sup> *Id.*

<sup>162</sup> However, the Court's caution has in the wake of *Lucas* been interpreted in some quarters as utter confusion on the part of the Court as to how to make sense of its own takings opinions. "For various reasons, most current members of the court display a predilection for narrow rulings that don't clarify the law in general. More recently, the justices have befuddled lower courts on the question of when land-use regulation violates property rights." Paul M. Barret, WALL ST. J., March 24, 1993, at A1.

<sup>163</sup> "Both property-rights advocates and environmentalists agree on one thing: the court's decision will encourage more litigation to test the bounds of the new property rights standard.' Says John Copeland, director of the University of Arkansas's National Center for Agricultural Law, Research and Information: 'We're going to have to litigate. We don't know all the rules.'" Sonja Hillgren, *No Pay, No Take*, FARM JOURNAL, June/July, 1992, at 18.

<sup>164</sup> "He that troubleth his own house shall inherit the wind: and the fool shall be servant to the wise in heart." Proverbs 11:29.

<sup>165</sup> *E.g.*, application of fertilizes to increase future productivity; application of other elements to enhance the character of the soil itself (e.g. gypsum to increase the soil's absorption of water); also, planting legume-type cover crops (especially in permanent crops like trees or vines) that naturally add nitrogen to the soil is another expensive and commonly used technique for enhancing future productivity.

that plant and equipment can be easily appraised.<sup>166</sup> Thus, as acreage is farmed by a particular individual or family, the land becomes unique in that its composition or nature as a means of production has been shaped and enhanced by the people who have cultivated it.<sup>167</sup> Essentially, farmers have more invested in their land than the land is actually worth on the open market, for instead of “banking” profits (in the form of cash) over the years, this money has been reinvested in the productivity of the soil.

Land is often viewed as something that is to be passed from generation to generation, and this intangible bond between the farmer and the land, its soil types, and even the location of the farm itself are factors contributing to the subjective value of a particular piece of land. Additionally, it is this bond that often drives farmers to protect their land, i.e., to sue for compensation when their land has been taken or devalued through regulation. People will disagree over the value of a particular piece of land, but many will agree that farming is as fundamentally based upon land as commercial fishing is based upon the sea, and any regulation that limits or diminishes the value of land as a means of production affects farming productivity and the very lives of those citizens engaged in agribusiness. However, farmers need to be mindful of the fact that they subjectively value their land as being worth more than the government’s valuation at fair market value, and any action brought to recover damages for a devaluation can at best recover the fair market value of the property. This value represents a loss to the farmer who has invested in the land, so even if the farmer wins in obtaining an award of fair market value, he loses in the sense that he must surrender a unique piece of property. Also, growers must realize that just because land can’t be used for farming under a regulation does not mean that a court will find that its value is gone.

Farmers need to balance investment in their farming operations with other investment vehicles by investing both in the land itself and in prudent off-farm investments. Farmers who plan for retirement must, in part, avail themselves of investments removed from their farming operations, for if all or part of their farm is taken for some public

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<sup>166</sup> Farming concerns could prudently keep meticulous records of all improvements made in order to aid in appraisal.

<sup>167</sup> “[A] poll of Farmers in Iowa, a leading farm state, found they considered their operations ‘family farms’ and want to preserve them. Only 4 percent of the respondents regarded their enterprises as ‘industrial farms’ according to the poll conducted by Paul Lasly, an Iowa State University extension sociologist.” Richard Orr, *Farmers Deep In Soil Conservation*, CHI. TRIB., July 15, 1991, § M, at 3.

purpose, the farmer may find that by receiving fair market value for his land, he may have less retained wealth to set aside for retirement than anticipated. While formerly he had a rich piece of farmland, farmland whose richness and productivity is directly traceable to his years of expensive soil building and care, he now has the fair market value for the land in the form of cash. *Lucas* sends a sobering message to farmers that they must manage their affairs like any other business people by making careful investment choices, for the days of safely "plowing the profits back into the farm" without fear that such reinvestment involves risk are sadly over.

### CONCLUSION

#### *Catching The Scent in The Wind*

The *Lucas* Court's reintroduction of "background principles of nuisance and property law"<sup>168</sup> sends a message to farmers who might be facing litigation: regulations that eliminate all economic value of a piece of property must be supported by more than legislative findings that the property owner's activities or "desires are inconsistent with the public interest."<sup>169</sup> However, if those activities constitute a nuisance, no compensation need be paid. Generally, a farming activity may not be enjoined by the State unless common-law principles would have prevented the farming activity.<sup>170</sup> However, changes in the farming operation or "circumstances in which the property is presently found"<sup>171</sup> are crucial elements in determining if the State may regulate property use without paying compensation.<sup>172</sup>

An ill wind, therefore, blows toward farmers, for the "circumstances in which [farms are] currently found"<sup>173</sup> are always in a state of change as urban forces encroach on rural regions. Also, farmers are constantly trying to find new and more efficient ways of operating. If these changes in a farm's mode of operation run afoul of any environmental laws or interfere with the neighbors' use and enjoyment of their land, farmers can expect to face litigation. Thus, farmers must be ever mindful of any recent changes in their farming activities, how they are car-

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<sup>168</sup> *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2901-2902.

<sup>169</sup> *Id.* at 2901.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> ". . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Id.*

<sup>173</sup> *Id.*

ried out, and how they affect people living nearby. Finally, farmers must remain continually informed of all regulations that apply to their farming operations, for only then will farmers be able to forecast accurately the economic weather which may include stormclouds of litigation.

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