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THE LUCAS DECISION: IMPLICATIONS FOR MINING LAW REFORM CASENOTE

*David H. Lucas, Petitioner v. South Carolina Coastal Council*

112 S. Ct. 2886, 120 L.Ed.2d 798 (1992)

In June of 1992 the United States Supreme Court decided that “total regulatory takings must be compensated” unless the state is able to prove that the prohibited land use would have been prohibited by principles of nuisance and property law applicable when title was acquired. While this holding accords with notions of basic fairness, i.e., it’s not fair to change the rules in the middle of the game, it may unreasonably limit the flexibility of legislative bodies to respond to new information and changing public values.

For example, laws governing property disposition and land tenure tend to be long-lived. During the life of these laws social goals change and information about previously unknown public harms may be acquired. The *Lucas* decision indicates that if legislatures change laws to prohibit activities that were previously lawful but are now deemed harmful, they may have to compensate the owners if their regulatory action “denies an owner economically viable use of his land.”

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2. Id. at 806-807.
3. Id. at 813 quoting Agins v. City of Tiburon, 447 U.S. 255 at 260. This holding is in contrast to a long line of cases in which it was held that total takings had occurred but no compensation was due for previously lawful activities. See Mugler v. Kansas, 123 U.S. 623 (1887), in which the Court upheld an ordinance effectively prohibiting operation of a brewery; Powell v. Pennsylvania, 127 U.S. 678 (1888), in which the Court upheld legislation prohibiting the manufacture of oleomargarine; Hadacheck v. Sebastian, 239 U.S. 394 (1915) upheld an ordinance that prohibited the operation of a brickyard; Goldblatt v. Hempstead, 369 U.S. 590 (1962) in which the Court upheld a law effectively prohibiting continued quarry operations in a residential neighborhood. The rationale in these cases was best expressed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) “in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed . . . recognized real property interests.” Id. at 125. This is the so-called nuisance or noxious use exception to the Fifth Amendment compensation requirement.

Justice Scalia, the author of the *Lucas* opinion, then goes on to say that this nuisance exception was simply the early expression “of the police power justification necessary to sustain (without compensation) any regulatory diminution in value.” Lucas v. South Carolina Coastal Council, 120 L.Ed.2d 798, 819 (1992). He distinguishes these regulatory “diminutions” which do not require compensation from regulatory total takings, which must be compensated. In *Lucas* it was an unreviewed predicate that a total taking had occurred so Justice Scalia dismisses this line of cases.

However, his assumption that the facts in the Mugler line of cases would sustain a finding that their value was diminished any less than was Lucas’, is unconfirmed and subject to skeptical scrutiny. This issue should be re-examined in future takings cases and might go a long way toward limiting *Lucas* by its procedural posture.
In 1993, two bills\(^4\) have been introduced in the U.S. Congress which potentially affect vested property rights as did Lucas. These very similar bills are the latest in a long line of legislation that has attempted to modernize the General Mining Law of 1872.\(^5\) In the last several Congressional sessions these bills have converged dramatically and a consensus exists that some revision of the old law is essential. If either bill or a close compromise were to pass and be signed into law, it is likely that the law could be challenged as an unconstitutional taking per se. Failing that, if the law is found to be a constitutional exercise of the government's police power then mining claim owners may still sue for damages if the application of the law to their property can be shown to be a taking under Lucas.\(^6\)

This paper briefly summarizes the Lucas facts, the holding, and the takings jurisprudence expressed in the opinion. Because the issue of compensation in Lucas rests on a contrast of the legal regime at the time title was taken and the application of a later law which prohibits a previously lawful use of the property, the next step is to contrast key provisions of the 1872 Mining Law to analogous sections of the proposed mining reform bills to determine the areas where challenges to the application of mining reform laws may succeed under Lucas jurisprudence. Finally, the paper concludes with a brief summary of several significant implications of the Lucas decision and speculation for the future of Lucas under the "Clinton Court."

THE LUCAS FACTS AND HOLDING\(^7\)

In 1972, Congress passed the Coastal Zone Management Act\(^8\) which expressed Congress' goal of protecting the public from shoreline erosion and coastal hazards\(^9\) by eliminating development in high

\(^{4}\) S. 257, 103rd Cong., 1st Sess. (1993); this bill will be referred to as the Bumpers Bill. H.R. 322, 103rd Cong., 1st Sess. (1993); this bill will be referred to as the Rahall Bill.


\(^{6}\) Lucas, 120 L.Ed 2d 798 (1992) did not challenge the constitutionality of the law which effected the claimed taking of his property. Had he done that and had it been sustained, only a declaratory judgment or a writ of mandamus could issue. Lucas had mortgaged his personal residence to buy the property in dispute and therefore wanted damages. He sued saying that when he bought the property his intended use, residential development, was allowed, that a subsequent law (while a valid exercise of police power) prohibited the previously allowed use and thereby made the property worthless and constituted a compensable taking.

The analysis contained in this paper relates solely to the application of valid laws which, as applied, may constitute takings.

\(^{7}\) For an excellent summary of the Lucas facts, procedure, and holding, see L. Watters, Viewpoints: Takings—Lucas v. South Carolina Coastal Council, the Facts and Holding, Nat. Res. Law Institute News 6, 6-7 (1993).

\(^{8}\) Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq.

\(^{9}\) Lucas, 120 L.Ed 2d at 826.
hazard areas. South Carolina implemented this directive by enacting the South Carolina Coastal Zone Management Act of 1977 which required a permit for any construction in designated critical areas. In 1986, developer David Lucas took a $900,000 mortgage, which also covered his principal residence, and bought two lots in non-critical areas for the purpose of residential development. In 1988, the South Carolina Legislature passed the Beachfront Management Act and expanded the definition of critical areas in a way that prohibited residential housing on Lucas' lots. Lucas sued in the South Carolina Court of Common Pleas. He did not challenge the validity of the Act as a lawful exercise of the state's police power. He simply claimed that the effect of the law was to take (make valueless) his property for a public purpose and that he was due compensation. The trial court found that the law created a permanent ban on Lucas' property of "any reasonable economic use" which rendered the lots "valueless." The Court held that a taking had occurred and ordered the Council to compensate Lucas $1.2 million dollars.

The Coastal Council appealed and the South Carolina Supreme Court reversed because, they said, as long as Lucas did not contest the legislative findings that such development was harmful, then under the Mugler line of cases his intended use was a nuisance and not compensable. Lucas petitioned the United States Supreme Court and certiorari was granted.

Because the South Carolina Supreme Court did not review the trial court's finding that there had been a total taking, the majority used that predicate as well and, outside of dicta, only examined the issue of compensation. The court held that "where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." The Court remanded the case for reconsideration of the compensation question based on nuisance and property law extant when Mr. Lucas purchased the lots.

14. L. Watters, supra note 7, at 6.
16. Lucas, 120 L.Ed 2d at 820.
LUCAS TAKINGS JURISPRUDENCE

After over a hundred years of confusing and sometimes apparently mutually exclusive methods of analyzing takings facts, Lucas charts a fairly clear path through the maze. It is important to remember that the constitutionality of the offending law was not questioned. It was only claimed that because a total taking had occurred, compensation was due even if the legislature, subsequent to purchase, declared the intended use harmful to the public interest.

Under Lucas, a practitioner need only answer three questions clearly. First, have all preliminary questions such as ripeness and standing, been resolved in such a way that going forward is correct? Second, is the property owner able to prove that a taking has occurred? Third, if a taking has occurred, is the state able to prove that such a taking would not be compensable under nuisance and property law extant at the time the owner acquired title? Each of these questions may be analyzed using lines of inquiry suggested by the Lucas decision even though the Lucas facts obviated the need to analyze the second question.

Preliminary Questions

Although a thorough discussion of preliminary questions is beyond the scope of this brief paper, these issues are important and should not be neglected by the practitioner. Constitutional standing should be argued in the light of Lujan v. Defenders of Wildlife. One of Justice Kennedy's concerns in his opinion, concurring in the Lucas judgment, is that a petitioner must show that she had the "intent and capacity to develop the property and failed to do so because the state prevented (the development)." This concern relates logically to the most essential element of standing: injury-in-fact. It is essential that concrete injury, causation, and redressability be clearly shown.

The second preliminary issue in Lucas is ripeness. This was addressed by Justices Scalia for the majority), Kennedy (concurring), Blackmun (dissenting), and Stevens (dissenting). These opinions underscore the importance of this issue. If the offending law has been amended since suit commenced, there may still be compensation due for a temporary taking even if the offense has been rectified. The facts must be analyzed to determine whether a claim of a temporary taking is justified even if the claim of a permanent taking may have to wait for resolution of the issue under an amended statute.

18. Lucas, 120 L.Ed. 842 at 824.
Has there been a taking?

Amendment V of the United States Constitution states that "private property [shall not] be taken for public use without just compensation." This is applied to the States through the Fourteenth Amendment. This issue can arise in several ways. First, if the government needs a private property for a public purpose it can institute eminent domain proceedings and pay the owner just compensation for the physical condemnation of the property. Second, inverse condemnation is the term used to describe the cause of action under which a landowner may recover compensation for a governmental taking even if condemnation proceedings have not been initiated. This process is sometimes referred to as a regulatory confiscation.

In general, the confiscation or restriction must rise to the level of a total taking that is tantamount to a physical appropriation and leaves the land valueless to the owner. Justice Scalia notes that three categories of regulatory action are compensable without further fact-specific inquiry: 1) regulations which require a physical invasion of private property; 2) regulations which deny "all economically beneficial or productive use of the land," and 3) regulations which do not "substantially advance legitimate state interests." In Lucas, the trial court found that the effect of the law was to leave the land valueless. The South Carolina Supreme Court did not review this finding. The petition for certiorari assumed a taking based on the total loss of value found by the trial court. The respondents' Brief in opposition did not contest that assumption. Therefore, Justice Scalia says that the United States Supreme Court declines to entertain argument on whether the land became valueless. They proceed on the assumption that it was rendered valueless and that therefore a taking did occur.

Should the taking be compensated?

The basic tension here is between the state's legitimate use of its police power to protect the citizenry and the fear of state overreaching and confiscation of property simply by declaring such property harmful or noxious. Justice Scalia notes that "many of our prior opinions have suggested that 'harmful or noxious use' of property may be proscribed by government regulation without the requirement of compensation." The real issues to the majority are: 1) is the regul-

21. Id. at 257.
22. Lucas, 120 L.Ed. 2d at 812.
23. Id. at 813.
25. Id. at 851.
26. Id. at n. 9, 816.
27. Id. at 817.
tion reasonably formulated to protect the health, safety, morals, and general welfare of the public and 2) is the level of restriction appropriate to that benefit? If the answer to both is "yes," then apparently a regulation would be upheld even if it constituted a total taking and compensation would not be due. This is Justice Scalia’s update on the "noxious use" doctrine.28

There is one very big caveat. The laws which effectively prohibit certain activities must be in place when title to the property was acquired.

Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owners estate shows that he proscribed use interests were not part of his title to begin with.29

The inquiry under state nuisance law will include analysis of: 1) the degree of harm to public lands and resources or adjacent private property, posed by the claimant's proposed activities, 2) the social value of the claimant's activities and their suitability to the locality in question, and 3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant or the government.30 If similarly situated landowners were engaged in the prohibited activity when the litigant purchased the property it is evidence that at that time there was no common law prohibition restricting the owners right to conduct the same activity. Scalia adds that "changed circumstances or new knowledge may make what was previously permissible no longer so. . . ."31

This summary of current takings jurisprudence can be succinctly summarized (Figure 1). In Lucas the Supreme Court accepted the unchallenged finding of the trial court that the land was rendered valueless and that a "total taking" had occurred. They remanded to state court for a determination of applicable state law at the time of purchase of the property.

The Lucas case centers around the property rights of individuals when the legislative branch changes laws and regulations to respond to a public demand for a greater measure of environmental protection. The issue is, does the application of the new law to that individual constitute a compensable taking under the Fifth Amendment? This question is also central to proposed reforms to mining law. Two

28. Id. at 818.
29. Id. at 820.
30. Id. at 822.
31. Id.
Property Owner's burden of evidence $\leftarrow$ State's burden of evidence $\rightarrow$

If applicable law would not have allowed the restriction when title passed.

SHOULD THE TOTAL OR PARTIAL TAKING BE COMPENSATED?

if YES

If applicable nuisance and property law would have allowed the restraint when title passed.

NO

HAS THERE BEEN A TAKING?

PRELIMINARY ISSUES

1. Does the law allow a physical invasion?

or

1. Ripeness

2. Does the law fail to advance a legitimate state interest?

if NO

or

3. Does the law deny all economically viable use of the land?

No Fifth Amendment taking has occurred.

Figure 1. Analytical sequence for determining whether compensation must be paid when a law or regulation which is a legitimate exercise of the police power effects a taking. Based on Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 120 L.Ed 2d 798.
### CONTRASTING PROPERTY RIGHTS

The features of mining law which are the most controversial under mining law reform are: the right to self-initiation, extralateral rights, the ownership interest in the minerals, the right to mine, the

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33. Supra note 4, the Bumpers Bill.
34. Supra note 4, the Rahall Bill.
right to patent, environmental protection, and the return to public. For
the sake of brevity, the treatment of each of these under the 1872 Law
and the Bumpers and Rahall bills is simplified and summarized in Fig-
ure 2. The bills show a remarkable convergence. Very few important
provisions retain significant differences. However, there are signifi-
cant differences between these bills and the law governing existing claims.
Both bills specify that existing claims must convert to the new system
within three years or be forfeited. For each category given on Figure
2 the following discussion will apply the jurisprudence of Lucas, sum-
marized in Figure 1, to the individual issues raised by mining reform.

Right to Self-initiation

Although claim location requirements are changed in the Bumpers
and Rahall bills, the basic right to self-initiated exploration has been
retained and this is unlikely to be a takings battleground.

Extralateral Rights

Both pending bills would totally eliminate extra lateral rights. Exis-
ting claims with extralateral rights would have three years to fol-
low the vein. Apparently, then their right would be extinguished and
any remaining mineral would belong to the claim vertically above the
mineral. Under Lucas this may be a taking because the new law would
allow a physical invasion of the mineral by another and because all
right to that economic resource would be extinguished. Such a taking
would probably be compensable because the law of existing claims would
not have allowed such an appropriation.

Ownership of Minerals

Under the old law pre-discovery rights were only those of pedis
possessio, the right to explore and defend your claim against all oth-
ers while you physically occupied the claim. Under proposed reforms
those rights accrue when a claimant has validly located the claim by
posting and filing. The right under proposed reform is more substantial
than the earlier right, therefore this is unlikely to create a takings con-
trovery. Ownership interests in valid perfected and converted or
patented claims would not be significantly changed under either min-
ing reform bill. Therefore, it is unlikely that these provisions could be
found to constitute an unconstitutional taking.

35. These bills have very similar or identical wording on these issues with the one
exception noted in the Figure (return to public). For reasons of space, the gist of both
bills is given in the Mining Reform column.
36. S. 257, § 404(a) and H.R. 322, § 404(a).
37. Supra note 4, at § 103 in both bills.
Right to Mine

This is likely to be a major takings battleground under either mining reform bill. Under the 1872 Law the government had no discretion to deny the right to mine to claimants who had complied with some relatively simple requirements. Under either the Rahall or the Bumpers bill there is no absolute right to mine. That right is transformed into a privilege which may be denied at the discretion of the Secretary. Because the United States retains title to the land, a claimant’s only real economic property right is the right or privilege to mine. If that is denied, then under Lucas all economically viable use of the land is withdrawn and the act of denial would probably constitute a taking.

The determination of whether the taking is compensable will probably depend on the interpretation of the conversion provisions. All claims must be converted or forfeited within three years of the effective date of the law. If it is found that a converted claim has no relation back to the applicable law when the claim was perfected, then the converted claim probably would be found to adopt the new law and that law allows denial of the privilege to mine.

A side issue that was not questioned in Lucas but may be important in this area in the future is the significance of investment-backed expectations. In Lucas, clearly the developer had satisfied this threshold issue, but what if a mining claim has been perfected under the old law, has maintained all required assessment and filing work but has not developed an operating mine and neglects to convert the claim. Under either bill, the claim would be forfeited, thus extinguishing an absolute right to mine. The right to mine was an unexercised or “fallow” right and it is not clear if that right can be extinguished without incurring liability for compensation.

Right to Patent

Under either Rahall or Bumpers, the right to patent is completely extinguished. Although similar analysis to the right to mine would apply, it is unlikely that this will be considered a takings problem. Very few claims have gone to patent in recent years and mining interests don’t seem to want to use their political capital fighting to preserve this former right.

Environmental Protection

The issue here will be if the changed requirements tip a marginal existing/converted claim into the unprofitable side of the balance sheet, then does the application of the new law to that operation constitute a taking? Because the United States retains title to the land
and the mineral wealth is the only economic benefit a claimant may derive from the land, the answer may be yes. Again, the compensation issue would depend on the interpretation of the conversion provisions.

Return to the Public

The rentals, user fees, and royalties required under the proposed legal regime would affect the overall profitability of the mining operations. The analysis would parallel that for the environmental protection provisions.

CONCLUSION

In Lucas, the United States Supreme Court decreed that "total regulatory takings must be compensated"38 unless laws applicable to the land at the time title passed would have prohibited the intended use. The majority defines total takings to include laws which allow physical invasions of property, laws which fail to advance legitimate state interests, or laws which deny economically viable use of the land. In Lucas the United States Supreme Court accepted as unreviewable the ruling of the trial court that the taking was total and remanded the case to determine if applicable nuisance and property law at the time Lucas purchased the property would have allowed his intended use. If so, as must certainly be the case, then the Coastal Council must compensate Lucas.

One area of property law for which major revision is proposed is mining law. Even if, as was the case in Lucas, the final law survives Fifth Amendment scrutiny, the application of the law to individual claimants will no doubt test the Lucas jurisprudence. If it is found that under the new law mining is either totally prohibited or made economically unprofitable (constructive prohibition) then it may be found that a compensable taking has occurred under Lucas.

If this decision is interpreted broadly there are several significant implications. First, the decision could be a powerful force to ensure the status quo in laws and regulations affecting property. Often state and local governments are the primary land use regulators (although that may not be true for mining law). State governments may have Eleventh Amendment immunity from damage awards but local governments are vulnerable and may think twice before changing the laws even if they believe change to be in the public interest.

Vulnerable regulatory agencies have at least two possible protections implied by the Court. First, laws and regulations should be

38. Lucas, 120 L.Ed. 2d at 819.
written with variance provisions. Then developers would have to, at least, seek variances before the case would be ripe for resolution by the courts. That would give regulators a chance to examine the difficult cases closely and weigh the public interest against the risk of compensation. Second, governments could use the power of eminent domain to compel scenic easements to prevent development. The issue would be: what is the value of a scenic easement if it effectively prohibits development and the land loses all economic value. It would be a good idea for regulators to hold hearings with developers to mediate "fair" valuation methods prior to specific disagreements.

In addition, if the requirement of compensatory payment for regulatory change makes legal change more difficult, then the Lucas decision favors property owners who already have substantial interests before any change. Either the existing law will continue unchanged or they will be compensated. But newcomers to the system would have to conform to any changed law and would not be compensated for lost rights. These implications favor the status quo.

Second, Lucas could lead to a lack of uniformity in the application of the Fifth Amendment. Most nuisance and property law is state law and if compensation depends on the laws of each of the states then there could be considerable difference in interpretation of a basic constitutional right. If that happened, eventually, the whole problem would work its way back to the Supreme Court for decision to resolve any split among the Circuits.

However, the Court has changed considerably since Lucas and future Supreme Court decisions could limit that decision. Brennan, Marshall, and Powell are no longer on the Court. Kennedy, Souter and Thomas have joined the Court. White has announced his retirement and there is speculation that Blackmun will retire soon. The Justices who since 1987 tend to find that takings have occurred are: Rehnquist, Scalia, O'Connor, White, and now Thomas. Stevens and Blackmun tend to find that takings have not occurred. If White is replaced by a liberal, the balance is close to even (4/3 in favor of takings and conservative property rights). Kennedy and Souter will be the swing votes. Blackmun would probably be replaced by a liberal and would not upset this analysis.

Therefore, even though Lucas militates against property law change in general because such changes might trigger compensation,

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39. This conclusion is based on a brief tally of whether individual justices found that there had been or had not been a taking in four landmark takings cases in 1987 and in the Lucas case. The four 1987 cases are: First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Hodel v. Irving, 480 U.S. 470 (1987); and Keystone Bituminous Coal Association v. de Benedictis, 480 U.S. 470 (1987).
the future Court could always point out that the only issue in *Lucas* was: when a total regulatory taking has occurred must it be compensated? Then, the Court could take a step back and decide the preliminary issue, has a taking occurred. The future Supreme Court may decide that issue very differently than did the South Carolina Court of Common Pleas.

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