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GEORGIA NUISANCE LAW AND THE
TAKINGS CLAUSE AFTER LUCAS V. SOUTH
CAROLINA COASTAL COUNCIL

INTRODUCTION

Few constitutional principles have caused more debate and
discussion than the Fifth Amendment's protection against the
taking of private property "for public use without payment of just
compensation." In its most basic application, the Takings
Clause\(^2\) requires the government to pay for property that it
seizes through the exercise of its eminent domain power.\(^3\) However, the Supreme Court has long recognized that the
government can effect a taking of private property through
regulations that do not actually deprive the owner of title to his
or her property.\(^4\) In its first attempt to define a regulatory
taking, the Court stated that a regulation effectuates a taking of
private property when it "goes too far."\(^5\) Later decisions sought
to clarify this definition, and several tests emerged from these
holdings.\(^6\)

Although the Court in Lucas v. South Carolina Coastal Council\(^7\) clarified when a land-use regulation "goes too far," it

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1. See, e.g., Joseph L. Sax, Takings, Private Property and Public Rights, 81 YALE
   LJ. 149 (1971).
2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use,
   without just compensation.").
3. See Sax, supra note 1. "Eminent domain" is the power of the government to
4. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("While
   property may be regulated to a certain extent, if regulation goes too far it will be
   recognized as a taking."). See generally Patrick Wiseman, When the End Justifies the
   Means: Understanding Takings Jurisprudence in a Legal System with Integrity, 63 ST.
5. Id. at 415.
   (holding that a government-imposed, permanent physical occupation of private
   property constitutes a per se taking and thus requires just compensation); Penn Cent.
   when a land use regulation did not substantially interfere with the property owner's
   investment-backed expectations).
also added a complicated wrinkle to takings jurisprudence. The Court found that a regulatory taking of private property occurs when a land-use regulation deprives a landowner of all economically viable use of his or her property. However, the Court further found that even when a regulation destroys all economically viable use of property, the regulation does not effect a taking if it regulates a nuisance as defined under a state's common law. In this sense, Lucas constitutionalizes state nuisance law because a state can regulate land use with impunity as long as the land-use regulation mirrors the results traditionally achieved under state common-law nuisance suits.

This Comment examines the Lucas decision in terms of Georgia law. Part I analyzes both the decision and the "nuisance exception" found in Lucas. Part II analyzes Lucas under the flexible and expandable definition of nuisance found in the Restatement (Second) of Torts. Part III examines Georgia's nuisance law in terms of both the Restatement approach and the Lucas decision. Finally, this Comment concludes that Georgia's nuisance law lacks any clear, defining background principles and that the Lucas nuisance exception will not allow greater land-use regulation in Georgia because, although Georgia nuisance law encompasses a wide range of activities, common characteristics predominate and limit the notion of a nuisance in Georgia. Therefore, Georgia courts will not likely expand the application of nuisance principles in order to justify modern land-use regulations under the Lucas nuisance exception.

I. **Lucas v. South Carolina Coastal Council**

A. **The Facts Behind Lucas**

In 1986, David Lucas bought two beachfront lots on the Isle of Palms in South Carolina for $975,000. When Mr. Lucas bought the property, it was not subject to any significant use restrictions. Mr. Lucas planned to build single-family homes on his property and retained an architect to design these

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8. *Id.*
9. *Id.* at 2893.
10. *Id.* at 2900.
11. *Id.*
12. *Id.* at 2889.
13. *Id.*
homes.14 Single-family homes already existed on the lots adjacent to Mr. Lucas’ property.15

In 1988, the South Carolina Legislature passed the Beachfront Management Act (the Act).16 This legislation authorized the South Carolina Coastal Council to designate “baseline” areas along the South Carolina coastline.17 These baselines separated areas of coastal erosion that could not be developed from inland areas that could be developed.18 The Coastal Council established such a baseline between Mr. Lucas’ property and the mainland, which effectively prohibited any significant development on the property.19

B. Lucas in the South Carolina State Courts

Mr. Lucas challenged the Act in the South Carolina Court of Common Pleas.20 He claimed that the Act prohibited all economically viable use of his property and effected a taking of the property that required payment of just compensation.21 Mr. Lucas did not challenge the validity of the Act under South Carolina’s police power.22

The trial court held that the Act effected a taking of Mr. Lucas’ property under the Fifth Amendment and required the state to pay $1,232,387.50 in just compensation.23 In reaching this decision, the trial court specifically found that the Act rendered Mr. Lucas’ property “valueless.”24

Although it accepted that Mr. Lucas’ property was “valueless,” the South Carolina Supreme Court reversed the trial court’s

14. Id.
15. Id.
17. Lucas, 112 S. Ct. at 2889.
18. Id.
19. Id. at 2889-90. The Court noted that the Beachfront Management Act permitted the construction of “nonhabitable improvements” like “small wooden decks no larger than one hundred forty-four square feet” on the seaward side of a baseline. Id. at 2889-90 n.2 (quoting S.C. Code Ann. § 48-39-290(A) (Law. Co-op. Supp. 1988)).
21. Id.
22. Id. “Police power” refers to a state’s authority to act for the health, safety, and welfare of the public. BLACK’S LAW DICTIONARY 801 (6th ed. 1991).
24. Id. Specifically, the court found that the Act’s prohibition on construction “‘deprive[d] Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, and render[ed] them valueless.’” Id.
decision.\textsuperscript{25} Because Mr. Lucas did not challenge the validity of the Act, the court also accepted the South Carolina Legislature's findings regarding the purpose of the Act.\textsuperscript{26} These findings stated that construction on beaches contributes to beach erosion and that the Act's purpose was to prevent erosion and preserve a valuable resource of South Carolina.\textsuperscript{27} The court reasoned that beach erosion was a great public harm that amounted to a nuisance.\textsuperscript{28} Therefore, the court concluded that when a land-use regulation prevents a "serious public harm," just compensation is not required, regardless of the regulation's economic impact on a landowner.\textsuperscript{29} Because a landowner does not have the right to use property in a manner that injures another property owner, the court held that a government can prohibit "nuisance-like activity"\textsuperscript{30} without effecting a taking.\textsuperscript{31}

C. Lucas in the United States Supreme Court

The United States Supreme Court reversed the decision of the South Carolina Supreme Court.\textsuperscript{32} The Court found that any land-use regulation which renders property economically valueless constitutes an automatic taking.\textsuperscript{33} Like the South Carolina Supreme Court, the Court recognized a nuisance exception to this general rule, but limited this exception to nuisances as defined by a state's common law.\textsuperscript{34} In other words, the Court found that state legislatures could not justify land-use regulations that destroy all economically viable use of property by simply claiming that the regulation was intended to control a noxious use.\textsuperscript{35} The Court concluded that, in order to fall under the nuisance exception, the prohibited use must give rise to a nuisance claim under the state's common-law nuisance principles.\textsuperscript{36}

\textsuperscript{25} Id.; Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).
\textsuperscript{26} Lucas v. South Carolina Coastal Council, 404 S.E.2d at 896-97.
\textsuperscript{27} Id. at 897-98 (quoting S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1990)).
\textsuperscript{28} Id. at 899.
\textsuperscript{29} Id. at 899-900.
\textsuperscript{30} Id. at 899 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 488 U.S. 470 (1987)).
\textsuperscript{31} Id.
\textsuperscript{33} Id. at 2893.
\textsuperscript{34} Id. at 2900.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
The Court, with Justice Scalia writing for the majority, began the *Lucas* opinion with a review of the Supreme Court's takings decisions. The Court noted that the "regulatory takings" inquiry began in *Pennsylvania Coal Co. v. Mahon*, but acknowledged that no clear definition of a "regulatory taking" emerged from the cases following *Pennsylvania Coal*.

Despite this lack of a specific definition, the Court found that two situations constituted automatic, or categorical, takings. A land-use regulation that mandates a permanent "physical occupation" of private property constitutes the first category of per se takings under the *Lucas* decision. In support of this rule, the Court cited *Loretto v. Teleprompter Manhattan CATV Corp.* In *Loretto*, the Court found that a New York law, requiring property owners to permit a cable television company to place cable boxes on their roofs, constituted a taking even though the boxes occupied less than two feet of roof space.

The second category of per se takings, defined by Justice Scalia as "total takings," involves land-use regulations that deprive property owners of all economically viable use of their property. The Court concluded that regulating the uses of land to the point at which the land becomes economically worthless may be, "from the land owner's point of view, the equivalent of a physical appropriation." Therefore, the Court concluded that, as with any other physical appropriation of private property,

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37. Id. at 2892.
38. 260 U.S. 393, 415 (1922).
39. *Lucas*, 112 S. Ct. at 2893 ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage[ ] in . . . essentially ad hoc, factual inquiries.'") (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
40. Id.
41. Id.
42. 458 U.S. 419 (1982).
43. Id. at 438 n.16.
44. *Lucas*, 112 S. Ct. at 2901.
45. Id. at 2893. In formulating this rule, the Court combined several rules from earlier takings cases. *Id.; see Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land . . . ."); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137-38 (1978) (holding that no taking occurred because the regulation did not prohibit all economically viable uses of the property).
such regulations automatically effect a taking and require the payment of just compensation.\textsuperscript{47}

The Court further found, however, that a land-use regulation does not require the payment of just compensation when the regulation is designed to control a nuisance.\textsuperscript{48} Under the Court's reasoning, property ownership entails a "bundle of rights"\textsuperscript{49} to put property to various uses, but these rights do not include the right to create a nuisance.\textsuperscript{50} In other words, owning title to property does not give a property owner the right to harm another person or society at large.\textsuperscript{51} Therefore, the court concluded that a state can legitimately exercise its police power to prohibit such nuisance-causing activities without paying for the privilege to do so.\textsuperscript{52}

Although the South Carolina Supreme Court's decision in \textit{Lucas} also centered around a nuisance exception, the Court refined and limited the applicability of this exception.\textsuperscript{53} The Court found that a state can justify a "regulation that deprives land of all economically beneficial use" without paying just compensation only if the regulation prohibits uses that the state's nuisance law already implicitly prohibits.\textsuperscript{54} The Court stated that such a regulation "must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners...under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public."\textsuperscript{55} Therefore, the Court concluded that the nuisance exception would not apply to "newly legislated" nuisances.\textsuperscript{56} Instead, the Court ruled that the restriction must "inhere in the title" of property and must be

\textsuperscript{47} Id.
\textsuperscript{48} Id. at 2899.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 2898-99.
\textsuperscript{53} Id. at 2896.
\textsuperscript{54} Id. at 2899 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").
\textsuperscript{55} Id. at 2900.
\textsuperscript{56} Id.
reflected in the “background principles of the State's law of
property and nuisance.”

Accordingly, under the *Lucas* decision, a state must inquire
into its own common-law nuisance principles to justify a total
taking. The Court stated that a state legislature could not
establish a nuisance exception by simply declaring that an
activity is contrary to the public interest. Similarly, the Court
found that this inquiry requires more than a reference to broad
common-law nuisance doctrine. Instead, the *Lucas* decision
requires state courts to replicate a nuisance suit and determine if
such an action, guided by the background principles of state
common law, would result in the prohibition of the activity.

The Court also described common elements of state nuisance
law and illustrated the general type of inquiry that applying the
nuisance exception would require. According to the *Lucas*
majority, determining whether an activity constitutes a nuisance
normally includes consideration of the type and degree of harm
the activity causes to other property owners. In addition, the
Court noted that the Restatement (Second) of Torts (the
Restatement) requires a balancing test which weighs the social
value of the activity against the suitability of the location for the
activity in question and the cost of abating the putative
nuisance. Finally, the Court noted that the fact that

57. *Id.*
58. *Id.* After *Lucas*, commentators quickly realized that the takings inquiry is now
different in each state. See, e.g., John A. Humbach, *Evolving Thresholds of Nuisance
and the Takings Clause*, 13 COLUM. J. ENVTL. L. 1 (1993) (arguing that *Lucas*
improperly takes defining nuisances out of the hands of legislatures and improperly
gives this power to the courts); James Jordon Patterson, *California Land Use
Regulation Post *Lucas*: The History and Evolution of Nuisance and Public Property
(arguing that California's history of extensive land-use regulation is part of owning
title to property in California, and therefore, land regulators can use the *Lucas*
nuisance exception with impunity).
60. *Id.* (“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, or the conclusory assertion that they violate a common-law maxim
such as *sic utere tuo ut alienum non laedas*.”). This maxim means “use your own
property in such a manner as not to injure that of another.” BLACK'S LAW
62. *Id.* at 2901.
63. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (1977)).
64. *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 828, 831 (1977)).
landowners have engaged in a particular activity normally suggests the common law would not prohibit the activity.\textsuperscript{65} In terms of South Carolina's Beachfront Management Act and Mr. Lucas' property, the Court remanded the case for a clarification of the background principles of South Carolina's nuisance law.\textsuperscript{66} The Court doubted that these background principles would prohibit Mr. Lucas from building houses on his property.\textsuperscript{67} The Court reasoned that nuisance law "rarely prohibits" improvements to land, but nonetheless allowed the South Carolina courts to make this determination.\textsuperscript{68}

II. THE RESTATEMENT DEFINITION OF NUISANCE AND LUCAS

The Restatement definition of nuisance, in part, requires balancing the utility of the activity giving rise to the nuisance claim with the damage that the activity causes.\textsuperscript{69} This definition allows a relatively high degree of flexibility in defining a nuisance-causing activity. Therefore, the background principles of nuisance law in jurisdictions that follow the Restatement approach presumably include some kind of social-utility balancing test. In these jurisdictions, courts can expand the types of activities that give rise to nuisance claims while justifying these expansions with common-law principles. Consequently, these courts could likely apply the Lucas nuisance exception to sustain a wide range of land-use restrictions, including restrictions that do not regulate traditional noxious uses.

\textsuperscript{65} Id. (citing RESTATEMENT (SECOND) OF TORTS § 827 (1977)).
\textsuperscript{66} Id. at 2902.
\textsuperscript{67} Id. at 2901-02.
\textsuperscript{68} Id. On remand, the South Carolina Supreme Court agreed with the Court's assessment of the relationship between the Act and South Carolina's common-law nuisance doctrines. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992). The South Carolina Supreme Court first noted that, during the litigation of Lucas' case, the South Carolina Legislature amended the Act to allow property owners to apply for variances from the Act's nonconstruction provisions. Id. at 485. Without discussion, the court rejected the Coastal Council's arguments that South Carolina common law would provide the basis for the land-use restrictions in the Act. Id. at 486. Finally, the court remanded the case to the trial court for a determination of the damages that Mr. Lucas suffered for the period that his property was restricted. Id.
\textsuperscript{69} RESTATEMENT (SECOND) OF TORTS § 826 (1977). "One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either . . . intentional and unreasonable, or . . . negligent or subject to strict liability. Id. § 822.
Essentially, the Restatement defines a nuisance as an unreasonable, and sometimes intentional, "invasion of another's interest in the private use and enjoyment of land" and suggests a balancing test to define "unreasonable." Because an activity qualifies as an intentional invasion when the actor is substantially certain that such activity will interfere with the use and enjoyment of land, the actor need not possess malice. Therefore, under this test, an activity is an unreasonable interference with one's enjoyment of land when the activity's harm outweighs its utility.

Under the Restatement approach, courts determine both the utility and harm of an activity on a case-by-case basis. However, the Restatement also suggests evaluating both harm and utility from society's perspective. Therefore, although the entire nuisance inquiry is fairly fact intensive, it includes society's views on the relative utility and harm of a particular activity.

Since the Restatement's balancing test weighs the respective harms and benefits of a noxious use in a particular fact situation, courts are not limited to defining nuisances according to specific types of conduct. Although the most common types of nuisances, such as unpleasant odors or loud noises, are certainly included within the Restatement's definition of an actionable nuisance, nothing in the balancing test limits this definition to such land-use activities. As the Supreme Court reasoned in *Lucas*, state nuisance law restricts a property owner's title to land and limits the permissive uses of property. Likewise, in states where the Restatement's balancing test defines nuisance, the balancing test is part of owning title to property. Therefore, in these jurisdictions, one acquires property subject to

70. Id. § 822.
71. Id. § 826.
72. Id. § 822.
73. Id. § 826.
74. Id. § 826 cmt. d.
75. Id. § 826 cmt. c.
76. Id.
77. See infra notes 83-92 and accompanying text.
78. See supra notes 69-76 and accompanying text; see also, Frank v. Environmental Sanitation Mgt., Inc., 687 S.W.2d 876, 880 (Mo. 1985). "A nuisance may be found as a factual matter independent of prior cases and conduct." Id. at 880-81.
79. Lucas, 112 S. Ct. at 2900.
80. See infra notes 83-92 and accompanying text.
judicially determined limitations on which particular land uses can be restricted as nuisance-causing activities.\textsuperscript{81} Most importantly, these determinations can be made after the property owner initially purchases the land.\textsuperscript{82}

The decision of the Wisconsin Supreme Court in \textit{Prah v. Maretto}\textsuperscript{83} illustrates the flexibility of the Restatement approach to nuisance law. In \textit{Prah}, the plaintiff owned a house that received its electrical power through solar energy.\textsuperscript{84} The defendant began building a house adjacent to the plaintiff’s house that would have blocked the plaintiff’s access to sunlight.\textsuperscript{85}

The plaintiff filed a complaint seeking an injunction which alleged that the defendant’s proposed building constituted a nuisance.\textsuperscript{86} Since Wisconsin case law conclusively established that interfering with access to sunlight was not an actionable nuisance, the trial court granted summary judgment to the defendant.\textsuperscript{87}

Explaining that the Restatement’s balancing test allowed an evolution of nuisance law, the Wisconsin Supreme Court reversed the award of summary judgment.\textsuperscript{88} The court reasoned that at one time society’s interest in developing land outweighed ensuring universal access to sunlight,\textsuperscript{89} but also concluded that this rational no longer applied.\textsuperscript{90} According to the \textit{Prah} court, modern developments have made access to sunlight more important to the enjoyment of land and, in general, land uses increasingly have become subject to greater regulation.\textsuperscript{91} Therefore, the court overruled previous decisions finding that

\textsuperscript{81} See infra notes 83-92 and accompanying text.
\textsuperscript{82} See infra notes 83-92 and accompanying text.
\textsuperscript{83} 321 N.W.2d 182 (Wis. 1982).
\textsuperscript{84} Id. at 184.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 185.
\textsuperscript{88} Id. at 190 (“What is regarded in law as constituting a nuisance in modern times would no doubt have been tolerated without question in former times.”) (quoting Ballstadt v. Pagel, 232 N.W. 862, 864 (Wis. 1930)).
\textsuperscript{89} Id. (“Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners’ disputes about property development in the 1980’s than is a rigid rule which does not recognize a landowner’s interest in access to sunlight.”).
\textsuperscript{90} Id. at 188.
\textsuperscript{91} Id. at 189-90.
access to sunlight could not be the basis for a nuisance claim and
remanded the case for further factual determinations.92

Although Prakh did not involve a takings claim, Lucas allows
similar reasoning to be imported into takings jurisprudence. In
states that use the Restatement's balancing test, the flexible
definition of nuisance used by the court in Prakh can justify a
wide range of land-use regulations under the Lucas nuisance
exception. By finding a substantial societal interest in preventing
the harm that the proposed activity causes, these courts could
reason that preventing this harm outweighs any costs associated
with preventing the harm, including the total deprivation of a
property owner's economic interests in his or her land.93

To date, only one court has addressed a takings claim under
the Lucas nuisance exception. In Loveladies Harbor, Inc. v.
United States,94 the United States Court of Appeals for the
Federal Circuit found that the nuisance laws of New Jersey could
not sustain a wetlands regulation that deprived a property owner
of all economically viable use of his property.95 The court in
Loveladies Harbor did not apply the nuisance exception in its
decision.96 Nonetheless, the court's reasoning illustrates how,
through an application of the Restatement's balancing test, a
court could expand a state nuisance definition while relying on
common-law nuisance principles and thereby avoid paying
compensation for a "total taking."97

In Loveladies Harbor, the plaintiff development company
(Loveladies) owned fifty-one acres of wetlands on Long Beach
Island, New Jersey.98 In the late 1970s, Loveladies developed
one acre of this property and planned to develop the remaining
fifty acres for residential purposes.99 Developing this property

92. Id. at 191.
93. In the Lucas case, for example, a court might reason that building houses on
certain beaches causes erosion of the beaches, which is a harm that outweighs the
social utility of allowing Mr. Lucas to develop his land. Therefore, even if South
Carolina nuisance case law produces no examples of where simply building a beach
house constituted a nuisance, the court could find that, under these circumstances,
building a house on Mr. Lucas' property constitutes a nuisance as defined by the
principles of South Carolina common law.
94. 28 F.3d 1171 (Fed. Cir. 1994).
95. Id. at 1182-83.
96. Id. at 1182.
98. Loveladies Harbor, Inc., 28 F.3d at 1173-74.
99. Id. at 1174.
entailed filling the wetlands, which required Loveladies to obtain the permission of the New Jersey Department of Environmental Protection (NJDEP) and the Army Corps of Engineers. After several years of negotiating with the NJDEP for a building permit, Loveladies agreed to develop twelve and one-half acres of the fifty undeveloped acres, and the NJDEP issued a building permit for this development. However, when Loveladies applied to the Army Corps of Engineers for permission to develop the property, the NJDEP suggested that the Corps deny the permit. In 1982, the Army Corps of Engineers denied Loveladies permission to fill the twelve and one-half acres of wetlands.

Loveladies filed suit in the United States Claims Court and alleged that the denial of the building permit effected a regulatory taking. After a hearing, the court found that if the property at issue were developed, its fair market value would be $2,658,000, but was worth only $12,500 without the building permit. The court concluded that such a drastic diminution in value combined with the lack of a substantial state interest amounted to a taking of private property without just compensation.

After the initial hearing in Loveladies Harbor, the Supreme Court decided the Lucas case, and accordingly, the United States appealed the trial court’s decision. The United States renewed its argument that even if the regulation deprived Loveladies of all economically beneficial use of the property, the nuisance exception justified the regulation. Reasoning that wetlands are a valuable natural resource, the government argued

100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 1174-75.
106. Id. at 1175.
107. Id. at 1178.
108. Id. at 1175.
109. Id. at 1182. The United States also argued that no taking occurred because the property had not been rendered valueless. Id. at 1180. In particular, the United States argued that Loveladies owned a total of 250 acres and that relative to all of the property that Loveladies owned, the property retained economic value. Id.
that nuisance principles justify preventing development of the property regardless of the impact on Loveladies.\textsuperscript{110} Although the court of appeals rejected this argument,\textsuperscript{111} the reasoning behind the decision left open the possibility of resisting takings claims by expanding the definition of a nuisance. Essentially, the court of appeals affirmed the lower court's determination that New Jersey nuisance principles could not have justified the land-use restriction.\textsuperscript{112} The appellate court agreed with the lower court's conclusion that the damage to Loveladies—losing the total economic benefit of developing the property—outweighed the public interest of preserving wetlands.\textsuperscript{113} In reaching this decision, the court relied on the state's failure to object to the development as a nuisance when the NJDEP issued the original building permit.\textsuperscript{114} Therefore, had the state completely opposed Loveladies' development plans throughout the entire dispute, the court of appeals might have accepted the nuisance rational.\textsuperscript{115} Furthermore, under the social utility balancing test, a variety of facts could have led to the conclusion that preserving wetlands is of the utmost importance to the state and that destroying such an important ecological resource constitutes a nuisance.\textsuperscript{116} Most importantly, however, the court in Loveladies Harbor could have accepted the government's argument, and thereby expanded New Jersey's definition of a nuisance without abandoning common-law nuisance principles.

III. GEORGIA NUISANCE LAW

Unlike jurisdictions that follow the Restatement's definition of a nuisance, Georgia nuisance law examines the particular characteristics of an activity and the degree to which the activity harms other landowners.\textsuperscript{117} To the extent that any background principles of Georgia nuisance law are discernible, these principles limit the applicability of nuisance law to land uses

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 1180.
\item \textsuperscript{111} \textit{Id.} at 1182.
\item \textsuperscript{112} \textit{Id.} at 1183.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{See supra} notes 83-92 and accompanying text.
\item \textsuperscript{117} \textit{See infra} notes 141-50 and accompanying text.
\end{itemize}
which look, sound, or smell like nuisances.\textsuperscript{118} Georgia courts engage in a very fact-specific inquiry in adjudicating nuisances, and therefore, nuisances as defined in Georgia tend to be land-uses that actually, and noticeably, annoy or bother other landowners.\textsuperscript{119} In addition, by requiring nuisance claims to be based on more than mere fanciful inconvenience, Georgia law effectively limits actionable nuisances to traditional noxious uses. Accordingly, Georgia courts will not likely be able to change, or expand, the notion of nuisance to justify land-use regulations that significantly impact property values.

In general, a “nuisance” is a difficult concept to define, and therefore, identifying the background principles of a state’s nuisance law is not an easy task.\textsuperscript{120} In explaining the concept of nuisance, Professor William L. Prosser stated that “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance’... There is general agreement that it is incapable of any exact or comprehensive definition.”\textsuperscript{121}

On its face, Georgia’s nuisance statute reveals no background principles.\textsuperscript{122} However, the general theme of an outwardly noxious use dominates the case law surrounding Georgia’s nuisance statute.\textsuperscript{123} In other words, nuisances in Georgia generally involve a property use that directly interferes with another’s enjoyment of private property, and these interferences typically involve loud noises, unpleasant odors, and unsightly uses of land.\textsuperscript{124} Unlike jurisdictions that follow the Restatement, Georgia nuisance law generally does not apply a balancing test to determine whether a particular land use

\begin{footnotesize}
\begin{enumerate}
\item \textit{See infra} notes 141-50 and accompanying text.
\item \textit{See infra} notes 171-76 and accompanying text.
\item \textit{See generally} Patterson, \textit{supra} note 58.
\item \textit{WILLIAM L. PROSSER, LAW OF TORTS} § 70 (2d ed. 1981).
\item \textit{See O.C.G.A.} § 41-1-1 (1981).
\item A nuisance is anything that worketh hurt, inconvenience, or damage to another, and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary, reasonable man. This, we think, is not intended to change the common-law definition of a nuisance. . . .
\item \textit{Id.}
\item \textit{See infra} notes 141-50 and accompanying text.
\item \textit{See infra} notes 141-50 and accompanying text.
\end{enumerate}
\end{footnotesize}
constitutes a nuisance. 125 In Restatement jurisdictions, the balancing test could be used to define a nuisance to justify land-use regulations even when the land use is not obviously noxious. However, the background principles of Georgia’s nuisance law are not so easily manipulatable. Therefore, courts in Georgia are likely to apply the Lucas nuisance exception only to land-use regulations that regulate traditional nuisance-causing activities.

A. The Georgia Nuisance Statute

As mentioned, the Georgia statute does not provide any clearer definition of a nuisance than the laws of other states. 126 Georgia defines a nuisance as “anything that causes hurt, inconvenience, or damage to another . . . . The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man.” 127 This definition replicates the common-law definition of a nuisance. 128 Therefore, although the nuisance statute does not clearly define the scope of an actionable nuisance in Georgia, an inquiry into the background principles of Georgia nuisance law begins, and to some extent ends, with the statutory definition.

In Cocker v. Birge, 129 the Georgia Supreme Court relied on Blackstone 130 to formulate the principles behind an actionable

125. O.C.G.A. § 41-1-1 (1981); accord ALA. CODE § 6-5-120 (1975). The Alabama nuisance statute states:

A “nuisance” is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would affect an ordinary reasonable man.

126. Id.; N.J. REV. STAT. § 2c:33-12 (1982) (“A person is guilty of a disorderly persons offense when . . . [b]y conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons.”).


128. The pedigree of the Georgia nuisance definition would likely be significant in any application of the Lucas nuisance exception because the Supreme Court clearly limited the necessary definition of nuisance to true common-law principles. Because Georgia’s nuisance statute is a nearly verbatim replication of the common-law definition of a nuisance, arguing that the nuisance statute is a recent legislative expansion of nuisance principles would be difficult. See infra notes 130-39 and accompanying text.

129. 9 Ga. 425 (1851).

130. Sir William Blackstone authored Commentaries on the Laws of England in the
nuisance. The plaintiff in *Cocker* alleged that the defendant was building a stable that would create an unhealthy and unpleasant environment and discourage visitors to the plaintiff's nearby hotel. The court noted that "Blackstone defines a nuisance to be anything that worketh hurt, inconvenience or damage" to another. The court ruled that in order to constitute a nuisance, an activity does not necessarily have to endanger "the health of the neighborhood" but merely must "produce[] that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable."

The Georgia common-law definition formulated in *Cocker* represents Georgia's modern definition of a nuisance. In *Hill v. McBurney Oil & Fertilizer Co.*, the plaintiff claimed that the defendant's practice of blowing a steam whistle constituted a nuisance. The Georgia Supreme Court ruled that, generally, noise was sufficient to constitute a nuisance when the noise occurs in a residential community and occurs on a regular basis. More importantly, however, the court ruled that the statutory definition of a nuisance did not alter the common-law definition. The current statutory definition of a nuisance in Georgia is almost identical to the definition cited in the *Hill* decision. Since the *Hill* decision, courts have repeatedly reaffirmed the conclusion that the Georgia statute does not alter Georgia common-law nuisance principles.

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late 1760s and was one of the most famous commentators on English laws. 2 *ENCYCLOPEDIA BRITANNICA* 263 (15th ed. 1992).

131. *Cocker*, 9 Ga. at 427. The court stated:

The complainant also expressly alleges in his bill, that if the defendant be permitted to complete the said stable, ... that it will result in the loss of health and comfort to the complainant and his family, in the loss of patronage to his hotel, ... in consequence of the unhealthy effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein.

*Id.*

132. *Id.*

133. *Id.* at 428. The court found that the prospective damage to the plaintiff was sufficient to constitute a nuisance and that the plaintiff was entitled to equitable relief. *Id.* at 429-30.

134. 38 S.E. 42 (Ga. 1901).

135. *Id.*

136. *Id.* at 44.

137. *Id.*

138. Compare *supra* note 123 with *supra* note 138 and accompanying text.

B. The Characteristics of Nuisance Cases in Georgia

In applying the Georgia nuisance statute, courts have engaged in a very fact-intensive inquiry.\(^{140}\) Thus, an activity that constitutes a nuisance in one area might not constitute a nuisance in another area.\(^{141}\) In addition, Georgia courts have labeled a very wide range of activities as nuisances.\(^{142}\) For example, in various decisions, the Georgia courts have held that an airport,\(^{143}\) railroad,\(^{144}\) bar,\(^{145}\) restaurant,\(^{146}\) gas station,\(^{147}\) and dry cleaning business\(^{148}\) could constitute a noxious use of property.

Similarly, under Georgia's opaque nuisance laws, whether an activity constitutes a nuisance may depend on where the activity is conducted. For example, in Benton v. Pittard,\(^ {149}\) the defendant, the Jasper County Health Commissioner, planned to build a clinic for the treatment of venereal disease on property adjacent to the plaintiff's property.\(^ {150}\) The proposed location of the clinic was in a residential area, and the defendant planned to convert a private home into the clinic.\(^ {151}\) The plaintiff alleged that the operation of such a clinic in a residential area would constitute a nuisance.\(^ {152}\) In particular, the plaintiff claimed that the clinic would encourage the congregation of diseased people, which would decrease the value of their property.\(^ {153}\)

In Benton, the Georgia Supreme Court found that the clinic could constitute a nuisance and reversed the lower court's granting of a general demurrer.\(^ {154}\) Noting the fact-specific nature of nuisance claims in general,\(^ {155}\) the court found that a

\(^{140}\) See infra notes 161-67 and accompanying text.
\(^{141}\) See infra notes 151-60 and accompanying text.
\(^{142}\) See ENCYCLOPEDIA OF GEORGIA LAW § 19 (1st ed. 1989).
\(^{143}\) Dyer v. City of Atlanta, 134 S.E.2d 585 (Ga. 1964).
\(^{145}\) Hunnicutt v. Eaton, 191 S.E. 919 (Ga. 1937) (holding that a bar or "roadhouse" could constitute a nuisance).
\(^{146}\) Pig\'n Whistle Sandwich Shops, Inc. v. Keith, 146 S.E. 455 (Ga. 1929).
\(^{149}\) 31 S.E.2d 6 (Ga. 1944).
\(^{150}\) Id. at 7.
\(^{151}\) Id.
\(^{152}\) Id.
\(^{153}\) Id. at 7-8.
\(^{154}\) Id. at 8.
\(^{155}\) Id. ("[I]t should be remembered that cases of this general class usually stand or
clinic, even if operated for the public good, could support a
nuisance claim.\textsuperscript{156} Reasoning that in this particular location, a
clinic that treated venereal disease could constitute a
nuisance,\textsuperscript{157} the court found that "[a] thing that is lawful and
proper in one locality may be a nuisance in another."\textsuperscript{158}

Despite the wide range of land uses that support nuisance
claims in Georgia, annoyance of another property owner is a
common theme.\textsuperscript{159} \textit{Gatewood v. Hansford}\textsuperscript{160} illustrates the
types of land uses that typically give rise to actionable nuisances
in Georgia.\textsuperscript{161} The plaintiff in \textit{Gatewood} lived adjacent to the
defendant's dry cleaning business and claimed that the business
constituted a nuisance.\textsuperscript{162} The plaintiff alleged:

\begin{quote}
[T]he defendants cause the smoke stack to belch forth
volumes of dense black smoke and soot which is continuously
being blown into the residence of the plaintiffs . . . . The
steam-boiler attached to said dry cleaning establishment has
certain pipes connected thereto and the defendants cause
these pipes to discharge about twice each and every day with
a startling, terrifying and nerve-racking roar.\textsuperscript{163}
\end{quote}

Beyond mere annoyance, the plaintiff claimed that renting
vacant rooms in his house was his only source of income and
that, because of the defendant's business, the plaintiff's tenants
constantly threatened to move.\textsuperscript{164} Reasoning that an otherwise
lawful business can give rise to a nuisance through improper
operation, the court found that the plaintiff's complaint
supported a nuisance cause of action.\textsuperscript{165}

\textsuperscript{156} Id.
\textsuperscript{157} Id. at 8.
\textsuperscript{158} Id. at 7.
\textsuperscript{159} See ENCYCLOPEDIA OF GEORGIA LAW §§ 14-18 (1st ed. 1989).
\textsuperscript{160} 44 S.E.2d 126 (Ga. Ct. App. 1947).
\textsuperscript{161} Id.; see also Rinzler v. Folsom, 74 S.E.2d 661 (Ga. 1953) (holding that
plaintiff's claim that defendant's accumulation of garbage, which washed onto
plaintiff's property and made the property unsanitary, was sufficient to support a
nuisance claim); Roberts v. Southern Wood Piedmont Co., 328 S.E.2d 391 (Ga. Ct.
App. 1985) (holding that evidence establishing that defendant's telephone pole
manufacturing company produced noises and vibrations causing walls in plaintiff's
house to crack was sufficient to support a nuisance claim).
\textsuperscript{162} Gatewood, 44 S.E.2d 126 (Ga. Ct. App. 1947)
\textsuperscript{163} Id. at 126-27.
\textsuperscript{164} Id. at 127.
\textsuperscript{165} Id.; see also Dan Austin Enterprises., Inc. v. Gray, 198 S.E.2d 294 (Ga. 1973)
(holding that plaintiff established that the defendant was using his property as a
Although drastic interferences with the use and enjoyment of property are common in nuisance claims, in Georgia, these types of complaints also seem to define the outer limits of the types of activities that create an actionable nuisance. As a result, the range of activities that will give rise to a nuisance claim in Georgia are generally limited to those property uses that either physically invade another’s property or offend the senses of a nearby property owner.

By specifying that an actionable nuisance must be more than a fanciful inconvenience, Georgia nuisance law further limits actionable nuisances to traditional nuisance-causing activities. For example, in Oklejas v. Williams, the Georgia Court of Appeals refused to allow the plaintiff to recover under a nuisance theory because the unsightliness of the adjacent landowner’s wall was the only alleged injury. Similarly, in Collins v. Lanier, the Georgia Supreme Court found that the plaintiff’s complaint, which alleged that the defendant’s proposed junkyard would “present an unsightly view landfill and was allowing raw sewage to flood plaintiff’s property and that this evidence supported a jury verdict that defendant was maintaining a nuisance.

166. ENCYCLOPEDIA OF GEORGIA LAW § 13 (1st ed. 1989). The Encyclopedia of Georgia Law describes the types of harm to a property owner which can give rise to a nuisance claim in Georgia. Id. The encyclopedia classifies the types of “annoyances” as: noise, smoke, dust, fumes, and other pollution. Id. §§ 14-18. Similarly, the encyclopedia lists the types of land uses that can give rise to nuisance claims. Id. §§ 19-69. The activities listed generally result in damages that are similar to the specified types of “annoyances”. Id. Although these damages could potentially give rise to nuisance claims under any definition of nuisance, the Georgia cases are limited to these traditional nuisances. See, e.g., ex rel Boykin v. Ball Inv. Co., 12 S.E.2d 574 (Ga. 1940); Cox v. De Jarnette, 123 S.E.2d 16 (Ga. Ct. App. 1961) (holding that defective church steps did not constitute a nuisance).

167. See, e.g., Fulton County v. Wheaton, 310 S.E.2d 910 (Ga. 1984) (holding that a culvert that overflowed onto adjacent property constituted an actionable nuisance).

168. See, e.g., Holman v. Athens Empire Laundry Co., 100 S.E. 207 (Ga. 1919) (holding that vapor or smoke can be an actionable nuisance); Lancaster v. Monroe, 165 S. E. 302 (Ga. Ct. App. 1932) (holding that pollution in general can be a nuisance).


172. Id. at 111.

173. 40 S.E.2d 424 (Ga. 1946); see also, Jillson v. Barton, 229 S.E.2d 476, 478 (Ga. Ct. App. 1975) (holding that defendant’s construction on land adjacent to plaintiff’s property did not amount to a nuisance when the only damage alleged was to aesthetic value of plaintiff’s property).
and . . . tend to devalue" the plaintiff's property, was insufficient to support a nuisance claim.\footnote{174} Furthermore, since Georgia courts do not use the Restatement balancing test to determine whether an activity constitutes a nuisance,\footnote{175} the social utility of an activity is not part of the common-law limitations on property ownership. Therefore, Georgia courts cannot import the concept of social utility into the \textit{Lucas} nuisance exception. Instead, the activities that give rise to a nuisance claim are limited to more traditional noxious uses.\footnote{176} Consequently, Georgia courts will likely continue to adjudicate nuisance claims through a fact-oriented inquiry. Thus, outwardly annoying, bothersome land-use activities likely will continue to define the limits of Georgia nuisance cases. Without the incorporation of a flexible concept like the Restatement's balancing test, the \textit{Lucas} nuisance exception likely will have little effect in Georgia.

CONCLUSION

The Supreme Court's decision in \textit{Lucas v. South Carolina Coastal Council} adds a new dimension to the Fifth Amendment's "taking inquiry."\footnote{177} Under \textit{Lucas}, the government does not have to pay just compensation for a land-use regulation that destroys all economically viable uses of property if the regulation controls a nuisance.\footnote{178} However, this nuisance exception will not apply unless the regulation merely replicates a common-law nuisance claim.\footnote{179} In states that follow the Restatement, a social utility balancing test is part of the principles of nuisance law.\footnote{180} In these jurisdictions, courts can import society's

\footnote{174} \textit{Collins}, 40 S.E.2d at 427. In \textit{Collins}, the court's reasoning also depended on the fact that the injury that the plaintiff alleged was prospective injury. \textit{Id.; see also Grubbs v. Wooten}, 5 S.E.2d 874 (Ga. 1939) (holding that defendant's plan to display and sell tombstones on property was not a nuisance-causing activity even in a residential neighborhood); Paul v. Bailey, 137 S.E.2d 337 (Ga. Ct. App. 1964) (holding that although defendant's construction might eventually deprive plaintiff's property of some lateral support, the mere unsightly appearance resulting from defendant's excavation of his property was not a nuisance).

\footnote{175} \textit{See supra} notes 127-40 and accompanying text; \textit{see also ENCYCLOPEDIA OF GEORGIA LAW} § 2 (1st ed. 1989).

\footnote{176} \textit{See supra} notes 130-76 and accompanying text.

\footnote{177} \textit{See supra} notes 32-68 and accompanying text.

\footnote{178} \textit{See supra} notes 32-68 and accompanying text.

\footnote{179} \textit{See supra} notes 40-65 and accompanying text.

\footnote{180} \textit{See supra} notes 69-92 and accompanying text.
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interest into the takings inquiry when regulating certain land uses. Consequently, land-use regulators can expand the scope of state nuisance law while adhering to the background principles of a state's nuisance law and thereby justify a wide range of land regulations. Conversely, Georgia does not use a social utility balancing test to define nuisance. Instead, the type and extent of property damage tend to define nuisance. Therefore, Georgia courts cannot consider the social utility inherent in particular land-use regulations to justify the deprivation of all economically viable use of property. Accordingly, the Lucas nuisance exception will not likely give Georgia land-use regulators a new weapon to resist takings claims.

F. Skip Sugarman

181. See supra notes 147-76 and accompanying text.