California Land Use Regulation Post *Lucas*: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California

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INTRODUCTION

Since the 1987 term in which the Supreme Court issued its much touted takings trilogy,[1] the law of "takings jurisprudence" has become more complicated and confused than ever. In 1992, instead of clarifying this rather specialized field of law, the Court perpetuated the chaos through its long awaited decision in *Lucas v. South Carolina Coastal Council*.[2] The *Lucas* decision prohibits the denial of a proposed use of property, absent compensation, unless the use would constitute a "common law" nuisance or would be otherwise impermissible under state property law. While the decision departs from established Supreme Court jurisprudence in several respects, its impact will be negligible in California. Historical underpinnings of both state public property laws and state nuisance law provide ample justification for the denial of many uses of property without the need for compensation. Other aspects of the decision are more troublesome. The *Lucas* opinion eschews traditional judicial deference to the legislative branch, a break from the Court's review of governmental regulation which interferes with personal rights. The

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1. First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 481 U.S. 704 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

2. 112 S. Ct. 2886 (1992).

Court appears to elevate economic rights, such as those embodied in the use of property, over the right to equal protection of the law or to liberty.[3] Although the Court stops short of requiring heightened or strict scrutiny, it nevertheless rejects South Carolina's legislative findings regarding the need for the legislation at issue. The Court holds that common law nuisance or state property laws alone may justify denial of all use of property, but then baldly states that a state may not rely on the common law maxim *sic utere tuo ut alienum non laedas*.[4] Nonetheless, it is inescapable that this very maxim has justified and embodied the concept of nuisance regulation throughout the history of the common law.

Perhaps an explanation for this decision lies in the Court's misapprehension of the law of nuisance and its interrelationship with public property rights. This article probes the underpinnings of state property law and nuisance regulation as they have evolved in California. As will be seen, rather than eliminating, or even limiting, governmental regulation of private property, state property law and nuisance law provide ample justification even for severe interference with the use of private property. Little will change as a result of the *Lucas* decision although the Supreme Court will no doubt need to clarify the confusion engendered by the decision.

THE *LUCAS* DECISION

In *Lucas*, the Court explained:

> It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate — a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.
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> "Harmful or noxious" use analysis was, in other words, simply the

3. *Compare id.* at 2899 n.14, *with* Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2875 (1992) (bestowing great deference to the legislative findings upon which abortion regulations were based. Of particular note is Justice Scalia's dissent wherein he would have applied the rational basis test to uphold the Pennsylvania abortion statute in its entirety).

4. "[O]ne should use his own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

progenitor of our more contemporary statements that land-use regulation does not effect a taking if it "substantially advances legitimate state interests."[5]

Where exercise of the police power resulted in *any* uncompensated diminution in value, such exercise had to meet the Court's early "prevention of harmful use" standard to be justified. However, the "noxious use" logic cannot serve as the touchstone to distinguish regulatory takings requiring compensation from regulatory deprivations not requiring compensation. Legislative findings alone cannot be the basis for departing from the categorical rule that total regulatory takings must be compensated.[6]

The Court then held that where regulation deprives an owner of all use of property, the State may resist payment of compensation only if the nature of the owner's estate shows that the "proscribed use interests were not part of his title to begin with."[7] The Court recognized that a property owner necessarily expects the uses of his property to be restricted from time to time by the legitimate exercise of the police power; however, the Court found no implied limitation that a State may eliminate all economically viable use.[8] The Court concluded:

> Any limitation so severe [as to prohibit all economically viable use] cannot be newly legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise [otherwise being absolving the State of liability for destruction of property to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others.][9]

Thus, the state may justify the denial of all economically viable use of private property where the property owner lacks sufficient property interest to undertake the proposed use or where use of the property would constitute a nuisance.

A finding that the use proposed constitutes a nuisance or that the

5. 112 S. Ct. at 2897 (citations omitted).
6. *Id.* at 2899.
7. *Id.*
8. *Id.* at 2900.
9. *Id.*

property owner lacks sufficient property interest does not necessarily end the inquiry into whether denial of the proposed use is permissible absent payment of compensation. As in all takings cases, a factual analysis must be employed. The Court in *Lucas* noted:

> The "total taking" 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, the social value of the claimant's activities and their suitability to the locality in question 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. The 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. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[10]

Each case must continue to be analyzed on its own individual facts, and numerous factors, including those set forth above, must be taken into consideration before a proposed use may be denied.

THE PROPERTY INTEREST EXCEPTION

The Supreme Court has recognized that property ownership comprises a "bundle of rights."[11] Much like destruction of one "strand" of an otherwise full bundle of rights is not a taking,[12] where the property owner lacks a strand and therefore the right to undertake a proposed use, denial of the use is not a taking.[13] Thus, the nature of a property owner's interest in property subject to such regulation is critical.

Private interests in real property may justify denial of use. For example, the California Coastal Act contemplates that an applicant for a permit demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, including the ability to comply with all conditions.[14] Under the Coastal Act, the permit applicant has the burden of proving ownership of the property sought to be developed. Where an applicant's property is encumbered such that the proposed use could be objected to by

10. *Id.* at 2901 (citations omitted).
11. Andrus v. Allard, 444 U.S. 51 (1979).
12. *Id.* at 66.
13. *Lucas*, 112 S. Ct. at 2901-02.
14. CAL. PUB. RES. CODE § 30601.5 (West 1986).

another with a legal interest in the property, denial of the proposed use would not constitute a taking.

More importantly, public rights in the property may be such that denial of the proposed use would not be compensable as a taking. Public rights acquired through actual or implied dedication could be sufficient to justify denial of a use which would interfere with those rights.[15] Public property rights and public trust rights in tidelands and lands beneath navigable waterways, rivers, bays and streams would also suffice to support denial of private use.[16] The boundary between public tidelands and private uplands is statutorily defined as the "ordinary high water mark"[17] and consists of the intersection of the plane of mean high tide with the surface of the land.[18] On a sandy beach where this intersection consists of loose sand easily removed and easily deposited with wave action, the boundary is a moving, fluctuating boundary.[19] A private landowner has no right to build a project that encroaches even periodically on public lands.[20] If the fluctuating boundary moves over an area upon which the upland owner desires to build, denial of the proposed use would not constitute a taking. On a rocky shoreline where there is no fluctuating beach or where the boundary is fixed, by agreement or otherwise, the public has an easement interest in the area subject to the ebb and flow of the tides for purposes of commerce, navigation and fisheries. Where the tides move landward of the fixed boundary, the public has the right to use the area covered by the tides. Denial of a private use of that area would also not constitute a taking.[21]

Similarly, California property law recognizes public rights in water, including ground water. California Water Code section 102 provides in part that "[a]ll water within the State is the property of the people of the State. . . ." All ownership of water in California is usufructuary; water rights decisions do not speak of the ownership

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15. Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970).

16. CAL. CONST. art. X, § 4; CAL. CIV. CODE § 670 (West 1982).

17. CAL. CIV. CODE §§ 670, 830 (West 1982).

18. Swarzwald v. Cooley, 31 P.2d 381 (Cal. 1934).

19. *Id.*; *see also* City of Oakland v. Buteau, 179 P. 170 (Cal. 1919); Strand Improvement Co. v. Long Beach, 161 P. 975 (Cal. 1916). Some tidelands experts have advocated locating the boundary at the most landward location, often termed the "winter line." The merits of this position are beyond the scope of this article.

20. Hitchings v. Del Rio Woods Recreation & Park Dist., 127 Cal. Rptr. 830 (Ct. App. 1976); *see also* Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969), *cert. denied*, 400 U.S. 878 (1970).

21. *See* CAL. PUB. RES. CODE § 6339(a) (West 1977); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Bohn v. Albertson, 238 P.2d 128, 140-41 (Cal. Ct. App. 1951).

of water, but only of the right to its use.[22] One court noted that "[t]he state's property interest in groundwater . . . is no less usufructuary than that of private ownership, and public waters may be duly used, regulated and controlled in the public interest."[23] The title in domestic water, including groundwater, is an equitable one, residing in the water users of the state, and the state as an entity is the holder of the legal title as trustee for the benefit of the people of the state, all of whom in the last analysis are the water users of the state.[24] The *Aerojet-General* court also noted that "[p]ollution of the ground and river waters is damage to public property, as well as a direct injury to the public welfare."[25] Thus, if a project on private property would damage or interfere with public water rights, whether through pollution or otherwise, denial of the project would not constitute a taking.

Since its statehood, California has recognized public rights in fish, game and wildlife.[26] Fish and game belong to the people in their sovereign capacity.[27] Fish and wildlife not only contribute significantly to the economy of the state, but also provide a part of the people's food supply. Therefore, their conservation is a proper responsibility of the state.[28] As the California Supreme Court stated:

> [W]ild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except insofar as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.[29]

Early case law spoke in terms of the "title to and property in" fish, game and wildlife.[30] However, more recent cases, while still

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22. United States v. State Water Resources Control Bd., 227 Cal. Rptr. 161, 167 (Ct. App. 1986).

23. Aerojet-General Corp. v. Superior Court, 257 Cal. Rptr. 621, 629 (Ct. App. 1989).

24. Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 605 (Ct. App. 1990).

25. *Aerojet-General Corp.*, 257 Cal. Rptr. at 629; *see also* Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1193-94 (9th Cir. 1986).

26. People v. Monterey Fish Products, 234 P. 398, 404 (Cal. 1925); *accord* California Trout, Inc. v. State Water Resources Control Bd., 255 Cal. Rptr. 184, 211 (Ct. App. 1989); People v. Glenn-Colusa Irrig. Dist., 15 P.2d 549 (Cal Ct. App. 1932).

27. Kellogg v. King, 46 P. 166, 169 (Cal. 1896).

28. CAL. FISH & GAME CODE § 1600 (West 1954).

29. *Ex parte* Maier, 37 P. 402, 404 (Cal. 1894); *cf.* CAL. FISH & GAME CODE § 3700 (West 1990) (prohibiting taking of certain migratory game birds without a license).

30. *See, e.g, Monterey Fish Products*, 234 P. at 404; Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

recognizing the state's sovereign interest in fish, game and wildlife, do not characterize that interest as a property right. In *Hughes*, the Supreme Court expressly held that a state's interest in wildlife is not the same as property ownership in the traditional sense, finding that a state's regulation of wild animals, like other natural resources, was an exercise of the police power subject to challenge under the Commerce Clause.[31] The Court recognized a state's interest in conserving and protecting wild animals as well as other natural resources.[32] However, in furthering this legitimate state interest, a state could not regulate in a manner repugnant to the Commerce Clause:

> The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available.[33]

Similarly, in *Douglas v. Seacoast Products, Inc.*,[34] the Court struck down Virginia statutes restricting the rights of nonresidents and aliens to fish in Virginia waters. The Court explained:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.... The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." ... Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.[35]

31. *Hughes*, 441 U.S. at 334.
32. *Id.* at 334-35.
33. *Id.* at 337.
34. 431 U.S. 265 (1977).
35. *Id.* at 284-85 (citations omitted). Interestingly, Justice Rehnquist, with whom Justice Powell joined, dissented from this portion of the decision on grounds that he was not sure the States' substantial regulatory interests were given adequate shrift. He noted that the precedents of the Court have upheld a variety of regulations designed to conserve and maintain the collective natural resources of a State.

> The exact bases for these decisions vary, but the cases are consistent in recognizing that the retained interests of States in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a traditional property right. The range of regulations which a State may invoke under these circumstances is extremely broad. Neither mere displeasure with the asymmetry of the pattern of state regulation, nor a sensed tension with a federal statute will suffice to override a state enactment affecting exploitation of such a resource. Barring constitutional infirmities,

Recent California case law takes a view similar to that of the Supreme Court of the nature of the state's ownership interest in fish and wild game. In *People v. Brady*,[36] the court of appeals held that fish and game are not personal property of the state for purposes of California's penal code.[37] Thus, the illegal taking and killing of abalone from coastal waters may not be punished as grand theft since grand theft applies only to the taking and carrying away of the personal property of another, although punishment for illegally taking and killing abalone is possible under other statutes. The court reaffirmed that fish and game belong to the people in their sovereign capacity and that the state acts as trustee to protect and regulate them for the common good. As the court explained:

> [T]he language in these cases indicating the state "owns" the fish for regulatory reasons cannot be stretched to mean that the fish and wild animals are the personal property of the state, like the law books in the court's library or the desks in our state offices. This language merely describes the comprehensive rights of the state to take action in the name of the people of this state, including the absolute prohibition of fishing and hunting to preserve and protect these natural resources.[38]

An additional point bears mention. State and federal laws protecting endangered species and migratory birds have been upheld as consistent with the Commerce Clause and other federal authorities. The courts have also held that the Commerce Clause and federal statutes such as the Clean Water Act and the Endangered Species Act protect not only migratory birds or endangered species themselves but their habitat as well.[39] Further, at least one court has noted, albeit in dicta, that there is a possibility that the United States could assert a property interest in endangered species, which would be superior to the interest of the state, under the Property Clause of the United States Constitution.[40]

Thus, California's legal interest in fish, game and wildlife, while not a traditional property right in the sense of either real or personal property, is still an interest of great substance. Regulation

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> only a direct conflict with the operation of federal law — such as exists here — will bar the state regulatory action.

Id. at 288.

36. 286 Cal. Rptr. 19 (Ct. App. 1991).

37. CAL. PENAL CODE §§ 484, 487 (West 1988 & Supp. 1992).

38. *Brady*, 286 Cal. Rptr. at 23.

39. *See* Leslie Salt Co. v. United States, 896 F.2d 354, 360 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1089 (1991).

40. Palila v. Hawaii Dept. of Land & Natural Resources, 471 F. Supp. 985, 995 n.40 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

designed to protect this interest is entitled to judicial deference. Generally, where development threatens deleterious impacts on fish or wildlife, that development has been approved with conditions to eliminate or mitigate such impacts. It remains to be seen whether denial of a proposed private use which would harm or destroy such resources, and where no mitigation is possible, is constitutionally sound.

There are additional property and public interests which may be asserted. Article I, section 25 of the California Constitution requires:

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.[41]

Thus, any private property acquired from the State is encumbered with the public's right to fish. Where the public has the right to fish on land granted by the State to a private property owner, a reasonable right of access must be implied in the reservation of the right to fish. In *State of California v. San Luis Obispo Sportsman's Ass'n*,[42] the California Supreme Court recognized the importance of the public's right to fish and held that the public entities involved were under a duty to provide access to the public for fishing in a reservoir under article I, section 25. The court, citing the ballot arguments submitted in support of the constitutional amendment adding article I, section 25, reasoned that this section is aimed at protecting the public's right to fish upon and from state-owned land and to prevent the State from disposing of land without reserving such a right. The ballot measure stated:

> The inland streams and coast waters of the State of California abound in a great variety of fish, and aside from the sport of taking them, they furnish a very large portion of the state's free food supply. . . . [T]he people of the state are spending large sums annually for its protection and propagation.
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41. CAL. CONST. art. I, § 25.
42. 584 P.2d 1088 (Cal. 1978).

> [F]or this reason if for no other, they should have the right to take them. It is not fair that a few should enjoy the right to take the fish that all the people are paying to protect and propagate.[43]

Moreover, article X, section 4 of the California Constitution prohibits excluding the public right of way to navigable waters where it is needed for any public purpose. The people's right to fish on property bordering a navigable waterway, both constitutionally mandated and expressly reserved, is clearly such a purpose.[44] Private property acquired from the State or bordering on navigable waterways is encumbered with the public's right to fish and the corresponding right of access.

There is, additionally, a line of cases recognizing and protecting the State's *parens patriae* interest in the air, land and waters of its territory.[45] Where confronted with the issue, courts have accorded the State the right to seek money damages based upon such interest.[46] The United States Supreme Court also recognized a state's right to sue to protect lands within its borders, little of which was owned by the state, noting: "[W]e are satisfied, by a preponderance of evidence, that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case [*parens patriae*] . . . ."[47] The Supreme Court has entertained suits *parens patriae* to restrain diversion of water from an interstate stream,[48] to prevent changes in drainage which increase the flow of water in an interstate stream,[49] and to prevent the discharge of sewage into the Mississippi River and New York Bay.[50] In *California ex rel. Department of Fish and Game v. S.S. Bournemouth*,[51] the district court held that the State had a sufficient property interest in navigable waters and marine life damaged by an oil spill to maintain an *in rem*

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43. *Id.* at 1091 n.5; *see also* Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500 (1872) (holding that the legislature's grant of a right to erect a dam included the implied condition to keep open the fishways unless expressly exempted); People v. Glenn-Colusa Irrig. Dist., 15 P.2d 549, 552 (Cal. Ct. App. 1932) (finding that "nothing . . . gives to appellant express authority to divert the waters of said river, regardless of its duty in so doing to protect the fish therein").

44. *See* CAL. CONST. art. I, § 25.

45. Selma Pressure Treating Co. v. Osmose Wood Preserving Co., 271 Cal. Rptr. 596, 605 (Ct. App. 1990).

46. *See id.*

47. Georgia v. Tennessee Copper Co., 206 U.S. 230, 238-39 (1907).

48. Kansas v. Colorado, 206 U.S. 46 (1907).

49. North Dakota v. Minnesota, 263 U.S. 365 (1923).

50. Missouri v. Illinois, 180 U.S. 208 (1901); New York v. New Jersey, 256 U.S. 296 (1921).

51. 307 F. Supp. 922 (1969).

action at common law under general maritime law. This line of cases may provide an additional justification for denial of a proposed project which poses potential threats to the State's environment.

Thus, at a minimum, where private use of property would interfere with or damage public property rights acquired through actual or implied dedication, public trust rights, or state waters including ground water and navigable waters, denial of that use should not constitute a compensable taking. Similarly, where a private project would interfere with or damage the public's right to fish or the concomitant right of access to exercise the right to fish, denial of the project should not constitute a compensable taking. All of these property rights are public property rights recognized by the State. They are part and parcel of a property owner's bundle of rights. As such, a private property owner has no right to use private property in such a manner as to interfere with or damage these public rights. As the Court in *Lucas* stated:

> The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) amendments, this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional.[52]

Additionally, the State's interest in fish, game and wildlife, while not a *traditional* property interest, may nevertheless be sufficient to justify denial of a particular use of land which threatens fish, game or wildlife. A more likely scenario is that the use will be permitted but subject to conditions designed to eliminate or mitigate the impacts on such resources.

Based on California's long-standing recognition and protection of such public property rights and assuming that the Supreme Court will adhere to and honor its statements quoted above, denial of the use of property based on California public property law should withstand constitutional attack.

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52. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) (citations omitted).

PUBLIC NUISANCE IN CALIFORNIA

In *Lucas*, the Court held that use of property may be denied where the use would constitute a nuisance, either private or public.[53] This article focuses primarily on public nuisance since, generally speaking, governmental agencies protect the rights of the public at large as opposed to individuals. California's law of public nuisance stems, like its recognition of public property rights, from its inception as a state. Several points bear mention at the outset of this discussion. Public nuisance regulation is often intertwined with protection of public resources and hence public property interests. It is also closely related to police power regulation in that respect.[54] To understand public nuisance law, a discussion of its origin and its evolution is helpful. In particular, the *Lucas* decision appears to limit nuisance regulation to common law nuisance regulation, hence a discussion of California's adoption of the common law as modified by the adoption of statutes or codes is necessary to ground a discussion of public nuisance under state law.

Public nuisance basically is a use of property or an activity injurious or offensive to the public.[55] The concept of public nuisance was grounded in the common law, as it evolved in England and as modified in the United States. A public nuisance originally was prosecuted as a crime, as it still may be today. Only reluctantly did courts of equity step in.[56]

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53. *Id.* at 2900-01.

54. The amicus brief filed on behalf of the State of California in support of the South Carolina Coastal Council in *Lucas* distinguished between nuisance regulation and police power regulation, noting that the two were not co-extensive. Thus, the brief argued, not all regulatory programs justified under the police power fall within the nuisance exception. An otherwise admittedly valid exercise of the police power may nevertheless result in a taking. Consequently, compensation could be required on the given facts of a particular case. Implicit therein was the recognition that the power to regulate a nuisance is essentially stronger and more likely to withstand constitutional attack than the police power.

55. While the United States Supreme Court in *Lucas* stated that a state may not rely solely upon the maxim of jurisprudence *sic utere tuo ut alienum non laedas*, that maxim forms the basis for nuisance regulation. *See also* CAL. CIV. CODE § 3514 ("One must so use his own rights as not to infringe upon the rights of another."). Under the Court's views, however, more than mere recitation of the maxim is required in order to fall within the nuisance exception. In other words, while the maxim may form the basis for a particular regulation, the regulation must truly address a nuisance-like activity. The Court's concern is similar to that expressed in the *Nollan* case wherein the Court characterized the proffered justification for a permit condition as "a made-up purpose of the regulation." Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 n.6 (1987).

56. Prosser and Keeton summarize the criminal prosecution of public nuisance as follows:

As the California Supreme Court explained in *People v. Lim*[57]:

> [I]t is clear that the jurisdiction of equity was very sparingly exercised on behalf of the sovereign to enjoin public nuisances. The attitude of the early English cases is expressed by Chancellor Kent in a leading case: 'I know that the Court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a Court of equity to interfere at all, and much less preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy.' The authorities support the conclusion that this statement accurately represents the attitude of the earlier courts of equity where the sovereign sought injunctions against public nuisances. The common law recognized various types of wrongful activity as indictable public nuisances, including such miscellaneous acts as eavesdropping, being a common scold and maintaining for hire a place of amusement which served no useful purpose. The kinds of public nuisance at common law, however, where injunctions were granted on behalf of the sovereign included

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> The remedies usually available [for public nuisance] are those of criminal prosecution and abatement by way of an injunctive decree or order. Equity followed the law generally speaking in adopting a broad definition of what would constitute a public nuisance. The equitable remedy of injunction to enjoin a public nuisance developed early in the history of the development of equity jurisprudence, and this remedy is available to the state or the appropriate governmental entity even though the conduct may not be a crime.
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> It is an entirely different concept from that of a private nuisance. It is a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property.
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> No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.' The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public. It includes interferences with the public health, as in the case of a hogpen, the keeping of diseased animals, or a malarial pond; with the public safety, as in the case of the storage of explosives, the shooting of fireworks in the streets, harboring of a vicious dog, or the practice of medicine by one not qualified; with public morals, as in the case of houses of prostitution, illegal liquor establishments, gambling houses, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; with the public peace, as by loud and disturbing noises, or an opera performance which threatens to cause a riot; with the public comfort, as in the case of bad odors, smoke, dust and vibration; with public convenience, as by obstructing a highway or a navigable stream, or creating a condition which makes travel unsafe or highly disagreeable, or the collection of an inconvenient crowd; and in addition, such unclassified offenses as eavesdropping on a jury, or being a common scold.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643-45 (5th ed. 1984) (citations omitted).

57. 118 P.2d 472 (Cal. 1941).

> only those cases of public nuisance in which the sovereign's rights were given the same protection that would have been given to the rights of a private person. An action on behalf of the state, therefore, to enjoin an activity which violates general concepts of public policy finds no basis in the doctrines of the common law.
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> It has been recognized that the tendency to utilize the equity injunction as a means of enforcing public policy is a relatively recent development in the law. Courts have held that public and social interests, as well as the rights of property, are entitled to the protection of equity. This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state.[58]

The court concluded:

> [T]he responsibility for establishing those standards of public morality, the violations of which are to constitute public nuisances within equity's jurisdiction, should be left with the legislature. "Nuisance" is a term which does not have a fixed content either at common law or at the present time. Blackstone defined it so broadly as to include almost all types of actionable wrong, that is, "any thing that worketh hurt, inconvenience or damage." ... Such declarations of policy [as to what constitutes a public nuisance] should be left for the legislature.[59]

Upon becoming a state, California's first legislature was faced with the choice of adopting either the common law or a codified form of the civil law, such as found in Louisiana.[60] The Committee on the Judiciary submitted a report strongly urging the adoption of the common law; the report contains a fascinating discussion of the then-perceived differences between the two forms of law.[61] In 1851 the California legislature adopted the common law of England "so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State."[62]

However, there continued to be much confusion in the law. There were repeated calls for revisions which finally bore fruit in 1872.[63] The committee appointed to revise the Civil Code initially recommended the adoption almost verbatim of Field's Draft New York Civil Code.[64] The 1872 Civil Code adopted the Field Code

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58. *Id.* at 474-75 (citations omitted).

59. *Id.* at 476 (citations omitted).

60. Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CAL. L. REV. 766 (1954).

61. *See* Appendix — Report on Civil and Common Law, 1 Cal. 588 (1850).

62. *See* CAL. CIV. CODE § 22.2 (West 1982).

63. Kleps, *supra* note 60, at 767-72.

64. *See id.* at 772-73; *Preface of the* REVISED LAWS OF THE STATE OF CALIFORNIA: CIVIL CODE iv-v (1871).

definition of nuisance:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either —
> 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; or,
> 2. Offends decency; or,
> 3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway; or,
> 4. In any way renders other persons insecure in life, or in the use of property.[65]

The definition of public nuisance also was identical to the Field Code: "A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."[66]

In 1873-74, the Civil Code was again revised and the provisions defining nuisance and public nuisance read as they do today. Nuisance is defined as:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.[67]

A public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[68] Another section reads: "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."[69] Remedies against a public nuisance include criminal indictment or information, a civil action or abatement.[70]

Case law fleshes out these rather broad definitions of nuisance. The Annotations to the Civil Code of 1872, citing numerous Eng-

65. CAL. CIV. CODE § 3479 (1872). This definition corresponded with that given of public nuisance in the Penal Code at that time except that it was modified to embrace private nuisance also. *See* REVISED LAWS OF THE STATE OF CALIFORNIA: PENAL CODE § 370 (1871).

66. *Id.* § 3480 (1872).

67. *Id.* § 3479 (West 1970).

68. *Id.* § 3480.

69. *Id.* § 3490.

70. *Id.* § 3491.

lish and sister state cases as well as the few California cases to date, note:

> What constitutes a technical nuisance is hardly capable of a precise definition; the law is best explained by particular instances of annoyance or injury adjudged to be or not to be a nuisance. An action may be maintained where the enjoyment of property is destroyed or substantially injured or depreciated. . . . Some instances are here given of what are adjudged nuisances . . . public or private, or either: An *offensive smell*; anything *offensive to decency* — as a distillery, with sties and hogs, or offal, rendering waters unwholesome, etc. Acts rendering waters less pure which are used for the ordinary purposes of life, fat boiling establishments, soap boiling, stables, sties, and slaughter pens, though not necessarily nuisances, may be so built and so kept as to become such. So a livery stable near a hotel, *powder magazine* in a large city, slaughter houses, melting houses in cities; so *dwelling houses*, cut up into small apartments and crowded with poor people in filthy condition, calculated to breed disease; and it may, by those thereby annoyed, be abated by tearing it down, especially during prevalence of disease like Asiatic cholera.[71]

A chronological discussion of public nuisance case law illustrates the various types of activities and uses of property which have been the subject of public nuisance regulation. The first reported public nuisance case in California is *Gunter* v. *Geary*.[72] Plaintiffs drove piles into San Francisco Bay and built a house on the piles. Defendants, the mayor of the city and a marshall, removed the furniture from the house and pitched the house into the Bay, claiming it was a public nuisance. Judgment for plaintiffs was reversed on appeal by the supreme court on grounds of improper jury instructions. The court held that if the house were a public nuisance, defendants had the right to remove it. There are two separate opinions both reversing for a new trial. The second opinion holds that the house was built on that part of the Bay constituting a public highway, common to all persons, and if any person appropriates it to exclusive use, the presumption is that there is a detriment to the public, the use is a public nuisance and the use may be removed.[73] The court noted that had the use been a wharf, there might be a benefit to the public, but "it is impossible to conceive how a house, a private dwelling perhaps, in such a locality, can be otherwise viewed than as a detriment to the public."[74]

71. CAL. CIV. CODE § 3479, note at 479-80 (1872) (citations omitted).
72. 1 Cal. 462 (1851).
73. *Id.* at 468-69.
74. *Id.* at 469.

The next reported decision on public nuisance, *Surocco v. Geary*,[75] also involved the destruction of a house. A house on fire became a nuisance, destruction of which was not a taking where necessary to stop the fire. The court held that "[t]he common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity."[76]

In perhaps California's seminal case involving public nuisance, *People v. Gold Run Ditch & Mining Co.*,[77] the court upheld a permanent injunction against a hydraulic mining company for creating a public nuisance by depositing the tailings of the mining operation into a stream which emptied into a navigable river. The court posed the question whether the defendant, as owner of hydraulic mines situated on the banks of an unnavigable stream which empties into a navigable river, has the right to dump its hydraulic debris into the river, to the endangerment of habitation and cultivation of cities, towns and villages and to the impairment of navigation of the river; and if not, whether its actions in so doing and threatening to continue doing constitute a public nuisance.[78] The court noted that contracting or narrowing a public highway is a public nuisance, invasion of the public's right to navigate is a public nuisance and an unauthorized encroachment on the soil itself is a purpresture, also a kind of nuisance.[79] The court further held that the fact that others similarly situated contributed to the nuisance did not preclude a remedy as against defendant. The court held that while the custom of mining in a particular manner had long been acquiesced in and had grown into a "legitimate business," nevertheless a "legitimate private business" may grow into a force to threaten the safety of the people and destruction to public and private rights; when it develops into that condition, the custom upon which it is founded becomes unreasonable and cannot be invoked to justify the continuance of the business in an unlawful manner.[80] The court also held that the right to continue a public nuisance cannot be acquired by prescription nor legalized by lapse of time.[81] Several

75. 3 Cal. 70 (1853).
76. *Id.* at 73.
77. 4 P. 1152 (Cal. 1884).
78. *Id.* at 1155.
79. *Id.*
80. *Id.* at 1158-59.
81. *Id.* at 1159; *accord Ex parte* Taylor, 25 P. 258 (Cal. 1890) (holding that there is no right to maintain a nuisance — the obstruction of a sidewalk — since prescription does not apply). The *Gold Run* case may be said to stand for several propositions. A

other hydraulic mining cases reached the same conclusions as *Gold Run*.[82]

An extraordinarily thorough analysis of the application of nuisance law to hydraulic mining, as well as a detailed description of how such mining is performed and the resultant impacts, is contained in *Woodruff v. North Bloomfield Gravel Mining Co.*[83] The federal appellate court found that hydraulic mining activities resulting in severe impairment of navigable rivers, substantial damage to public and private lands and excessive expenses to protect property from such damage constituted a public nuisance. The mining operators claimed that mining constituted a lawful activity and thus could not be a nuisance, relying on Civil Code section 3482 which provides that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The court rejected their position, noting that, first, there must be a state statute expressly authorizing the activity complained of and, second, that even if there were one, it would likely be unconstitutional and void because of the injuries caused to private individuals as a result of the activity. To come within the meaning of section 3482, there must be a valid state statute expressly authorizing the activity which would otherwise be a nuisance. The court further noted that failure to prohibit a nuisance does not prevent its being a public nuisance, citing *Wheeling Bridge Case*.[84] The court explained:

> It became patent to the most casual observer that some plan must be devised by which hydraulic mining could be carried on without injury to the agricultural regions in the valleys, and without obstructing or destroying the use of the navigable waters of the state, or, in other words, without creating a grievous nuisance in the valleys below, or else that such mining must be stopped. There was no other alternative.[85]

The court also noted that the effect of hydraulic mining was to take private property, such as farms inundated with mining debris. Such a taking was impermissible for two reasons. If for a public purpose,

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use may be denied based on cumulative impacts. A use previously considered legal or recognized as legitimate may become unreasonable and therefore become unlawful due to its impacts on the public. Failure to regulate a use previously does not preclude later governmental action with regard to that use.

82. *See, e.g.*, County of Yuba v. Kate Hayes Mining Co., 74 P. 1049 (Cal. 1903) (holding that hydraulic mining activities creating debris deposition and discharge constitute a public nuisance).

83. 18 F. 753 (C.C.D. Cal. 1884).

84. *Id.* at 777 (citing Pennsylvania v. Wheeling Bridge Co., 54 U.S. (13 How.) 518, 566-67 (1851)).

85. *Id.* at 781-82.

there was no due process of law and no compensation. If for a private purpose, there is no authority in the Constitution or laws to compel one man, unwillingly, to surrender his property for the use of another, either with or without compensation.[86] The court also held that obstruction of navigable waters with mining debris violated the express condition upon California's admission to the Union that all navigable waters shall be common highways and forever free to all inhabitants of the state and United States.[87] The court granted a permanent injunction, with a painfully anxious appreciation of the disastrous consequences to the defendants.

In *People v. Park & Ocean R.R.*,[88] the court found that a railroad which did not obstruct or interfere with the free use of a public park did not constitute a public nuisance but rather provided a means of ingress and egress to the park. In *People v. Elk River Mill & Lumber Co.*,[89] the court held that if a property owner cannot use property for a proposed use without creating a nuisance, the property owner must find another use, noting: "If the conformation of defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land."[90] In *Lind v. City of San Luis Obispo*,[91] the court held that a public sewer system in a creek which created an offensive odor and, when the creek flooded, discharged sewage into the yards of neighboring land owners constituted a public nuisance.

In another seminal case, *People v. Truckee Lumber Co.*,[92] the court upheld an injunction against maintenance and operation of a sawmill and box factory which polluted and poisoned the waters of the Truckee River, killing the fish therein. The court noted that the fish were the property of the people of the State. This property right was being greatly impaired and interfered with by the repeated and continuing acts of the defendant and such acts constituted a nuisance.[93]

> The dominion of the state for purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens . . . extends to all waters within the state, public or private, wherein these animals are habited or accus-

86. *Id.* at 801-02.
87. *See id.* at 778-79.
88. 18 P. 141 (Cal. 1888).
89. 40 P. 486 (Cal. 1895).
90. *Id.* at 487.
91. 42 P. 437 (Cal. 1895).
92. 48 P. 374 (Cal. 1897).
93. *Id.*

> tomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purpose to be public waters, and subject to all laws of the state regulating the right of fishery.[94]

The court has further recognized that it is no defense to an action to abate a public nuisance to show that other persons were violating the law.[95] In *Cloverdale v. Smith*,[96] the court held that diversion of surface waters by a bulkhead, embankment and ditch was a nuisance where injury resulted to another's land. In *People v. Russ*,[97] a dam on a tributary of a navigable river which interfered with the navigability of the river constituted a public nuisance. Reclamation of swamp and overflowed lands, while perhaps otherwise permissible under the Swamp and Overflowed Lands Act, could not interfere with navigation under article 15, section 2 [now article X, section 4] of the California Constitution. In *Donahue v. Stockton Gas & Electric Co.*,[98] the court of appeals found that gas from a gas works seeped and permeated the land, poisoned, polluted and injured the soil and water, and thus, could be considered a public nuisance.

In 1912 the California Supreme Court embraced the concept that it would be wrong to withhold relief where irreparable injury will be suffered by persons whose financial interests are small in comparison to the interests of those who wrong them, noting that to hold otherwise would be to say to the wrongdoer that if "your financial interests are large enough so that to stop you will cause great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors."[99] The court cited *Woodruff v. North Bloomfield Gravel Mining Co.* with approval[100]:

> Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim *de minimis non curat lex* is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large

94. *Id.* at 375.
95. Fisher v. Zumwalt, 61 P. 82 (Cal. 1900).
96. 60 P. 851 (Cal. 1900).
97. 64 P. 111 (Cal. 1901).
98. 92 P. 196 (Cal. Ct. App. 1907).
99. Hulbert v. California Portland Cement Co., 118 P. 928, 933 (Cal. 1911), *adopted in* People v. Selby Smelting & Lead Co., 124 P. 692 (Cal. 1912).
100. 18 F. 753 (C.C.D. Cal. 1884).

> capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all small and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of great value and importance, both to the individual and the public, would be arrested in its incipiency.[101]

In *People v. Stafford Packing Co.*,[102] overuse of fish supplies by a fish packing company was found to threaten injury to the property rights of the people, rights held in trust by the state; this obstruction to the property rights of the people constituted a nuisance. In *Dauberman v. Grant*,[103] the court stated that smoke and soot could constitute a nuisance. In *City of Turlock v. Bristow*,[104] an irrigation ditch, overgrown with debris, polluted the water and was unsanitary and therefore a nuisance.

In *Smith v. Collison*,[105] the court of appeals upheld an ordinance prohibiting stores in residential areas on public nuisance grounds. The stores would cause excessive, loud noise due to traffic, impair safety to children, create annoyance due to loiterers, cause dirt and rubbish to be blown and collect upon plaintiff's land, increase fire hazard and impair views. Similarly, in *People v. K. Hovden Co.*,[106] the court upheld a statute giving the courts the power to close a plant for violation of a statute protecting fish, which were the property of the state, even though the statute did not expressly declare the plant a public nuisance; because the plant was an integral part of the nuisance harmful to the property of the state, the statute allowing it to be shut down was a valid exercise of the police power. The court held it unnecessary to declare the plant a public nuisance, for such declaration was implied by giving the courts the authority to abate it.

In *Katenkamp v. Union Realty Co.*,[107] the California Supreme Court held that groins erected to trap sand may be a private nuisance to adjacent landowners deprived of littoral transport. A property owner does not have the right to create a nuisance at the expense of his neighbor. Excavation of dirt and gravel resulting in dangerous sloughing of the neighboring land, and adjacent to a sin-

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101. *Hulbert*, 118 P. at 933 (citing *Woodruff*, 18 F. 753, 807 (C.C.D. Cal. 1884)).
102. 227 P. 485 (Cal. 1924).
103. 246 P. 319 (Cal. 1926).
104. 284 P. 962 (Cal. Ct. App. 1930).
105. 6 P.2d 277 (Cal. Ct. App. 1931).
106. 8 P.2d 481 (Cal. 1932).
107. 59 P.2d 473 (Cal. 1936).

gle family residence without required notice was found to be a private nuisance.[108] It was also within the jurisdiction of the state court to determine whether a federally-licensed operation of a hydroelectric plant and dam could be a public nuisance where one million fish were killed and fourteen people drowned due to the manner of operation.[109] As the court of appeals noted in *Reid & Sibell v. Gilmore & Edwards Co.*[110]:

> [T]heories of nuisance, ultra-hazardous activity and negligence are closely related as they apply to the right of a user of real property to be free from unreasonable invasion of, or unreasonable risk to, his use and enjoyment of his property. The corresponding duty is to refrain from causing such invasion or risk.[111]

Pollution and contamination of the ocean from sewage deposited in the bay and deposition of the waste on land was found to be a sufficient cause of action under a public nuisance theory in *People v. City of Los Angeles.*[112] Pollution of air and water, offensive sights, and unpleasant sounds resulting from a dairy operation constituted a public nuisance in *Wade v. Campbell.*[113] A subsurface basement not obstructing passage on the surface of a street above, was found not to be a public nuisance.[114] On the other hand, unreasonable temporary blockage of traffic may constitute a public nuisance; a public nuisance need not be permanent.[115] Similarly, an ordinance prohibiting certain types of outdoor advertising adjacent to freeways was upheld as one regulating the location of signs so that they would not constitute nuisances and for the obvious purpose of protecting highway safety as well as enhancing community aesthetic values.[116] The ordinance was enacted pursuant to California Government Code section 38771,[117] which authorizes a city to declare what constitutes a nuisance, and Government Code section

108. McIvor v. Mercer-Fraser Co., 172 P.2d 758 (Cal. Ct. App. 1946).

109. California Oregon Power Co. v. Superior Court, 291 P.2d 455 (Cal. 1955).

110. 285 P.2d 364 (Cal. Ct. App. 1955).

111. *Id.* at 368.

112. 325 P.2d 639 (Cal. Ct. App. 1958).

113. 19 Cal. Rptr. 173 (Ct. App. 1962).

114. City of Berkeley v. Gordon, 70 Cal. Rptr. 716 (Ct. App. 1968).

115. People v. Jones, 725 Cal. Rptr. 216 (Cal. App. Dep't Super. Ct. 1988).

116. City of Escondido v. Desert Outdoor Advertising, Inc., 505 P.2d 1012, 1015 (Cal. 1973), *cert. denied*, 414 U.S. 828 (1973), *overruled on other grounds by* San Diego Bldg. Contractors Ass'n v. City Council, 529 P.2d 570 (Cal. 1974), *and by* Metromedia, Inc. v. City of San Diego, 592 P.2d 728 (Cal. 1979), *and by* Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980).

117. CAL. GOV'T CODE § 38771 (West 1988).

38774,[118] which allows a city to regulate the exhibition, posting or carrying of banners, posters, advertisements and the like in or on the street, or on a building, fence, or billboard.

PRIVATE NUISANCE

In *Lucas*, the Supreme Court recognized that a proposed use may be denied if it would constitute a private nuisance. While, generally speaking, governmental agencies are more likely to be concerned with public nuisances, under certain circumstances the potential for creation of a private nuisance could constitute grounds for denial of a use. A brief discussion of private nuisance follows.

Every nuisance not included within the definition of public nuisance constitutes a private nuisance.[119] "[A] private nuisance is a civil wrong based [upon a] disturbance of rights in land while a public nuisance is an interference with the rights of the community at large."[120] " 'The essence of a private nuisance is an interference with the use and enjoyment *of land* . . . without it, the fact of personal injury, or of interference with some purely personal right, is not enough for such a nuisance.' "[121] Where personal discomfort is the basis for the alleged nuisance, "the test of liability is the effect of the interference on the comfort of normal persons of ordinary sensibilities in the community."[122] "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance."[123] Direct damage or prevention of its use is not necessary.[124]

The following have been held to constitute a private nuisance: smoke from an asphalt mixing plant, noise and offensive odors from the operation of a refreshment stand, noise and vibration from machinery, noise and excessive dust from a rock quarry, smoke from a donkey-engine which discolored plaintiff's building, and poisonous

118. *Id.* § 38774.

119. CAL. CIV. CODE §§ 3479-3481 (West 1970).

120. Venuto v. Owens-Corning Fiberglass Corp., 99 Cal. Rptr. 350, 355 (Ct. App. 1971).

121. *Id.* at 356 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 611 n.91 (3d ed. 1964)). "Although 'any interest sufficient to be dignified as a property right' will support a private nuisance action, including a tenancy for a term, such [a] right does not inure in favor of a licensee, lodger or employee." *Id.* (quoting PROSSER, *supra*, at 613-14).

122. *Id.*

123. *Id.* at 357 (quoting PROSSER, *supra* note 121, at 613).

124. *Id.*

dust carried by the wind onto plaintiff's land.[125] However, mere obstruction of light and air by a structure alone will not amount to a nuisance whether caused by the building itself or by smoke or other waste matter emitted by the building.[126] Interference with the view from plaintiff's land due to obstruction by a building or by emissions from a building, without more, does not constitute a nuisance.[127] In order to constitute a private nuisance, emissions from a building must either injure plaintiff's property or pollute the air so as sensibly to impair the enjoyment of his property.[128]

CALIFORNIA ENVIRONMENTAL REGULATION AS PUBLIC NUISANCE REGULATION

The California courts have opined that contemporary environmental regulation represents an exercise by the government of the traditional power to regulate activities in the nature of nuisances. In *CEEED v. California Coastal Zone Conservation Commission*,[129] the court of appeals explained:

> Subject to constitutional barriers against unreasonable or arbitrary action, the Legislature may declare that a specified condition or activity constitutes a public nuisance. The power of the state to declare acts injurious to the state's natural resources to constitute a public nuisance has long been recognized in this state. Contemporary environmental legislation represents an exercise by government of this traditional power to regulate activities in the nature of nuisances: "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."[130]

In perhaps the most definitive explanation of environmental regulation as public nuisance regulation, the court of appeals in *Leslie Salt Co. v. San Francisco Bay Conservation Commission*[131] explained:

> It needs to be emphasized at this point that the McAteer-Petris Act is the sort of environmental legislation that represents the exercise by government of the traditional power to regulate public nuisances. Such legislation "constitutes but a sensitizing of and refinement of nuisance law." Where, as here, such legislation does not expressly

125. *Id.*
126. *Id.* at 127.
127. *Id.*
128. *Id.*
129. 118 Cal. Rptr. 315 (Ct. App. 1974).
130. *Id.* at 324 (citations omitted).
131. 200 Cal. Rptr. 575 (Ct. App. 1984).

> purport to depart from or alter the common law, it will be construed in light of common law principles bearing upon the same subject.
>
> "At common law public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large — interests that were recognized as rights of the general public entitled to protection. In each of these instances the interference with the public right was so unreasonable that it was held to constitute a criminal offense. For the same reason it also constituted a tort." All that is required to establish that a particular conduct constitutes the tort or common law crime of public nuisance is that it interferes with a right common to the general public. However, if specific conduct of this sort is proscribed *by statute* — as clearly it is by the McAteer-Petris Act — then, consistent with the common law rule, one may be held in violation of that statute "even though his interference with the public right was purely accidental and unintentional. There is a clear analogy to the doctrine of negligence as a matter of law, under which a legislative act is taken as laying down a specific rule of conduct that substitutes for the general standard of what a reasonable prudent man would do in like circumstances." Liability, in other words, may be strict.[132]

The *Leslie Salt* court continued with a detailed discussion of how, at common law, a person could be held strictly liable, simply by virtue of the possession and control of the land, for a public nuisance caused by failure to act. The court noted:

> This principle that the private right to control land carries with it certain strictly enforceable public responsibilities is, as we have seen, a venerable idea; and it is one that grows progressively more vital in the law as the interdependencies in our society become more apparent and the threats to the integrity of our environment more ominous.[133]

While the *Lucas* Court stated 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 [sic] assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*,"[134] where the legislative declaration does not depart from or alter the common law as to public nuisance, the statutory scheme should withstand constitutional attack. Moreover, it bears remembering that most, if not all, environmental legislation is intended to prevent harm by prohibiting pollution, prohibiting contamination due to toxic or hazardous sub-

132. *Id.* at 583-84 (citations omitted).

133. *Id.* at 586.

134. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992).

stances, preventing erosion or preventing adverse impacts on fish and wildlife. Such legislation simply mirrors and implements California case law and the common law treatment of such activities. Thus, the treatment of environmental regulation as another form of public nuisance regulation is not inconsistent with the *Lucas* decision.

CONCLUSION

As can be seen from the foregoing, public nuisance regulation is closely intertwined with public rights, including property rights and the right to be free of an act or omission which obstructs or causes inconvenience or damage to the public. Public property rights include rights acquired through actual or implied dedication, public trust rights, public ownership interests in water including ground water, the right to fish from former and current state property, and a corresponding right of access, the right of access to navigable waters where required for a public purpose and potential *parens patriae* rights in the land, air and water within the state. Public rights in fish, game and wildlife, while not traditional property rights, must nevertheless be considered in analyzing what private uses may be made of property.

Public nuisance is broadly defined, encompasses any number of activities and uses of property which are injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway. A public nuisance must also affect at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

In *Lucas*, the United States Supreme Court appears perhaps to underestimate the power of a state to regulate nuisances through prohibition or abatement. The intent of the decision no doubt was to restrict a state's ability to deny all use of property. However, the very formulation of the test — denial of all *reasonable* use whether economically viable, beneficial or productive — in and of itself contradicts the ruling upholding the nuisance exception. One must query how a use could be reasonable or beneficial[135] if it would con-

135. Justice Scalia uses the terms "economically viable use" and "economically pro-

stitute a nuisance or if the ostensible owner lacks the property right to undertake the desired use. Similarly, given the breadth of nuisance regulation, its common law origins and subsequent adaptation to changing societal needs, the nuisance exception may, in some circumstances, result in greater ability to prohibit uses of property.

In sum, where the proposed development would be harmful or offensive to a public property right or would fall within that category of activities and uses constituting a nuisance, the proposed development could be denied even if it is the only economically viable use to which the property may be put. In so concluding, it should be kept in mind that the *Lucas* Court requires inquiry into the factual situation presented. Thus, the severity of the nuisance, the potential harm to public or private lands, the social value of the proposed use, the suitability of the use to the particular site, and the fact that the same use occurs on similarly situated or neighboring lands must all be taken into consideration if government wishes to deny the proposed use.

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ductive or beneficial use" in describing takings analysis. *See* 112 S. Ct. at 2893-94. It remains to be seen whether courts will find these terms interchangeable or whether shades of meaning render different results. For example, an economically viable or beneficial use may simply be the ability to sell land for value whereas a productive use connotes some sort of actual use on the property.