Lucas and Takings: Private Property Redefined

Michael J. Davis

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One of the important constitutional issues emerging in the past two decades concerns the question of when government regulation of private property becomes so restrictive that it constitutes a "taking" without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution.

It is noticeably odd that more than two hundred years after the adoption of its Bill of Rights, a country so devoted to the principle of private property does not have a definitive answer to such a basic question. Surely, few issues get closer to the essence of governmental power than determining the latitude, if any, a government has to diminish private property rights for its own purposes without compensating the rightful owner involved.

What follows is a condensed review of United States Supreme Court attention to this fundamental question. It is written with a particular eye to the jurisprudential currents converting the "taking issue" from a minor backwater in the law of real property to a rolling tide of constitutional controversy. After tracking the basic history of the Court's treatment of the taking issue, this article ultimately focuses on the latest taking opinion, *Lucas v. South Carolina Coastal Council.*[1]

In *Lucas* the Court made an obvious, conscious effort to straighten out jurisprudential wires tangled over a century of taking opinions, an undertaking it had attempted only once before. The attempt succeeded in a limited, jurisprudential way, but this success was reached at a heavy price. Specifically, the majority opinion effected basic changes in both a century of precedents and the constitutional definition of private property itself. The changes *Lucas* brought were substantial in both the constitutional and policy senses, and the entire legislative and regulatory process will be a heavy loser if the logical conclusions of the opinion are reached in subsequent decisions.

From Breweries to Coal to Air Rights to Coal: A Century of Regulatory Taking Jurisprudence in A Capsule.

For almost 150 years there was no such thing as a regulatory taking under the federal constitution. In this Country's first century the issue never even arose. During that period the fifth

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amendment applied exclusively to the national government, which was at most a minor player in the predominately rural society and economy of the time.

Three dramatic changes, two legal and one societal, ended that halcyon era. First, the due process clause of the fourteenth amendment, passed shortly after the conclusion of the Civil War, was found to have a substantive element that protected individual citizens from *ultra vires* acts by state and local governments.[2] Second, the same due process clause was found to extend the protection of certain federal Bill of Rights provisions, including the principle that property cannot be "taken" without just compensation, to the States.[3] Finally, the agrarian society of the nation's first century was rapidly transformed into an urban, industrial society requiring far more active governmental oversight, especially through state and local regulations aimed at protecting health, safety, and general welfare.

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The Early View: Regulation and Taking as Unrelated.

These three forces came together for the first time as an indirect result of Carrie Nation's successful temperance movement in her home state of Kansas. When Kansas banned the manufacture and sale of alcoholic beverages a half century before the Great Experiment, it closed many active breweries, among them Peter Mugler's in Salina. Mugler sued the State, alleging that the application of prohibition to his property effected a taking. The Court explicitly rejected both the claim and the underlying assumption, holding that "[a] prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit."[4]

Mugler identified for the first time the constitutional relationship between the private ownership of property and the ultimate right of a government to eliminate preexisting rights in that property without compensation. Justice Harlan's majority opinion seemed to say that so long as a government acted within the scope of its police power, the mere *regulation* of property uses could never effect a taking, regardless of the impact on the owner. A physical invasion or an appropriation of title might violate the fifth amendment, but a restriction on use lawfully grounded in the police power would not.

This initial view carried well into the twentieth century. Two Court decisions in the 1920s particularly reflected a continued allegiance to the position. When a property owner challenged the general constitutional validity of zoning, the Court upheld the ordinance in question in its famous *Euclid* decision despite unchallenged allegations that the plaintiff's property values had been reduced 66-75 percent.[5] Two years later in *Miller v. Schoene*, the Court held that the State of Virginia did not take a claimant's cedar tress when it ordered them destroyed because rust from the trees was infecting nearby orchards.[6] In neither case did the Court consider the impact of the regulation on the property owner, and in the latter it reiterated the original *Mugler* holding that "where the public interest is involved, preferment of the [legislatively determined] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[7]

A Change in Direction: Regulation as Taking.

By the time *Euclid* and *Mugler* were decided, however, the original view that regulation by itself could never be a taking was no longer the only one adopted by the Court. Only a few years earlier, in an opinion still regarded as the headwater of modern taking law, the Court in *Pennsylvania Coal Co. v. Mahon*, found a "taking" in a pure regulation case. The claimant coal company alleged that a Pennsylvania law forbidding mining in a way that caused subsidence effectively appropriated its mineral rights. The Court agreed through a majority opinion by Justice Holmes, holding that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . . [T]his is a question of degree."[8]

Exactly what prompted this change of view is unclear,[9] as is why the Court never mentioned *Pennsylvania Coal* and its new perspective in either *Euclid* or *Miller*. What is clear, however, is that the viewpoint that a taking occurs when a restriction "goes too far" permanently altered the constitutional interest in regulatory control of private property and became the forerunner to a debate that continues today.

Finishing the First Century: The Issue Realized, the Battle Begins.

Having created the regulatory taking issue, the Court avoided almost all contact with it for the next half-century. It offered only two relatively unimportant decisions on regulatory taking between the confusing trilogy of the 20s and its next major decision fifty years later.[10]

This decision was *Penn Central Transportation Co. v. City of New York*,[11] in which Justice Brennan wrote a majority opinion

holding that the City had not unconstitutionally taken the claimant's property by denying two plans to build a tower on Grand Central Station. The opinion was important in many ways, all grounded in its effort to clarify the state of regulatory taking law.

At the most basic level, *Penn Central* held that there was such a thing as a regulatory taking,[12] but the Court had been unable "to develop any 'set formula'" for distinguishing a taking from constitutional regulation under the police power.[13] It then identified several factors which were influential in deciding past regulatory taking cases, two of which eventually became the basis of the controversy that reached its climax in *Lucas*.

If 105 years of regulatory taking jurisprudence teaches anything, it is that no single case can be used as a basis for extrapolating future holdings.

The first critical factor the Court identified was the legal basis for the regulation in question. If the regulation was a lawful exercise of the legislative body's police power, it was constitutional even when it prohibited "particular contemplated uses of land."[14] Zoning laws were a "classic example," Brennan wrote, citing *Euclid*.[15] Moreover, there were a number of precedents upholding regulations that "prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm." The opinion cited, *inter alia*, *Mugler* and *Miller*.[16] Did that mean that lawful police power regulations could never be takings? In the end Brennan hedged that bet, stating "a use restriction on real property may constitute a taking [if it fails the substantive due process test], or *perhaps* if it has an unduly harsh impact upon the owner's use of the property"[17] (emphasis added).

The second factor was impact. Brennan first rejected the claimant's assertion that denial of the use of its air rights was, *ipso facto*, a taking, responding that impact should be judged against the value of, and rights in, the fee simple as a whole rather than "a particular segment."[18] He then found that the regulation in question did not "go too far," primarily because the claimant retained all previous uses and the record reflected that he continued to receive a "reasonable return" on his investment.

Three members of the Court liked neither of the majority's analyses. Justice Rehnquist wrote a dissent for that group which was the first shot in the now-raging war over the essence of regulatory takings. The dissenters first thought the impact of the ordinance was unconstitutionally harsh, in part because they rejected the majority's holding that impact must be considered on the fee as a whole. They particularly disliked, however, the idea that a regulation might be constitutional without regard to impact merely because it was lawfully grounded in the police power.

The regulations upheld in *Mugler*, *Miller*, and related cases were not constitutional, Rehnquist wrote, simply because they were valid under the police power. They were constitutional because they prohibited nuisances. This "nuisance exception" to regulatory taking law "is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health, or welfare of others."[19] It was obvious to the dissenters that the contemplated use by the claimant would not have been a nuisance.

Thus this first skirmish in the takings war left two principal fronts of battle: 1) the standards a tribunal should employ in determining whether a regulation "goes too far;" and 2) the circumstances under which a governmental body can regulate without regard to impact on the property owner.

While the decade following *Penn Central* was the most active in the Court's history of deciding regulatory taking questions, for various reasons it made little progress towards working out either of these difficulties. Indeed, it was nine years until the Court again turned its attention to the substance of taking law. Ironically, the opportunity finally came in a case that could claim historical ties to the fundamental decisions in each of the developing camps. *Keystone Bituminous Coal Association v. DeBenedictus*[20] was a mirror image of *Pennsylvania Coal* and was also decided in the centennial year of *Mugler*.

Keystone said little about the impact issue. The majority opinion again found no taking, and again adopted the "entire fee" posture of *Penn Central*. Justice Rehnquist again dissented, and neither his opinion nor the majority offered further instruction on how far was "too far."

An obvious change had taken place, however, on the governmental authority issue. The majority still maintained that there were circumstances under which the impact of a regulation need not be considered to uphold constitutionality. But Rehnquist's dissent in *Penn Central* had now set the agenda. The majority's view was far more subdued than Brennan's had been for the *Penn Central* majority, holding that "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation."[21] No member of the Court took exception to this much narrower view of legislative prerogative. Nor did any suggest that there was *no* area of legislative authority, an absence that became ironic after *Lucas*.

The *Lucas* Decision: The Sides Square Off.

The most recent manifestation of this fundamental quarrel came in *Lucas*, unquestionably the most eagerly anticipated taking decision in history.

Lucas' attempts to explain away a century of precedents in two pages is a breathtaking endeavor.

The case arose from the South Carolina legislature's attempt to prevent erosion of the state's barrier islands by enacting a Beachfront Management Act (BMA), increasing previous restrictions on island development. The upshot for claimant Lucas was that he could no longer build permanent structures on two lots he had purchased two years earlier for almost $1 million.

The taking action was filed in state court,[22] which found for the claimant because the Act deprived him of "any reasonable economic use of the lots." The judge awarded $1.2 million as just compensation. The South Carolina Supreme Court reversed, 3-2, holding that the application was constitutional without regard to impact because the restriction was aimed at preventing "serious public harm," citing, *inter alia*, *Mugler* and *Miller*.

So the stage was set. There was a finding of fact that the regulation deprived a claimant of all reasonable use. There was also a legal determination that the regulation was properly aimed at preventing serious public harm. The obvious questions were which factor, in a direct showdown, was more significant, and why?

Often at such apparently opportune moments the Court disappoints. But not this time. Justice Scalia found four other justices to sign his majority opinion holding that 1) the elimination of all economically beneficial use is always a taking, and 2) that lawful grounding of the offending regulation in the police power does not nullify an unconstitutional impact. Justice Kennedy concurred, Justices Blackmun and Stevens dissented in separate opinions, and Justice Souter would have dismissed the writ.[23]

Scalia first addressed the impact question, beginning where *Penn Central* had, by admitting that the Court had never developed a set formula for determining how far was "too far." The majority then held that there were two categorical exceptions to the usual *ad hoc* nature of the taking inquiry -- when the government physically invades[24] and when "regulation denies all economically beneficial or productive use of land."[25]

The remainder of the impact analysis justified the second category. The most important aspect of the discussion took place in a footnote, where Scalia suggested a strong interest in dismantling the *Penn Central* view that the degree of diminution should be judged against the value of the entire fee. After taking a gratuitous swipe at the *Penn Central* characterization, he suggested that the interest taken must merely be one "accorded legal recognition" by the State's property law. This formulation is a far cry from Brennan's majority view in *Penn Central*, and very close to that offered by Rehnquist in his dissent in the same case.[26]

The Court then turned to the issue of whether the valid grounding of the Act in the State's police power saved its constitutionality. It began by admitting that "a long line" of precedents beginning with *Mugler* "suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation."[27] But it found the usual interpretation of those cases misleading for two closely-related reasons.

The first reason was that the earlier decisions, rendered in a day when the concept of the police power was still being defined, had used the "noxious" language simply to verify that the regulation in question was within the legislature's constitutional authority. Thus the language was never intended to create a special set of regulations free from an impact analysis under the taking clause.

The second reason was that as the understanding of the police power broadened, any difference between the kind of "harm-preventing" regulation around which the early precedents revolved and newer, "benefit-conferring" regulation had become merely semantic. The BMA might, for example, be considered either preventing harm or conferring a benefit. Therefore it was impossible to carve out a special category of regulations free from fifth amendment analysis, at least for cases involving real, as opposed to personal, property. This latter distinction was justified by indicating that superior protection for "land" was "part of our constitutional culture."[28]

The majority finished by throwing one very small bone to the South Carolina courts and to all others who supported a broader definition of legislative prerogative. There is a nuisance exception, Scalia wrote, if the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[29] In other words, if South Carolina could establish that the claimant's proposed use would have been a nuisance under common law, it had the right to prevent that use by legislation even if the impact deprived claimant of all economically viable use.

The Importance of *Lucas*: Property Law Redefined.

If 105 years of regulatory taking jurisprudence at the U.S. Supreme Court level teaches anything, it is that no single case can be used as a basis for extrapolating future holdings. Any attempt to restate or explain how the law has developed is impossible

outside the context of the times, the makeup of the Court, and particular facts of the case. Decisions have careened around the philosophical and political landscape, but none has ever overruled a previous one. More basically, though the decades have piled analytical tool upon analytical tool, no Court prior to *Lucas* had ever explicitly found a previous analysis unhelpful. One opinion has often ignored the analytical systems fashioned in previous decisions, but it has never besmirched them.

Even in this humbling context, *Lucas* seems a pivotal decision. On a more sweeping level, it is -- despite all faithful repetitions of Holmes' formula in other cases -- the only Court opinion since *Pennsylvania Coal* in 1922 to hold that a regulation went "too far."[30] More fundamentally, it apparently signals a shift in power toward a new conservative majority on the taking issue. The views of this majority are based on Rehnquist's dissent in *Penn Central* but go much further, becoming the most radical viewpoint on the taking issue ever expressed by the Court. In particular, *Lucas* 1) establishes a new view of how impact is analyzed and 2) greatly narrows the freedom legislatures have to regulate without regard to impact. Together, these views form nothing less than a brave new world of taking law, offering the most extreme constitutional protection ever afforded private property interests.

This is not a Paul Revere piece. If past is prologue, Lucas will have a short run on the constitutional stage, soon to be replaced by a more sensible regulatory taking jurisprudence.

Going Too Far: A Two-Tiered Analysis of Impact.

It is beyond question that the Court has always had difficulty both expressing and applying the idea that at some magical point an otherwise lawful regulation becomes unconstitutional because of its impact on private property. Yet all decisions after *Pennsylvania Coal* and before *Lucas* found the regulation in question constitutional either because of the important governmental interest it served or because it did not eliminate all of the claimant's economically viable uses of the property. The "governmental interest" half of that history is the most obvious victim of the *Lucas* majority. But the opinion effects an important change in the "economically viable use" aspect, and suggests an even more fundamental one.

For over a decade the Court has uniformly stated that a taking occurs when a regulation "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ."[31] The second half of that formulation clearly implies that any restriction *leaving* an economically viable use is *not* a taking. But Scalia's opinion in *Lucas* holds otherwise. By his analysis, any restriction that eliminates all economically viable use is a taking without further examination. Additionally, courts should employ a "case-specific inquiry into the public interest advanced in support of the restraint" in *other* impact cases.[32] The obvious upshot is that prior to *Lucas* only restrictions eliminating all economically viable use -- and perhaps not all of those -- were takings, yet afterwards all of those are definite takings, as perhaps are other, less-intrusive restrictions.

The problems such an analysis creates for state and local governments are substantial. Until now, these bodies could feel reasonably safe that a regulation grounded in the police power would be constitutional so long as it left an economically viable use. Now, owners can apparently bring taking actions even when left with an economically viable use by challenging the "public interest advanced in support of the restraint" in some kind of balancing test. The threat of such litigation will no doubt make governments more cautious of enacting beneficial but stringent legislation, and the reality of such litigation will no doubt cost the taxpayers millions of dollars in defense costs.

This serious problem will become a nightmare if the new majority also prevails on its apparent campaign to broaden the definition of "property" to include any interest recognized by state law. At present the idea exists only as a *Lucas* footnote with the *Penn Central* view of calculating impact on the entire fee interest remaining intact. The notion that any identifiable interest is entitled to separate protection under the fifth amendment is astonishing. Carried to a logical conclusion, the concept could virtually paralyze the economic regulation of land. The mind boggles at the consequences if air rights, water rights, mineral rights, incorporeal hereditiments, the rights to be free from trespasses or nuisances, and all identifiable possessory rights are each entitled to individual protection under the fifth amendment. Add to that the possibility that interference which falls short of appropriation could also be unconstitutional under the "public interest advanced" theory, and it is hard to imagine a restriction that *could not* be challenged in good faith.

The New Property: Legislatures Bridled.

The above mentioned issues are further compounded by the more serious holding of *Lucas* that if a regulation eliminates all economically viable use, no degree of public importance can

sustain its constitutionality. The most striking aspect of this part of the decision is its willful and disingenuous treatment of precedent.

A full one hundred years of cases from *Mugler* to *Keystone* held that the legislature had *some* authority to eliminate harmful uses without regard to impact on affected owners. *Mugler, Miller*, and *Penn Central* defined that authority broadly; *Keystone* defined it more narrowly. But never had the Court suggested that there was *no* authority. The Court's attempt in *Lucas* to explain away this century of precedents in two pages was a breathtaking endeavor. (If previous holdings had been insufficient to make the historical point, there had also been active debate within the Court on the topic stretching from Justice Brandeis' dissent in *Pennsylvania Coal* to Rehnquist's own dissents in *Penn Central* and *Keystone*.)[33]

The idea that a legislature cannot regulate real property use without regard to impact is more than novel, it is terrible constitutional policy. If Kansas again prohibited liquor would it now have to pay Peter Mugler? Could Virginia no longer require cutting the cedar trees without awarding "just compensation?" Can we no longer shut down air pollution violators or stream polluters without paying them to quit? Of these cases, only the cedar rust instance is probably a common law nuisance. Yet, in every instance, *Lucas* would seem to deny the ability to regulate without compensation if the owner had no further economically viable use.

All of this is rendered even stranger by the majority's view that because of our "constitutional culture" land (or "real property") is more protected than "personal property" by the word "property" in the fifth and fourteenth amendments. After *Lucas*, the Insurance Commissioner can wipe out a company with a single regulation imposing a standard the company cannot meet, but the state, regional, or local governing body cannot restrict a harmful land use without facing either an automatic taking claim (if the regulation eliminates all economically viable use) or a circumstantial one (if it does not).

Conclusion

This is not a Paul Revere piece. If past is prologue, *Lucas* will have a short run on the constitutional stage, soon to be replaced by more sensible regulatory taking jurisprudence. At the very least, it seems likely that the Court will reject the most extreme possibilities the case portends.

But at the moment *Lucas* is the law and has expanded protection of private (real) property under the fifth and fourteenth amendments to a level never reached in constitutional history. If one thinks back through the history of adjudication under the taking clause, back through the Nine Old Men of the 20s and 30s, back through the *Lochner* court of the early 1900s, and eventually back to the Harlan I Court of the post-Civil War era, that is a remarkable statement.

Notes

1. 112 S. Ct. 2886 (1992).
2. The Court first decided in the *Slaughter-House Cases* that the fourteenth amendment's prohibition that "nor shall any State depreive any person of . . . property, without due process of law" did not limit police power actions. 83 U.S. 36, 80 (1872). This view began to reverse itself shortly afterwards, though, and by Lochner v. New York, 198 U.S. 45 (1905), "substantive due process" was in full bloom.
3. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
4. Mugler v. Kansas, 123 U.S. 623, 668-69 (1887).
5. Village of Euclid v. Ambler Realty, 272 U.S. 365, 384 (1926).
6. 276 U.S. 272, 280-81 (1928).
7. *Id.* at 279-80.
8. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).
9. For one view, *see* Michael Davis & Robert Glicksman, *To the Promised Lnd: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 ORE. L. REV. 393, 415-419 (1989).
10. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Goldblatt v. Hempstead, 369 U.S. 590 (1962).
11. 438 U.S. 104 (1978).
12. *Penn Central*, 438 U.S. at 123, n. 25.
13. *Id.* 438 U.S. at 124.
14. *Id.* at 125.
15. *Id.*
16. *Id.* at 125-27.
17. *Id.*
18. *Id.* at 130.
19. *Penn Central*, 438 U.S. at 145 (J. Rehnquist, dissenting).
20. 480 U.S. 470 (1987).
21. *Keystone*, 480 U.S. at 492.
22. One of the significant developments in the *procedural* law of regulatory takings during the 80's was an increasingly strict application of the "ripeness" doctrine to taking claims. One aspect of that application was a determination that a claim could not be brought in federal court unless state judicial remedies had

been exhausted. Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172, 186-97 (1985).
23. 112 S.Ct. 2886, 2902-26 (1992).
24. This was decided in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-40 (1982).
25. *Lucas*, 112 S.Ct. at 2893.
26. *Id.* at 2894, n. 7.
27. *Id.* at 2897.
28. *Id.* at 2900.
29. *Id.*
30. Technically, the Court did not "hold" the South Carolina law a taking as applied to the claimant's property. The State still had the option of proving that two beach homes built on the island would have been a common law nuisance, but that seems extremely unlikely.
31. Agins v. Tiburon, 447 U.S. 255, 260 (1980).
32. *Lucas*, 112 S.Ct. at 2893.
33. Brandeis began the "noxious" use debate in *Pennsylvania Coal* by opining that legislatures have a broader degree of authority when regulating noxious uses. 260 U.S. at 422 (Brandeis dissenting). Also, it is impossible to read Rehnquist's dissent in *Penn Central* as not recognizing an area of legislative authority. 438 U.S. at 145 (Rehnquist dissenting).

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