
J. Peter Byrne
Georgetown University Law Center, byrne@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/2086
https://ssrn.com/abstract=3244705

53 Real Prop. Tr. & Est. L.J. 1-26 (2018)
A FIXED RULE FOR A CHANGING WORLD:  
THE LEGACY OF  
LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

J. Peter Byrne*

Editor’s Synopsis: In light of the 25th anniversary of the Supreme Court’s Lucas decision, this Article reexamines the actual relevance of the opinion by weighing the framing, reach, and aftermath of Justice Scalia’s majority opinion. This Article argues that Justice Scalia’s opinion consciously framed the regulatory takings doctrine in a more favorable way for private property owners, and by doing so, helped pave the way for subsequent denial that environmental and climate concerns are a valid basis for any government action. Justice Scalia attempted to create a regulatory environment that protects private real estate investments instead of protecting the public environment as intended by democratically enacted regulations, but courts have applied Lucas in a more limited manner than Justice Scalia probably intended.

I. INTRODUCTION

For some of us of a certain age, Lucas v. South Carolina Coastal Council has been woven into the fabric of our professional lives. I wrote an amicus brief in Lucas, under the auspices of the State and Local Legal Center for a host of state and local government organizations, arguing in

* J. Hampton Baumgartner Chair in Real Property Law, Georgetown University Law Center. This Article is an edited version of a keynote address delivered at the 2017 ABA Real Property, Trust & Estate Law Journal Symposium, “Takings and Coastal Management, a Quarter-Century after Lucas,” held at the University of South Carolina School of Law. I am grateful for helpful comments on an earlier draft from Professor Timothy Mulvaney.

support of the respondent.\(^2\) I attended the argument and was among those startled and concerned about the opinion—not so much the reversal of the South Carolina Supreme Court but the reasoning and rhetoric of the U.S. Supreme Court’s opinion, which seemed to portend a revolution in regulatory takings law.\(^3\) My concern influenced my subsequent scholarship and advocacy, but a revolution in takings law never occurred.

The conference topic was the legacy of *Lucas* from the perspective of our time. To address that, I will discuss two aspects of the opinion. First, how did it take the shape it did? The Court could have found for David Lucas on much narrower grounds. Here, I’ll make some use of the Harry Blackmun papers, lodged in the Library of Congress, which tell us something about the Court’s deliberations.\(^4\)

Second, and more significant, why do we commemorate the twenty-fifth anniversary of *Lucas* with a scholarly conference? Of course, the case has continuing importance for South Carolina and its eroding coastline. I appreciate the opportunity to learn at the conference about how South Carolina has coped with its continual and worsening coastal challenges in the era of accelerating sea level rise despite *Lucas*. But what makes this 1992 decision of continuing national significance for takings law or the environmental generally? Subsequent Supreme Court decisions arguably have confined the *Lucas* holding to its own facts.\(^5\)

Justice Blackmun anticipated the limited reach of the *Lucas* opinion when he wrote in dissent: “Today the Court launches a missile to kill a mouse.”\(^6\) But attack missiles often inflict “collateral damage.”\(^7\) Moreover, they often are intended to send a message and deter future enemy action. If the U.S. Supreme Court disliked the opinion of the South Carolina


\(^5\) See infra notes 118–124 and accompanying text.

\(^6\) *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

\(^7\) Id. at 1037.
Supreme Court, it had many avenues to reverse or vacate that decision without creating a new per se rule. Similarly, if the Court was concerned about the plight of David Lucas, it could have found for him easily within the framework of established law. But, Justice Scalia’s opinion consciously set out to recast the regulatory takings doctrine in a new key—far more helpful to property owners whose plans were stymied by environmental regulations. The Lucas opinion represents the high-water mark of a concerted effort by property rights advocates to use the Takings Clause to check environmental regulation of land use. The decision did so by creating a categorical rule looking only to the restriction on the proposed development and excluding any serious assessment of the environmental consequences of the development. Lucas has had surprisingly little significance for subsequent regulatory takings decisions, but it contributed to a polarized occlusion of environmental concerns evident today in the denial of the reality of and risk from anthropogenic climate change.

We still live with influential politicians and industry policy entrepreneurs who refuse to acknowledge, let alone engage with, environmental threats, particularly anthropogenic climate change, which had influenced decisively the coastal regulations enfeebled by Lucas. Today, the federal executive departments deny in bad faith the reality of human induced climate change and the existential threat it poses, not just to beachfront communities but to human civilization in general. Lucas fashioned a constitutional means to protect private investments in real estate against democratically enacted regulations without considering the public environmental harms those regulations attempted to mitigate. It is that legacy
that has become clearer from the perspective of twenty-five years and that we need to confront today.

II. BACKGROUND

The U.S. Supreme Court decided *Lucas* against a particular legal and cultural background. Two decades of environmental legislation at both the federal and state levels had begun to address pollution and the degradation of natural resources. This movement also sought to regulate, for ecological goals, land development patterns, particularly on sensitive lands like wetlands and coastal areas.\(^\text{13}\) Thus, Congress enacted the Coastal Zone Management Act in 1972, encouraging states to regulate coastal areas.\(^\text{14}\) South Carolina responded with its Coastal Management Act\(^\text{15}\) in 1977, which created the South Carolina Coastal Council\(^\text{16}\) and empowered it to regulate structures in designated “critical areas.”\(^\text{17}\) Although the effort to make land development more environmentally careful achieved only sporadic legislative successes, there were signs courts were embracing a conservation land ethic, too. The Wisconsin Supreme Court’s statement on this matter became iconic: “An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”\(^\text{18}\)

By the 1980s a property rights movement arose, which focused on the Takings Clause as a means to oppose such regulation without taking issue with the underlying goals for environmental protection.\(^\text{19}\) The regulatory takings doctrine, as elaborated by the Court, supposes that a challenged regulation is within the power of government if it furthers a “public use,”

---


\(^\text{18}\) Just v. Marinette Cty., 201 N.W.2d 761, 768 (Wis. 1972).

but compensation must be paid because of the nature and gravity of the burden it imposes on the owner.\textsuperscript{20} But, as advocates realized, making regulators pay for the reductions in value the landowners suffered as a result of regulation would make regulation too expensive, thus deterring new regulation.\textsuperscript{21} Before William Rehnquist was appointed as Chief Justice, the Court’s regulatory takings approach was amorphous, fact-specific, and accommodating to regulations of use for diverse conservation purposes even when they resulted in large reductions in the value of the plaintiff’s property.\textsuperscript{22}

The Supreme Court signaled its new commitment to property rights in \textit{Nollan v. California Coastal Commission},\textsuperscript{23} where the Court’s opinion by Justice Scalia extolled the constitutional status of property rights and invalidated a state program to enhance beach access.\textsuperscript{24} \textit{Nollan}, however, dealt only with permit conditions that modified an owner’s right to exclude people rather than with regulatory limitations on the use of land.\textsuperscript{25} That same term, environmental regulation, was bolstered by \textit{Keystone Bituminous Coal Ass’n v. DeBenedictis},\textsuperscript{26} where the Court held coal mining regulations did not constitute a taking, even though they were remarkably similar to those in the foundational regulatory taking case of \textit{Pennsylvania Coal Co. v. Mahon}.\textsuperscript{27} In doing so, the Court took a broad view of the affected property and affirmed the doctrinal significance of the

\begin{itemize}
\item \textsuperscript{20} Lingle v. Chevron USA, Inc, 544 U.S. 528, 543 (2005).
\item \textsuperscript{22} See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”).
\item \textsuperscript{23} 483 U.S. 825 (1987).
\item \textsuperscript{24} See \textit{id.} at 841–42; \textit{see also} J. Peter Byrne, \textit{Green Property}, 7 CONST. COMMENT 239, 247 (1990).
\item \textsuperscript{25} See \textit{Nollan}, 483 U.S. at 827.
\item \textsuperscript{26} 480 U.S. 470 (1987).
\item \textsuperscript{27} \textit{Compare} Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding a coal mining statute was a regulatory taking), \textit{with Keystone}, 480 U.S. at 505–06 (holding that a nearly identical statute to the one in \textit{Mahon} was not a regulatory taking). “Although the Court purported to distinguish \textit{Mahon} rather than to overrule it, there is little doubt that \textit{Mahon} can no longer be considered good law with respect to the question whether anti-subsidence laws give rise to a takings claim.” \textsc{Thomas W. Merrill} \& \textsc{Henry E. Smith}, \textit{Property: Principles and Policies} 1226 (3d ed. 2017).
\end{itemize}
State’s purpose of environmental protection. In its Keystone decision, the Court reaffirmed the line of cases following Mugler v. Kansas, holding that “the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.” But by 1992, the dissenters in Keystone had joined a new majority on the Court.

III. FRAMING

In this Part, I want to sketch briefly the factors that led to Lucas becoming a blockbuster opinion. As in many major cases, this was the result of a blend of fate, happenstance, and intention. As suggested in the prior Part, property rights advocates and environmentally-minded regulators were on a collision course at the end of the 1980s. Their engagement came in South Carolina.

South Carolina had grown increasingly concerned about the effects of development on coastal erosion, especially given growing awareness about sea level rise. Consequently, the South Carolina Coastal Council appointed a Blue Ribbon Committee to recommend changes in the Coastal Act to address erosion. The Committee’s Report issued in 1987 noted the inevitability of sea level rise, the damage done by recent storms, and the futility of armoring the coastline. It concluded that “a retreat from the beaches over a thirty year transition period, in combination with selective beach nourishment, is the only practical approach to our coastal erosion

28 See Keystone, 480 U.S. at 506.
29 123 U.S. 623 (1887).
30 Keystone, 480 U.S. at 492.
31 Compare Keystone 480 U.S. at 506, with Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1005 (1992) (showing that the Justices who dissented in Keystone are now part of the majority opinion in Lucas).
32 In 1984, EPA and the South Carolina Sea Grant program sponsored a conference in Charleston, South Carolina to present the results of a study on the impacts of future sea level rise on the city and the surrounding barrier islands, with the latter organization mailing 10,000 brochures to people in the area.
33 See id. at 1335.
34 See S.C. BLUE RIBBON COMM. ON BEACHFRONT MGMT., REPORT OF THE SOUTH CAROLINA BLUE RIBBON COMMITTEE ON BEACHFRONT MANAGEMENT ii-iii (1987) [hereinafter BLUE RIBBON REPORT].
problems. In 1988, the South Carolina legislature revised its approach to critical areas and enacted the Beachfront Management Act (BMA), prohibiting construction or reconstruction seaward of a setback line based upon a calculation of forty times the annual erosion rate. Although entirely appropriate from a science-based natural resources protection perspective, this regulatory approach created an ideal factual premise for a regulatory takings claim.

The new BMA setback line prohibited all permanent development on David Lucas’s two lots. He had recently purchased those remnant lots for nearly $1 million from the Wild Dunes Associates, the development company that developed a large gated community on the Isle of Palms. Lucas had been a principal of the company. If Wild Dunes itself had sought and been denied permits to build on those two lots, it would have had a much weaker takings claim because the lots likely would have been viewed as part of a larger property that had been profitably developed. However, Lucas’s two lots were presumed to be legally distinct from all of the other Wild Dunes properties from which he had profited. Moreover, all of the oceanfront lots in the vicinity of Lucas’s lots had already been developed with expensive homes, making the prohibition on building on his lots seem arbitrary or at least to secure minimal public benefits.

35 Id. at iii–iv. The Report stated:
Sea level rise in this century is a scientifically documented fact. . . . It must be accepted that regardless of attempts to forestall the process, the Atlantic Ocean, as a result of sea level rise and periodic storms, is ultimately going to force those who have built too near the beach front to retreat.


38 See id.

39 See id. at 1038 (Blackmun, J., dissenting).


41 See Lucas, 505 U.S. at 1020.

42 See Been, supra note 17, at 304–05. We may never know whether the transfer of the lots to Lucas individually was fortuitous from the perspective of litigation strategy or deliberate. See id. at 305. Justice Blackmun’s law clerk wrote him stating that there was “something fishy” about the case based on her reading of the many transactions involving
Lucas never applied for a permit to build but instead sued the South Carolina Coastal Council (Council) claiming that the BMA had taken his property.43 The Council crucially allowed Lucas to proceed, despite the prevalence of standard ripeness requirements stated in the Supreme Court’s decision in Williamson County,44 conceding that the Council would deny any permit for construction on Lucas’s lots.45 In retrospect, this was a damaging litigation decision.46 Requiring Lucas to go through the permitting process would have delayed his takings claim and also might have built an administrative record showing the continuing value of his lots and documenting an environmental justification for a permit denial.47 The Council did present evidence to the trial court explaining the dynamics of erosion in the area of Lucas’s lots and the efforts made to armor and renourish the shore, and it showed that Lucas’s lots had been beneath the high water mark during the past forty years.48 The trial court viewed such evidence as irrelevant given its finding that the regulations deprived Lucas of any reasonable economic use of his lots.49 This created the highly artificial premise in the case that the lots had zero economic value.50

The South Carolina Supreme Court held categorically that the regulations did not effect a taking because they were intended to prevent significant public harm.51 In so holding, the court relied on the stated legislative purposes of the BMA, which Lucas had stipulated, but did not

the lots and their rapid rise in value. Letter from Law Clerk for Justice Harry A. Blackmun, to Justice Harry A. Blackmun (Feb. 28, 1992), in Blackmun Papers, supra note 4. Professor Vicki Been’s historical analysis of the case reasonably surmises that Lucas must have known about the likelihood of imminent, strict regulations of coastal development as the South Carolina legislature debated how to implement the Blue Ribbon Committee’s recommendations. See Been, supra note 17, at 304–06. At the time of purchase, Lucas was an experienced coastal real estate investor. See id. at 304.

43 See Lucas, 505 U.S. at 1009; see also Been, supra note 17, at 306, 309.
44 See Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 173 (1985) (holding that a takings claim was not ripe because the respondent had not received a final decision regarding an ordinance and had not exhausted her state remedies).
45 See Been, supra note 17, at 309–10, 324.
46 See id. at 325.
47 See id. at 324–25.
48 See id. at 311–12.
49 See id. at 310.
50 See id. at 309.
reference any of the evidence the Council presented at trial about erosion threats to Lucas’s lots. The court relied principally on the U.S. Supreme Court precedents, which held that regulations that prevent harm to the public cannot be considered a taking even if they involve a significant loss of economic value. The court’s approach was largely consistent with those precedents, although none of them clearly involved a property that had been deprived of all economic value. Moreover, the court did not review the foundation for the trial court’s conclusion that the lots had no economic value. Finally, the court rejected the Council’s request to remand the case to consider the effects of the special permit provision adopted in 1990. In all this, the South Carolina Supreme Court acted upon principle, but in the context of that time, it teed up a perfect case for property rights advocates to bring to a new majority on the U.S. Supreme Court.

Lucas’s petition for certiorari presented the U.S. Supreme Court with a clean and appealing question: does a land-use regulation, pursuant to a state’s police power, require just compensation under the Constitution’s Fifth and Fourteenth Amendments if it totally eliminates the value of private property? This was a question of first impression for the Court, but it found apparent support in language from Agins v. City of Tiburon, where the Court stated: “The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” In Agins, the Court unanimously upheld the rezoning of the petitioner’s lots, finding that they had substantial economic value, and rendering that loose and erroneous statement mere dicta.

---

52 See id.
54 See Lucas, 404 S.E.2d at 899.
55 See id. at 898–900; see also Keystone, 480 U.S. at 491–95.
56 See Lucas, 404 S.E.2d at 900.
57 See id. at 908.
60 Id. at 260 (citations omitted).
61 See id. at 258–59. Agins was one of a series of cases in which the Court tried to address whether states had to provide property owners with an inverse condemnation remedy that would afford compensation at least for a temporary taking, but found for various reasons that it could not reach that question. See id. at 263. In Agins the Court’s
Yet, the granting of the petition was not a foregone conclusion. The petition for certiorari was held over at least once because of some Justices’ concerns about the procedural posture of the case. Justice O’Connor wrote in a memorandum to the conference on November 4, 1991, that she believed that Lucas’s claim was ripe only for a temporary taking. She reasoned that Lucas could now apply for a special permit and there was “no reason to grant plenary review of a statute that since has been amended, [she was] inclined to suggest that [the Court] summarily reverse the judgment insofar as it address the temporary taking, and otherwise deny.” Justice White may also have been worried about whether even a temporary taking could be found, given that Lucas never applied for a permit and the record did not reveal whether he was ready to build or was holding the land at the time of suit for better market conditions. Justice Blackmun’s merit conference notes suggest that Chief Justice Rehnquist and Justice Scalia had been the most adamant about granting certiorari, as

statement of the standard for finding a regulatory taking seems summary and sloppy. See id. at 260. It created lots of mischief. The first prong, which states that a taking should be found when a regulation failed to advance a legitimate state interest (actually a due process test), see id., finally was unanimously and apologetically rejected by the Court in Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005). For the clear rule presented as the second prong, see Agins, 447 U.S. at 260. The Agins Court cited Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 138 n.36 (1978), see Agins, 447 U.S. at 260, where Justice Brennan wrote for the majority:

We emphasize that our holding today is on the present record, which in turn is based on Penn Central’s present ability to use the Terminal for its intended purposes and in a gainful fashion. The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be “economically viable,” appellants may obtain relief. Penn Cent. Transp. Co., 438 U.S. at 138 n.36. But Penn Central hardly states a categorical rule; for example, the Court had not considered the historic preservation of Grand Central Station to protect the public against harm. See id. at 130.

62 See Lucas, 505 U.S. at 1036 (Blackmun, J., dissenting), 1061 (Stevens, J., dissenting) (dissenting over procedural concerns).

63 See Memorandum to the Conference from Justice Sandra Day O’Connor (Nov. 4, 1991), in Blackmun Papers, supra note 4.

64 Id.

they stressed the importance of the case.\textsuperscript{66} In any event, the Court granted certiorari on the question as presented.\textsuperscript{67}

As Justice O’Connor’s memorandum suggests, the Court had a wide range of ways to address the case, even assuming that the South Carolina Supreme Court’s approach seemed insufficiently protective of property rights.\textsuperscript{68} The Bush Justice Department’s brief argued for a modest resolution, reversing the South Carolina court’s decision and remanding for consideration about the weight of the state’s environmental interest and the fit between that interest and the statutory structure.\textsuperscript{69} The brief affirmed the \textit{Mugler} line of cases and argued that the state had a special authority to regulate land use to protect the public against harm, which went beyond common law nuisance, even when it imposed serious economic losses on individual owners.\textsuperscript{70} Furthermore, the brief objected that the South Carolina court had treated the nuisance exception as coterminous with the police power, so it recommended that the South Carolina court’s decision be vacated and the case remanded.\textsuperscript{71} The Solicitor General, Kenneth Starr, thus showed the Court how to limit the reach of \textit{Keystone Coal}, while leaving room for accommodating property rights with environmental protection.\textsuperscript{72} The brief also suggested that the Court could vacate the decision below and remand for consideration of ripeness, given the availability of the special permit under the 1990 amendments.\textsuperscript{73}

The oral argument focused primarily on establishing or challenging whether the case actually presented the question of whether a regulation that denies an owner all economic use of his land is a taking.\textsuperscript{74} Counsel for Lucas stated the proposition immediately, and the Chief Justice quickly

\textsuperscript{66} See Memorandum: Lucas v. S.C. Coastal Council Merit Conference Notes from Justice Harry A. Blackmun (Mar. 4, 1992), \textit{in} Blackmun Papers, supra note 4.

\textsuperscript{67} See Lucas, 505 U.S. at 1010.

\textsuperscript{68} See Memorandum to the Conference from Justice Sandra Day O’Connor, (Nov. 4, 1991), \textit{in} Blackmun Papers, supra note 4.

\textsuperscript{69} See Brief for the U.S. as Amicus Curiae in Support of Reversal at 26–28, Lucas, 505 U.S. 1003 (No. 91-453), 1991 WL 11004086.

\textsuperscript{70} See id. at 19.

\textsuperscript{71} See id. at 8, 28.

\textsuperscript{72} See id. at 21–22.

\textsuperscript{73} See id. at 11.

asked whether it was “perfectly clear from the opinion of the majority in the [S]upreme [C]ourt of South Carolina that they accepted the hypothesis that he was denied all economically viable use of his land?” Justices Blackmun, Stevens, and Souter all expressed discomfort with the zero valuation, and Justice Blackmun asked Lucas’s advocate if he would give him the property because it was worthless. Justice O’Connor expressed reservations about whether the case presented a permanent taking, given Lucas’s opportunity to seek a permit under the 1990 amendments. Justice White queried whether there had been even a temporary taking, because the record did not show that Lucas would have built in the two years before the amendment was adopted.

The argument for the Council was mostly disastrous. Counsel sought to defend the state supreme court’s holding that the regulation could not be a taking because it prevented harm to the public. Justice Scalia aggressively questioned counsel about what harm there could be from building another house behind the sand dunes among the other houses. Justice O’Connor questioned whether the rationale relied on by the state court would justify ordering the removal of the existing oceanfront houses seaward of the setback line; she appeared frustrated at counsel who was not articulating a limiting principle to the no compensation rationale. Justice Scalia pressed his view that the 1990 special permit provision did not require a remand because ripeness concerns are prudential and discretionary. Justice White took counsel to have conceded that at least a temporary taking was before the Court.

Justice Blackmun’s conference notes report his impressions of the views of his colleagues. A caveat is that the notes are hand written and

---

75 Transcript of Oral Argument, supra note 74, at 3.
77 See id. at 1:57.
78 See id. at 7:37-8:59.
79 See id. at 10:45.
80 See, e.g., id. at 28:57–42:54.
81 See id. at 34:14–35:05.
82 See id. at 36:09, 36:56.
83 See id. at 40:10.
84 See id. at 53:26, 54:51.
85 See id. at 55:40.
employ informal shorthand abbreviations, so they cannot always be clearly understood. At the conference, Chief Justice Rehnquist criticized the South Carolina Supreme Court’s reliance on _Mugler_, which he thought was inconsistent with modern regulatory takings cases. Justices Kennedy, O’Connor, and White all seemed to think that the case should be decided as a temporary taking, focusing just on the period from 1988 to 1990, when the special permit provision was added. Justice Scalia agreed that he could accept treating the case as a temporary taking but argued for addressing it as a permanent taking. He argued, as he eventually wrote in his opinion, that the Court could ignore any need for Lucas to apply for a permit because ripeness is prudential rather than jurisdictional. He stated that the South Carolina Supreme Court had skipped it, so the U.S. Supreme Court need not limit its analysis. Justice Scalia also stated his agreement with Chief Justice Rehnquist on the merits. He said, according to Justice Blackmun, that the state would need to show something “akin to CL nuisance – need > [than] we have here.” He also appears to have stated that the burden of showing this is on the state. It may be that Chief Justice Rehnquist assigned the task of writing the opinion to Scalia because of his clear view about treating the taking as permanent and suggesting the doctrinal means to cut down on the scope of the harmful use precedents.

Justice Scalia circulated his first opinion on June 1. He framed the question to be addressed in the manner most congenial to his purpose, as

---

87 See id.
88 See id. Blackmun reported this as Rehnquist’s view: “SC Ct did not rely on admin excep – went to Mugler – 88 – 90 no permit proc – in old cases all use went out – this type a not suff to bring us + nuisance line of a cases – real is terms of just comp cases i.e. Penn Central.” Id.
89 See id.; see also Memorandum to the Conference from Justice Sandra Day O’Connor (Nov. 4, 1991), in Blackmun Papers, supra note 4.
90 See generally Memorandum to the Conference from Justice Antonin Scalia (June 25, 1992), in Blackmun Papers, supra note 4.
92 See id. at 1011.
93 See id. at 1025.
95 See id.
96 The Blackmun papers show that Scalia circulated three drafts of his opinion. The major changes occurred between drafts one and two, as Justice Scalia spiritedly responded to the dissents. Justice Blackmun’s law clerk reported to him on June 25: “I talked to
a challenge to the pre-1990 statute where “as the Act then read, the taking was unconditional and permanent.”97 He dispatched any lingering concern about how the relevance of the 1990 special permit amendment might qualify the question by stating that ripeness concerns are prudential, that the South Carolina Court had “shrugged off” its relevance, and that Lucas would be free to seek a “permit under the 1990 amendment for future construction, and challenging, on takings grounds, any denial.”98

Chief Justice Rehnquist quickly joined the opinion and made an important suggestion to strengthen constitutional property rights. In a memorandum of June 3, 1990, he urged Justice Scalia to include language that would “distance itself a bit more from” the use of “the ‘noxious use’ line of cases . . . even when there may not be a denial of all economically viable use.”99 Justice Scalia adapted Chief Justice Rehnquist’s suggested language and added to the opinion:

When it is understood that “prevention of harmful use” was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that “prevents harmful use” and that which “confers benefits” is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory “takings”—which require compensation—from regulatory deprivations that do not require compensation.100

Thus, the Court rejected the Solicitor General’s contention that there was some range of cases where no taking should be found because a prohibited use imposed serious harm on the public but did not amount to a common law nuisance.101 Justice Scalia’s opinion treated the Mugler line of cases as being only historic artifacts.

Scalia’s clerk. AS himself read our dissent and got so angry, he has decided to extensively respond (and do so nastily).” Note from Law Clerk Justice Harry A. Blackmun (June 25, 1990), in Blackmun Papers, supra note 4.

97 Lucas, 505 U.S. at 1011–12.
98 Id. at 1011.
100 Lucas, 505 U.S. at 1026.
101 See id. at 1010.
All of the factors discussed in Part III indicate that the Justices most eager to promote constitutional property rights identified the case as ideally suited to creating a new per se rule and fought off concerns that might not cleanly present an opportunity to fashion a distinct rule for the elimination of all economic value. The very artificiality of the case made it a convenient vehicle. The applicability of the *Penn Central* approach could be ignored.\(^{102}\) The clean concession by the state that no permit would be granted, the unquestioned but implausible trial court finding that the regulation had eliminated all economically viable use, the broadly categorical decision of the South Carolina Supreme Court, and its general reliance on broad legislative findings of purpose all contributed to an opportunity for the U.S. Supreme Court to make new law, which the more determined Justices were not going to pass up.

**IV. Reach**

What did *Lucas* accomplish? Primarily, it created a per se rule based entirely on economic impact.\(^{103}\) The Court credited *Agins* as having stated an established rule: a regulation that deprives an owner of all economically viable use is a taking.\(^{104}\) Rather than admitting that the *Agins* language was dicta, the Court simply claimed that they “have never set forth the justification for this rule.”\(^{105}\) In this context, it is interesting to note that Justice Kennedy had stated, at conference, that the *Agins* language is “not correct & has [to] b[e] explained.”\(^{106}\) The Court only offered one justification for the rule:

---

\(^{102}\) The most ardent property rights enthusiasts on the Court could not simply jettison the *Penn Central* approach. *See* Letter from Justice Sandra Day O’Connor to Justice Anton Scalia [I] (June 26, 1992), in Blackmun Papers, *supra* note 4; Letter from Justice Sandra Day O’Connor to Justice Antonin Scalia [II] (June 26, 1992), in Blackmun Papers, *supra* note 4. In his opinion, Scalia argued that the approach used to determine the relevant parcel in *Penn Central* was “unsupportable.” *Lucas*, 505 U.S. at 1017 n.7. Justice O’Connor wrote Justice Scalia on June 26 objecting to this reference, stating “I am not prepared to disapprove of *Penn Central* as part of the resolution of this case.” Letter from Justice Sandra Day O’Connor to Justice Antonin Scalia [I], *supra*. Later that day, she withdrew her objection after Justice Scalia pointed out to her that he had criticized only the state court opinion in *Penn Central*. *See* Letter from Justice Sandra Day O’Connor to Justice Antonin Scalia [II], *supra*.

\(^{103}\) *See* *Lucas*, 505 U.S. at 1015.


\(^{105}\) *Id.* at 1017.

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.107

But the only factual support offered for this peculiar claim of governmental subterfuge was that the federal government sometimes acquired conservation easements over private land to prevent development, which could as easily indicate the government’s care in distinguishing regulation from acquisition.108 The core value in the opinion is found in its comfortable observation that “our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land.”109

The environmental concerns that motivated the BMA entirely dropped out of the constitutional analysis. Constitutional protection was conferred on the economic expectations sanctified in an insider property transaction; the appropriateness of setback lines on shifting sands, as determined by science and experience, was never considered. The risks of erosion and sea level rise were exiled, given that they were not encompassed by the common law of nuisance. To be sure, the per se rule was limited to the vanishingly small set of cases where the regulation eliminated all economically viable use, but, within that set, the Court would not need to consider the gravity of the harm addressed or the tailoring of the regulation.110

107 Lucas, 505 U.S. at 1018.
109 Lucas, 505 U.S. at 1019 n.8. In context, this is a repudiation of the view associated with Just v. Marinette County, 201 N.W.2d 761, 768 (Wisc. 1972).
110 The per se rule also seemed to ignore whether the regulation frustrated reasonable investment-backed expectations, a key inquiry from Penn Central. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 121 (1978). This eliminates the inquiry into the timing of the plaintiff’s purchase of the land in light of when the regulations were enacted. Justice Scalia later took the view that this inquiry should be stricken from the analysis, but the Court has rejected that view. See Palazzolo v. Rhode Island, 533 U.S. 606, 636–37 (2001) (Scalia, J., concurring). As noted supra, although Lucas acquired the lots in 1986, he was deeply involved in the Wild Dunes development and probably was very aware of the risk of new stronger regulations when he bought the property. See Lucas, 505 U.S. at 1037 (Blackmun, J., dissenting).
As a corollary, the *Lucas* opinion suppressed the *Mugler*—or noxious use—line of cases that had given greater leeway to regulate against environmental harms without compensation. The Court not only corrected what the Department of Justice thought was an overbroad reliance on *Mugler* by the South Carolina Supreme Court, but completely dropped it from the takings analysis, relegating it to “our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value.” This characterization of the *Mugler* line of cases elides the fact that until the 1920’s the Court consistently rejected any notion that regulation of use could violate the Takings Clause. The characterization is consistent with Justice Scalia’s rather casual acknowledgment that the original meaning of the Takings Clause did not encompass regulations of use, even though he had treated the original meaning of the Constitution as inviolate in cases where his understanding of that meaning more closely matched his policy preferences. Justice Scalia’s approach to regulatory takings cases amounts to a straightforward declaration of policy-driven constitutional rulemaking.

The Court also argued that the distinction between regulations that prevent harm and regulations that secure benefits was incoherent: “the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis.” The Court suggested that giving effect to the distinction based on the findings of the legislature would result in protection for the property owner only when “the legislature has a stupid staff.” Even if the determination needs to be based on objective factual analysis, the judgment regarding the regulation of uses that harm the public must be normative. All of regulatory takings law rests on assessments of distributive justice. Justice Scalia’s criteria seem to confuse a question of

111 See *Lucas*, 505 U.S. at 1022–23.
112 Id. at 1026.
115 *Lucas*, 505 U.S. at 1026.
116 Id. at 1025 n.12.
117 See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear
The underlying normative question is whether government may prohibit a use of land without paying the owner the cost of foregoing the use. An environmental approach would take into account the extent to which the use can reasonably be viewed as noxious, injurious, or harmful to the public. Surely, one would be justified in concluding, as an objective matter, that leaching toxins into water used for drinking harms the public. The fact that some regulations are difficult to categorize does not invalidate the distinction. *Mugler* held that the question of whether a regulation of use prevents harm is reserved for the elected legislature, reflecting a public judgment, while the court’s role is to assess if the determination is reasonable. In such review, a court defers to the legislative judgment. This was essentially the view urged by the Solicitor General in *Lucas*: the case should be remanded for a factual development to assess whether the degree of public harm prevented justified the loss that the South Carolina legislature imposed on the property owner (although with weight given to the owner’s loss as well).

Justice Scalia’s elimination of the harm/benefit distinction also eliminates any serious judicial accommodation of regulations that decrease property values while preventing environmental harm.

This tactic manifested itself also in the opinion when it portrays regulators as primarily seeking to appropriate private property without payment. In *Lucas*, where the loss to the owner was found to be complete, Justice Scalia found “a heightened risk that private property is public burdens which, in all fairness and justice, should be borne by the public as a whole.”;

---

118 Perhaps Justice Scalia half remembered Coase’s famous approach to nuisance law, which eschews ethical judgment about land uses in favor of resolving competing land uses by attending to the reciprocal nature of liability problems. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 passim (1960). But, Coase did not address conflicts between an individual landowner and the legislature, which presumably is empowered to designate the public interest. Moreover, Coase’s analysis operates within the amoral axioms of the economics discipline.

119 See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (“If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.”).


122 See, e.g., *Lucas*, 505 U.S. at 1018.
being pressed into some form of public service under the guise of mitigating serious public harm.”\textsuperscript{123} But there is no logical connection between the degree of loss suffered by the owner and the motive of the regulator. Moreover, the opinion engaged in no actual consideration of the evidentiary basis or reasoning supporting the limitations on constructing permanent structures on sands at clear risk of being washed away. Unfortunately, it was characteristic of Justice Scalia in takings cases to denigrate the motivations of public regulators rather than engage with the reasonableness of their work.\textsuperscript{124}

Hostility to environmental regulation was manifest in another feature of the opinion. \textit{Lucas} held that property regulations that eliminate all economic value do not require the payment of compensation only when they duplicate limitations inherent in the title, primarily those provided by the common law of nuisance. This approach gives constitutional status to common law categories. It reverses the previously held judicial view that statutes properly can remedy inadequacies in the common law created or revealed by social and economic change.\textsuperscript{125} As Professor Sax observed, the opinion posits an entitlement to continue current uses consistent with the common law:

\begin{quote}
Though the \textit{Lucas} majority does not say so explicitly, its adoption of a standard based upon historically bounded nuisance and property law reflects a sentiment that a state should compensate landowners who, through no fault of their own, lose property rights because of scientific or social transformations.\textsuperscript{126}
\end{quote}

On this point Justice Scalia lost Justice Kennedy, who concurred separately, arguing that the scope of harms that regulators can address without incurring takings liability is broader than that encompassed in the common law of nuisance.\textsuperscript{127}

\begin{footnotes}
\item[123] \textit{Id.}
\item[124] See Byrne, \textit{supra} note 114, at 760.
\item[125] As the Court wrote long ago in the foundational case of \textit{Munn v. Illinois}, 94 U.S. 113, 134 (1877), “A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.” \textit{Id.}
\item[127] See \textit{Lucas}, 505 U.S. at 1034–35 (Kennedy, J., concurring).
\end{footnotes}
Critics have often pointed out how ill-suited common law nuisance is for dealing with environmental harms. The revered nuisance law scholar, Louise Halper, wrote of *Lucas*:

The majority . . . strips the legislature of the police power, an attribute of sovereignty, by claiming that the public interest which the police power doctrinally protects does not exist as a formal entity. By giving the judiciary the power to adjudicate between legislature and landowner, *Lucas* reduces the police power to no more than the extension to the commons of the rule of *sic utere*. The legislature’s role in land use is limited to codifying the common law of private disputes.128

Nuisance law has the modest aim to resolve specific conflicts of use between a limited number of parties, rather than to address broadly distributed harms.129 Nuisance litigation has a limited capacity to assemble the relevant information about complex and long term resource degradation, and judges and juries are poorly equipped to resolve the many technical issues and tradeoffs of social values inherent in devising a regulatory approach.130 Nuisance baseline also ignores incremental harms;

---


129 Although the *Lucas* opinion refers to public nuisance, it erroneously treats that body of law as merely an application of private nuisance criteria, whereas it historically has been considered as an expansive legislative power. See id. at 344–46. Indeed, the Court refers to what the state would have to show in a “common-law action for public nuisance,” ignoring the historical significance of legislative designations of public nuisances. *Lucas*, 505 U.S. at 1031.

130 *Boomer v. Atlantic Cement Co., Inc.*, 257 N.E.2d 870, 871 (N.Y. 1970), contains the iconic judicial expression of the inability of nuisance courts to address complex resource issues such as air pollution:

> Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

> It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

> A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is
it is not just Lucas’s potential houses that create the problem at the shore, but the overall development, of which Lucas’s homes would be the last.131 Climate change similarly does not fit conventional nuisance law because no one emitter creates a nuisance; climate change is caused by the aggregation of emissions since the beginning of the industrial age.132

Lucas also cast doubt on the method that the Court had used to determine the economic impact of a regulation on a property owner. In Penn Central, the Court held that economic impact must be measured against the value of the property as a whole, so that the continuing valuable uses of a facility, or on a tax lot, would be counted to reduce the measure of loss.133 Justice Scalia invoked Pennsylvania Coal, the single contrary decision of the Court in which only the affected portion of the owner’s property was considered,134 and suggested in Lucas that the Court identify the relevant unit of property based upon “the owner’s reasonable expectations [that] have been shaped by the State’s law of property—i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land.”135 Moving the approach to economic loss that focuses only on the affected portion of property will neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

Id.

131 See Rose, supra note 36, at 258–61. To prevent the South Carolina court from giving precedence to public need over private rights, the U.S. Supreme Court used Lucas as a gateway to supervise state court’s development of South Carolina property law. The Court warned South Carolina that any effort to examine its nuisance law to extend them to construction that exacerbates beach erosion “must identify background principles of nuisance and property law that prohibit the uses” to the satisfaction of the U.S. Supreme Court. Lucas, 505 U.S. at 1031. This inversion of federalism nearly came to fruition in Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010), but Justice Scalia’s invention of the doctrine of judicial takings, whereby the U.S. Supreme Court would supervise state court development of its common law of property more generally, to prohibit the elimination of an established property right, was embraced only by a plurality. See id. at 733.


135 Lucas, 505 U.S. at 1078 n.7.
greatly increase the number of cases where the owner has been deprived of all economically viable uses of the affected property, and thus, the cases where the Lucas per se rule will eliminate all judicial consideration of the public interest in environmental regulation.

As noted above, the Court could have decided the case on the merits in a manner that would have recognized Lucas’s property interest without ignoring the environmental issues that South Carolina was trying to address. The Court could have applied the more open ended Penn Central test. It could have vacated the decision of the South Carolina Supreme Court and remanded the case for a number of unanswered issues: an accurate calculation of the economic value retained by Lucas, inquiry into his reasonable investment-backed expectations at the time of purchase, an evaluation of the gravity of the harm that the government was addressing, and a determination of whether the prohibition on building was a reasonable measure to address that harm. Whether Lucas had suffered a taking under such an analysis seems fairly debatable, but such an approach would acknowledge the legitimate competing interests at stake in implementing a policy of coastal retreat. Such an approach would foster balancing and accommodate competing private and public interests instead of marginalizing and trivializing serious environmental concerns.

V. AFTERMATH

The effect of Lucas on government regulators was dramatic. The opinion was feared to inaugurate a new era of judicial activism protecting property owners against regulations. Aspects of this view were on display during our conference in South Carolina. Coastal development continues unabated without adequately addressing erosion and sea level rise. Although South Carolina long maintained an official policy of retreat from the oceanfront, it is hard to find decisions that implement that goal. Rather, state officials seem to view any decision to deny a permit to build as creating a taking for which the state must pay compensation. What one encounters at the Isle of Palms, for example, are building adaptations,

136 Candor prompts me to acknowledge my long held view that the entire regulatory takings endeavor is ill conceived and should be abandoned. See J. Peter Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine, 22 ECOLOGY L.Q. 89 passim (1995). Given that regulatory takings appear to be here to stay, the doctrine should at least incorporate an honest weighing of competing interests.

efforts to find legal means to armor the coastline, and repeated projects of sand nourishment. While regulators are aware of risks, they operate within perceived tight restraints. Generally, regulator’s fear of takings liability, litigation costs, and political strife exert a larger effect than the actual risk of losing takings cases.

But *Lucas* also generated pushback. Governmental and non-profit environmental organizations stepped up to critique aggressive regulatory takings liability rules. The Georgetown Environmental Law and Policy Institute, formerly led by John Echeverria, issued analytic papers and organized conferences for government regulators and supporting lawyers at which doctrine was critiqued and litigation strategy conceived; the Conference on Litigating Takings Challenges to Land Use and Environmental Regulations, under the auspices of Vermont Law School, celebrated its twentieth annual meeting in October 2017. Outstanding appellate advocates, such as Professor Richard Lazarus of Harvard Law School, brought sophistication to arguments in favor of environmental regulation. The Community Rights Counsel, led by the late Douglas Kendall, made major contributions through papers and amicus briefs. Though never funded nearly as lavishly as the property rights non-profits, these efforts brought resources and fresh thinking to regulators feeling besieged by takings claims. The tide began to turn.

But it was the weakness of *Lucas* itself that provided the opportunities for advocacy. It is remarkable that the first forty-three citations to *Lucas* reported on Westlaw are all flagged negative. The *Lucas* opinion was able to evade the *Penn Central* precedent based on the finding of no economically viable use of the land, a finding never challenged but also unrealistic. At that time, Richard Lazarus pointed out: “[B]ecause environmental protection laws almost never result in total economic deprivations, that categorical presumption will rarely apply. Instead, the negative implication of the category’s nonapplicability will dominate the

---

141 See 505 U.S. 1003 (click “Citing References”).
lower courts’ takings analyses. These courts will likely apply the opposite presumption that no taking has occurred.142

Subsequent decisions confined the Lucas per se rule to cases of zero economic value, rendering it a rule that applies to virtually no cases.143 Subsequent decisions also firmly entrenched the property as a whole analysis of economic impact, making the likelihood of no economic value vanishingly small.144 The Court also has come to give at least muted credit to the need for planning and regulation to protect both environmental and property values, incorporating them into regulatory takings analysis.145 Thus, at least for now, the Court has declined to follow on the charged ideological ambitions for constitutional property rights that fueled the Lucas opinion.

VI. CONCLUSION

Lucas failed to contribute to addressing sensibly the conflict between the value of beachfront development, the harm it imposes on the shore, and the needs to adapt to erosion and sea level rise. The opinion stands practically as a barrier to regulations mandating retreat from the rising seas.146 But retreat will occur. The seas will rise and stay risen, perhaps for millennia.147 The occurrence of storms is a roulette; some will miss the South Carolina coast and others will hit. However, sea level rise is more like gravity; it will be pervasive, irresistible, and for all practical purposes permanent. But because our property institutions are rigid, retreat will be

142 Lazarus, supra note 9, at 1427 (footnote omitted).
145 See Murr, 137 S. Ct. at 1949–50 (2017) (rejecting regulatory takings claim because “the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land”); Koontz v. St. John’s River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (“Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”).
146 In a recent article, Kate Zyla and I offered a device to either nudge development away from lands subject to sea level rise or require developers to pay the costs of failing to do so. See J. Peter Byrne & Kathryn A. Zyla, Climate Exactions, 75 Md. L. Rev. 758 passim (2016).
messy, expensive, possibly lethal, and damaging overall to the natural environment upon which we depend.

*Lucas* excised any constitutional balance among competing interests by erecting a per se protection of the property interest. Thus, its rhetorical strategy is akin to denial of anthropogenic climate change, taking off the table how humans can lessen their contributions to environmental risks and adapt to changed conditions in a manner consistent with our legal culture and traditions. Examples of enforced silence surround us. The Environmental Protection Agency (EPA) recently forbade three of its scientists who had authored a substantial part of a 400 page report about the effects of climate change in the Narragansett Bay from speaking at a conference in Rhode Island about the state of the Bay.148 Political operative John Konkus, now runs the EPA’s Office of Public Affairs. In this position, Konkus purportedly

reviews every award the agency gives out, along with every grant solicitation before it is issued. According to both career and political employees, Konkus has told staff that he is on the lookout for “the double C-word” — climate change — and repeatedly has instructed grant officers to eliminate references to the subject in solicitations.149

We face unprecedented, existential environmental risks from anthropogenic climate change. We have seen in the past year the new scale of threats from severe storms and wildfires. The South Carolina coast will almost certainly undergo catastrophic changes from sea level rise and storm damage in the foreseeable future. Globally, the scientific consensus predicts greater heat, flooding, storms, wildfires, drought, desertification, and ocean acidification.150 We cannot know with certainty what exactly will occur but the scientific consensus about climate change poses risks

---


with a high level of probability that we cannot ignore without surrendering any claim to rationality or morality.\textsuperscript{151}

Our political and legal institutions, including property law, must adapt to this new reality. The eclipse of \textit{Lucas} in regulatory takings jurisprudence offers hope that the Supreme Court no longer sees its mission as preventing a reasoned accommodation between traditional understandings of property rights and the urgent need to adapt to sea level rise and other consequences of climate change. Twenty-five years after it was decided, we should reject \textit{Lucas}'s approach to regulatory takings as willful blindness to accommodate environmental risks.

\textsuperscript{151} See id.