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THE CONSTITUTIONAL DIMENSIONS OF PROPERTY: A DEBATE

*Joseph L. Sax**

I. INTRODUCTION

For more than half a century the United States Supreme Court virtually ignored claims that regulatory enactments constituted takings of property. In that atmosphere, it was inevitable that regulatory excess would occur and that the Court would eventually again turn its attention to the takings issue. Indeed, it was Justice William Brennan, one of the leaders of the Court's liberal wing, who in 1981 opened the way to restoring property issues to the constitutional agenda.¹ By 1987, with a new conservative majority in place, the Court made clear that it was preparing to take a fresh look at the constitutional law of property rights.²

II. THE SETTING: *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

The case the Court chose as its instrument was *Lucas v. South Carolina Coastal Council*.³ In 1986, David H. Lucas bought two shoreline

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1. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan dissented from the majority's unwillingness to decide the temporary takings issue, saying "[a]fter all, if a policeman must know the Constitution, then why not a planner." *Id.* at 661 n.26 (Brennan, J., dissenting). Justice Brennan was shocked by the advice given by one city attorney to his colleagues, discussing regulations challenged for unconstitutionality: "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START ALL OVER AGAIN. . . . 'See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war.'" *Id.* at 655 n.22 (Brennan, J., dissenting) (quoting James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUN. L. REV. 175, 192-93 (1975)).

2. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Though *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (5-4 decision), was decided against the property owner, the closeness of the case and the vigor of the dissent only underlined the Court's new concern about property. Two members of the *Keystone* majority, Justices Marshall and Brennan, no longer sit on the Court.

An earlier decision signalled the Court's willingness to examine this issue. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. 112 S. Ct. 2886 (1992). At the time of the debate from which this Essay is drawn, *Lucas* had been briefed and orally argued, but not decided. I have retained the general format of the debate here, not incorporating ideas drawn from the Court's subsequent opinion. An

lots on a barrier island known as the Isle of Palms.⁴ At that time it would have been lawful for him to build a house on the landward portion of each lot, though parts of his land had been regulated as within a critical coastal zone since 1977.⁵ In 1988, South Carolina enacted the Beachfront Management Act under which new setback lines were established, and no construction of habitable structures was permitted seaward of the setback line.⁶ The setback line was established landward of Lucas's lots so that all of his property was within the newly established no-construction zone.⁷ The island had a history of severe episodic erosion.⁸ Lucas's lots had been entirely underwater as recently as 1963, and in 1973 a pond formed over a portion of the lots, though they were not under water in the 1980s.⁹

Lucas claimed the 1988 law took his property without compensation. The trial court made a factual finding that Lucas's land had been made valueless by the enactment.¹⁰ The South Carolina Supreme Court, assuming without deciding the factual correctness of the finding on diminution of value, held that the building restriction was a lawful exercise of the state's police power and did not constitute a taking for which compensation was constitutionally required, regardless of the extent of diminution in the value of the land.¹¹

Lucas did not challenge either the reasonableness or the validity of the law. The central argument he presented to the Supreme Court was that no matter what harm building a structure on his land would cause,

analysis of the decision itself will be the subject of a second presentation and a second Essay in this Review.

The Court granted review of several potentially significant property cases in the 1991 Term, but only *Lucas* led to a major discussion of the takings doctrine. See *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Romein v. General Motors Corp.*, 112 S. Ct. 1105 (1992); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), cert. granted, 112 S. Ct. 414 (1991), cert. dismissed, 112 S. Ct. 1151 (1992); see also *Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (holding that city ordinance conditioning nonresidential building permit on payment of fee to offset burdens caused by low-income workers employed on project was not unconstitutional taking), cert. denied, 112 S. Ct. 1997 (1992). I have omitted the discussion of *Yee* that took place in the debate because of the Court's very limited disposition of that case.

4. *Lucas*, 112 S. Ct. at 2887.

5. *Id.* at 2889.

6. Beachfront Management Act (BMA), 1988 S.C. Acts 634, amended by 1990 S.C. Acts 607 (current version at S.C. CODE ANN. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1991)).

7. *Lucas*, 112 S. Ct. at 2889.

8. *Id.* at 2905.

9. *Id.*

10. *Id.* at 2887.

11. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), rev'd, 112 S. Ct. 2886 (1992).

assuming it is the only economically viable use of the land, the owner has a constitutionally protected property right to do that harm, or to be compensated.¹² Justice Scalia identified the extraordinary nature of Lucas's primary claim with a question he posed at the oral argument: "Scalia then asked if the state should be made to pay even if its action is to save a city."¹³ "If the land had value before and you take it away, then it's a taking, [Lucas's attorney] replied."¹⁴

Lucas wanted to prevail solely on the claim that a total diminution of value was a compensable taking, no matter what the circumstances. However, there was also a good deal of debate about the purposes and needfulness of the law.

The South Carolina statute is by no means a model of clarity, but it certainly was not simply an effort to make beaches more attractive to tourists by demanding that landowners maintain their shoreline land in its natural state, as some critics have charged.¹⁵ Among other things, the law states that it was designed to "protect life and property" including "adjacent property."¹⁶ It was calculated to achieve those results by requiring maintenance of a buffer against storms such as the hurricanes that periodically cause devastating damage along the Atlantic Coast. The law also was structured as a response to risks to third parties created when disaster relief is provided as part of post-storm emergency management. In addition the statute states that other erosion control devices had "not proven effective" and that it was adopting measures for existing structures as well as undeveloped land, to phase out ineffective measures over time and to encourage a policy of retreating back from the unstable coastal area.¹⁷ Among the several goals stated in the law, these—protection of life (at least lives other than those of the regulated owners), adjacent property and facilitation of disaster relief—are all directed to avoidance of adverse external impacts anticipated from development of the land being regulated. The law seems strongly focused on the risks of storm disaster, and was enacted to limit the external harms caused when

12. *See Arguments Before the Court*, 60 U.S.L.W. 3609, 3610 (U.S. March 10, 1992).

13. *Id.*

14. *Id.* "But [the attorney] said his 'fallback' position would recognize a 'public necessity' exception to the economically viable use rule. But that exception is not implicated here, he said." *Id.* The public necessity exception to which he referred is the extremely rare sort of case in which a building is destroyed by a city to prevent the spread of fire. *See Bowditch v. Boston*, 101 U.S. 16 (1879), *cited in* Petitioner's Brief at 43, *Lucas* (No. 91-453).

15. The background of the Act is set out in Respondent's Brief at 28-35, *Lucas* (No. 91-453); *see also* Brief of Nueces County Texas et al. as Amici Curiae in Support of Petitioner at 4-15, *Lucas* (No. 91-453).

16. S.C. CODE ANN. § 48-39-250(1)(a) (Law. Co-op. Supp. 1991).

17. *Id.* §§ 48-39-250 to -280 (Law. Co-op. Supp. 1991).

violent natural forces strike developed barrier beach lands such as those where Lucas's tracts were located.

The South Carolina law followed scholarly and government studies that pointed to serious harms from precisely the sort of construction prohibited in the *Lucas* case.¹⁸ Hurricanes and storms cause man-made structures to be broken apart and these parts become projectiles that are carried by wind and wave, creating significant peril to nearby construction—which occurred on this very shoreland during Hurricane Hugo in 1989—and impeding the work of public emergency services.¹⁹ Storms on barrier islands raise the water table and lead to failure of septic and wastewater systems. Sewer lines and septic tanks for near shore homes are often severed or uncovered, causing contamination of coastal waters and shellfish beds.

Building in storm hazard areas also imposes costs on the public for disaster relief. It is not simply a matter of risks one takes that his or her own property may be destroyed. Others beside the owners come into developed areas, and they are put at risk in times of natural disasters. In evacuating individuals, rescue workers must contend with downed power lines and dangerous debris; they too are put at risk.

Undoubtedly, achieving the goal of storm damage minimization also enhances a community's attractiveness as a tourist destination. Disasters discourage tourists, as San Francisco found after its earthquake in 1989. But the fact that tourism will benefit and is important to the state does not diminish the law's other health and safety purposes. That the state did not require preexisting houses on the beach to be torn down, another fact that critics cited, does not support the claim that there must not have been a very serious danger to the public. It is very common to make regulations—even of the most serious hazards such as earthquake and fire—prospective only. Such grandfathering is a well-accepted form of concern for owners with existing investments, even though it represents a failure to impose full, or fully symmetrical, control of hazards.²⁰

18. Brief of Nueces County Texas et al. as Amici Curiae in Support of Respondent at 8-9, *Lucas* (No. 91-453).

19. John R. Nolon, *High Court's 'Lucas' Decision Leaves Shifting Sands in Regulatory Takings Law*, N.Y. L.J., July 8, 1992, at 1, 8.

20. See *City of New Orleans v. Dukes*, 427 U.S. 297, 305-06 (1976); cf. *Nordlinger v. Hahn*, 112 S. Ct. 2326 (1992) (sustaining differential property taxes on old and new residents, which disproportionately favor longtime property owners in inflationary market, as stabilizing neighborhoods and recognizing longtime owners' greater reliance interest, as against equal protection claim).

III. THE QUESTIONS THE SUPREME COURT WANTED TO RAISE

The interesting question that the grant of review in *Lucas* was no doubt meant to pose was whether the regulatory history of recent decades calls either for a significant shift in takings doctrine or for a significantly expanded judicial role in reviewing legislative judgments about the propriety of regulation. I believe that neither change is called for.

Indisputably, the Takings Clause *is* about government abuse of power. As my description of the case reveals, however, I doubt that *Lucas* itself involved such an abuse. The Takings Clause *does* require judicial review of regulatory government action, but it does not require any major restructuring of takings law. A sensible implementation of a proportionality principle—assuring that there be a fit between the problem and the remedy—answers most regulatory excess aspects of the takings problem.²¹ Is the remedy the government has chosen proportional to the problem created by regulated use of property? The more far-reaching a regulation's impact on a property owner, the more serious the problem that gave rise to it must be to meet a test of proportionality. But proportionality is simply a commonsense precept of rational governance. Its demands fall far short of claims asserted by Lucas and his allies—those of absolute right of use regardless of the gravity of the problem presented by use, or the constitutionalization of the law of nuisance.

IV. THE ROLE OF THE JUDICIARY

How extensive should judicial review of the propriety and proportionality of regulation be? There is no pat answer to such a question. It is in part a question of judicial activism, of the appropriate degree of judicial deference to legislative judgments. Certainly the same scope of judicial inquiry is not appropriate to all constitutional rights—such as property and First Amendment rights.

In areas like free speech and religion, the fundamental premise is that government should stay out. In such areas, more extensive judicial scrutiny of legislative action is warranted. The First Amendment says "Congress shall make no law" respecting an establishment of religion, or

21. That is where most modern controversy is centered. There is relatively little dispute over the most traditional forms of takings, in which the government appropriates property to its own use, invades exclusivity by opening private property to public use, or trenches on the equal protection element of takings jurisprudence by selecting out one owner for discriminatory treatment. Of course there are blurred lines at the edges of all these categories. See Zygmunt J.B. Platter, *The Takings Issue in a Natural Setting: Floodings and the Police Power*, 52 TEX. L. REV. 201, 243-56 (1974).

abridging freedom of speech, press or assembly.²² No such language appears in the Fifth Amendment's Property Clause. Indeed, the Constitution expressly authorizes legislation in the economic sphere, in bankruptcy, in patent and in copyright.²³ The legislative role is not just that of a private individual. Moreover, the Tenth Amendment preserves the police power of the states,²⁴ which was never limited to the law of nuisance, private or public.

Government *must* make laws about property, laws that demand innumerable and detailed judgments on many issues. Must tenement owners install fire sprinklers? At what age should a minor's contract be voidable? Do property lines move with shoreline accretion? Are spite fences enjoined? Shall we have negligence or strict liability; riparian rights or prior appropriation, or both? On all such matters legislative judgment is both appropriate and necessary, disputable and, over time, variable.

The more intense the level of judicial scrutiny, the more courts are called on to have the last word on all the many questions of judgment that necessarily attend legislation relating to economic relations. To significantly raise the standard of judicial scrutiny is effectively to trivialize the police power as a legislative matter, to reduce the state to a litigant that must demonstrate, case by case, by a preponderance of the evidence, the needfulness of its judgments. One can imagine the state having to justify its fire safety standards building by building, with application to each requiring proof in regard to the particular construction and status of each building. The world would not collapse under such a regime, but neither is there reason to be confident that a judiciary restricting legislative judgment so closely would produce even a minimally appropriate level of protection against fire, flood and disease.

State courts have long rejected any such judicial constraints on legislative judgments.²⁵ The United States Supreme Court ruled similarly in the landmark *Village of Euclid v. Ambler Realty Co.*²⁶ case three-quarters of a century ago when it held that land use regulation could be effected

22. U.S. CONST. amend. I. The full text of the amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

23. *Id.* art. I, § 8.

24. *See id.* amend. X.

25. *See, e.g.,* *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 104 (1851) ("The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not . . .").

26. 272 U.S. 365 (1926).

by legislation of general application.²⁷ The essence of the decision was that the legislature, in exercising the police power, was not to be treated by the courts as if it were simply a plaintiff in a nuisance case, bearing the same sort of specific burden of proof as to every property affected by its regulation. In speaking of the role of the judiciary in *Euclid*, Justice Sutherland observed:

If these reasons . . . do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.²⁸

To be sure, just because courts have held a certain view (like that in *Euclid* or *Alger*) for a long time does not prove that their judgment is correct. But in thinking about how a constitutional provision ought to be interpreted, the judiciary's considered judgments that have endured over many decades ought to carry considerable weight.

V. THE SUBSTANTIVE CLAIMS

A primary argument made in amici briefs on Lucas's behalf was that unless the harm threatened was a nuisance at common law, uncompensated regulation that left his land without economic potential was impermissible.²⁹ For at least a century it has been the law that the takings test does not turn on the presence of conduct that had been a nuisance at common law,³⁰ and this should continue to be the law. Even assuming,

27. *Id.* at 397.

28. *Id.* at 395.

29. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 16-23, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), reprinted in 25 *LOY. L.A. L. REV.* 1233, 1245-50 (1992).

30. See *Mugler v. Kansas*, 123 U.S. 623 (1887). I am unaware of any earlier case that establishes a different test. See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851) (holding that issue was whether wharf violated statutory limit, not whether wharf was common-law nuisance). Professor Richard Epstein, in his brief in *Lucas*, gives no justification for such a position beyond the following statement, which strikes me as casting little if any light on the matter: "It might," he says, "seem odd at first blush that the limits of state power to regulate could be determined, even in part, by the common law conceptions of nuisance that have been developed over the centuries in such radically different contexts." Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 16, *Lucas*, reprinted in 25 *LOY. L.A. L. REV.* at 1245 (1992). Indeed it does seem odd. He purports to explain away the oddity with the following statement: "But the intimate historical connection between the law of nuisance and the proper scope of the police power remains in principle as vital and impor-

for purposes of argument, that the content of "common-law nuisance" is a relatively clear and identifiable category,³¹ there is a compelling reason not to adopt any such test.³²

The reason is this: A nuisance at common law is simply a use of property that, at some time in the (presumably rather distant) past, was considered as imposing an intolerable harm on other owners or the public. The nuisance standard of any historic moment reflects the public values and the state of scientific knowledge of its time; its content in 1890 differs from that of both 1990 and 1790. As the Supreme Court observed in the *Euclid* case:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . In a changing world it is impossible that it should be otherwise.³³

Undoubtedly, construction on barrier beaches was not a common-law nuisance at some historic moment in the past, both because its consequences were not known and because the types and levels of development of our time were not a problem. Nor was construction on earthquake faults or unstable hillsides a common-law nuisance. But I am prepared to rest my case on the propriety of prohibiting construction on top of earthquake faults—or slide areas or precarious barrier beaches—as an entirely appropriate and non-compensable exercise of governmental power; even if such regulation devalues entirely a particular owner's

tant today as it has ever been." *Id.*, reprinted in 25 LOY. L.A. L. REV. at 1245. What connection? If the suggestion is, as it seems to be, that common-law nuisance has historically circumscribed the scope and limit of the police power, that is simply not so. See *Euclid*, 272 U.S. 365; *Mugler*, 123 U.S. 623; *Alger*, 61 Mass. (7 Cush.) 53.

31. Dean Prosser said, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971) (footnotes omitted).

32. The Supreme Court decision in *Lucas* adopts a verbally less constricting standard, though what precisely the majority has in mind is not certain. The Court's test is this: "Any limitation so severe [restricting all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 112 S. Ct. at 2900. I shall discuss this formulation in my upcoming Essay. It may be noted here that if the Court meant only to embrace the kind of problems that were dealt with by traditional nuisance law, such as health and safety, such a formulation by definition excludes those interests that have been brought to light both by modern industrial activity and by modern ecological knowledge, such as the preservation of species.

33. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

tract; even if he or she purchased that tract prior to the time the regulation was enacted; even if the justification for the law was to protect the state against the burdens of disaster relief, to protect public waters against potential contamination, or to protect uplands against storm damage; and even if by no stretch of doctrine could it be called a common-law nuisance or nuisance-like or noxious.³⁴

Perhaps the claim for some standard of a time past is to seek a test of actual and consequential harm imposed beyond one's own property domain; to give weight to expectations; and to discipline government from simply transferring value, through regulatory action, from a disfavored *A* to a favored *B*. The purpose of the Takings Clause is to discipline government overreaching. But to adopt as the only permissible form of regulation a standard of harm frozen in some past historic moment—such as “a nuisance at common law” rather than a nuisance, or a serious harm, as perceived in 1989—is quite incomprehensible.

Any nuisance, when it was first recognized by a court or defined by legislation, was by definition a departure from then-existing expectations and an implementation of the values of the time. To hold to a standard set in the past, paradoxically, is to accept a governmental judgment of some past moment, while disdaining parallel governmental judgments made today. Such a view must assume that the problems worthy of governmental regulation are essentially immutable, and have nothing to do with shifting societal values. That is not the case. Once, playing ball on Sundays was considered a public nuisance. In 1843 a bowling alley was held to be a common-law nuisance in New York because it was

[a] useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the

34. Oddly enough, Justice Scalia's opinion in *Lucas*, written several months after the debate for which this Essay was prepared, chose to use the earthquake fault example to illustrate noncompensable modern regulation:

Nor [would] the corporate owner of a nuclear generating plant [be entitled to compensation] when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. . . . The use of these properties for what are now expressly prohibited purposes was always unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Lucas, 112 S. Ct. at 2900-01. The opinion never describes or elucidates the “background principle” of illegality to which Justice Scalia refers, but the notion seems to be that the owner was somehow on notice of a preexisting principle and thus could not have formed reasonable expectations. Perhaps the notion is that the form of harm can change under new technology or new knowledge, and owners must bear that risk, but not the risk of changing values. That has not been the law, as *Mugler*, 123 U.S. 623; *Tanner v. Trustees of the Village*, 5 Hill 121 (N.Y. 1843) and the Industrial Revolution cases all demonstrate. See *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312); *Lancey v. Clifford*, 54 Me. 487 (1867).

men and boys of the neighborhood into a bad moral atmosphere . . . at best . . . a waste of time and money, followed by the multiplication of paupers and rogues.³⁵

At one time—before the presence of modern artificial illumination—landowners were limited in what they could build by the doctrine of “ancient lights,” a restriction designed to permit a high level of natural light to enter neighboring structures.³⁶ Today, no such restriction is necessary and that limitation on landowners has disappeared.³⁷ As a new solar technology develops, the issue in modern form arises again.³⁸ The law of property has always been shaped by and adapted to the problems of its time.

Nor can any appropriate lines be drawn between uses wholly internal to one’s land and those that create external harms. That may once have seemed the crucial distinction, and doubtless it underlay many of the intuitions that generated older nuisance and trespass law. Modern ecological knowledge has gone a long way to undercut such distinctions.

The ecological truism that everything is connected to everything else may be the most profound challenge ever presented to established notions of property. The reason is that every traditional theory of property assumes rights within a bounded domain, where one can use, enjoy, profit and exclude, but not adversely affect others within their separate domains. No theory of property supposes a right to impose burdens on others.³⁹ No fundamental claim of right *in* a distinct property can extend beyond that property’s limits to other domains where others’ rights begin. Regulation prohibiting the infliction of harm beyond what one owns, albeit only by uses within the physical limits of one’s own domain, cannot in theory take property away even if it makes the owned property

35. *Tanner*, 5 Hill at 128.

36. See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (citing 1 AM. JUR. *Adjoining Landowners* § 49, at 533 (1936)).

37. See *id.* at 359.

38. See CAL. PUB. RES. CODE §§ 25982-25985 (West 1986) (regulating placement of trees and shrubs obstructing solar collectors); GAIL BOYER HAYES, *SOLAR ACCESS LAW* 15-32 (1979) (outlining “when and why solar access protection may be needed”).

39. It may be said that to speak of doing “harm” is just a self-fulfilling way of defining conduct, and that the same conduct (or nonconduct) can be described as conferring a benefit on others. This issue arose in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), in which there was a dispute in the United States Supreme Court about whether tearing down a historic building was doing harm or whether a law prohibiting such action compelled the owner to confer a public benefit by retaining its building as an amenity for others to enjoy. This same distinction was to arise in the Supreme Court decision in the *Lucas* case. I shall reserve comment on it for my upcoming Essay. The important point is that if separate properties are in a state of mutual dependence, no basic property theory confers a right in that mutuality on either one or the other of the owners.

useless and thus worthless, unless somehow the right to intrude on the domain of others is conceived as incorporated in a property right. I am aware of no theory that has ever posited such an expansive notion of property.

The real difficulty is that modern ecological theory has eroded the notion of a bounded domain, often almost to the vanishing point. Many things that a short time ago were thought entirely the business of a landowner within the confines of his or her own land are now revealed to be intimately interconnected with other lands and with public resources that have never been thought to belong to the owner of a given tract.

It was once thought that a farmer's application of pesticide was no one's business but his or her own; and the same for filling and building on swampy land, though we now know that such uses can contaminate adjacent public waterways that do not belong to the wetland owner. Filling lands that are natural floodwater retention basins will cause enhanced flooding on downstream lands. Lucas's case is one of this new genre growing out of modern ecological knowledge. Indeed, one finding of the South Carolina law was that coastal development created risks to adjacent waters and their marine species.⁴⁰

Not many years ago we knew little about the impact of dune removal and foreshore development on other lands or the burdens they imposed on the public domain. Prior to the modern ecological era, Lucas's claim would have seemed utterly reasonable: "I only want to build a single residential dwelling on my own property; what less right than that can I have, and still be thought to have property?" But modern ecological knowledge of connections impels a rethinking of traditional notions of the content of property rights. It sees not simply the construction of a house but the destruction of a dune system that has been the source of protection for properties upland of the barrier beach. It sees the desired construction as an act of destruction of an integral part of other lands. In the same sense it sees traditional dredging and filling—the conventional means by which houses were long built on swampy lands—as the destruction of a crucial part of a marine ecosystem that exists outside the swampland owner's domain, and that has never been considered a part of his or her property to destroy.

By what theory of property, however grounded in natural rights, can the owner of land have a right to fill in his or her tract if the consequence is to destroy the marine life in adjacent public waters that breed in the landowner's naturally swampy lands? Taken to its extreme, the

40. S.C. CODE ANN. § 48-39-250 (Law. Co-op. Supp. 1991).

question is this: If chopping down the trees on privately owned tropical forest lands will, indeed, lead to massive global harm, do those landowners have a compensable property right to destroy the world? This is the stunningly novel question that the new ecology poses to traditional property law.

To be sure, it is not simply that we know more than we once did. We also have different priorities, or at the least we have shifted priorities in light of changed circumstances. It is not only that we know more than we did about the filling of wetlands. It is also either that we are more concerned about the impact on marine ecosystems than we were earlier or that we have diminished the stocks of marine resources (and wildlife and wilderness) so that what remains seems more valuable to us. No doubt, both increased knowledge and different priorities are at play. The important fact is that the range of acceptable uses has always been a product of the societal goals and priorities of the time and has been in flux to the extent that those goals and priorities have been in flux.

If proof is needed that change is a constant and the definition of property is not, there is no better example than the time of the Industrial Revolution, when uncompensated changes in the definition of property rights were probably greater than in any other historic time. Traditional landed interests felt enormous impositions as the landscape was transformed by railroads, factories, mines, mills and quarries.⁴¹

These changes in property use rights can be clearly traced through the shifting rights of riparian owners in the waters appurtenant to their land.⁴² In the pre-Industrial Era, when water was primarily an amenity resource, the law of natural flow gave every landowner the right to continuance of historic flows in quantity and quality as they were wont to flow in the state of nature. However, as industrial uses got underway, as mine drainage diminished water quality and as mills changed flows, the law changed from the right to maintain natural flow to a right only to prevent "unreasonable" use, which meant a right to diminish both quality and flow to meet the needs of industrial development. The definition of tolerable harm was fundamentally revised.⁴³

41. See, e.g., *Baird v. Williamson*, 143 Eng. Rep. 831 (C.P. 1863) (holding that miner can do what is necessary to get mineral out of ground even though doing so creates damaging flows onto adjoining mine).

42. The historic evolution of riparian rights is traced in JOSEPH L. SAX, ROBERT H. ABRAMS & BARTON THOMPSON, *LEGAL CONTROL OF WATER RESOURCES* 69-127 (1991). Changing concepts of navigability reveal a parallel pattern. See *Lancey v. Clifford*, 54 Me. 487, 491-92 (1867).

43. See *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312).

Similarly, when timber production required it, riparian rights were reexamined. The public easement of commercial navigation was redefined to the detriment of riparian owners, from ships to log floating,⁴⁴ for that was the only practical way to get timber to market. When the American West was settled, yet another doctrinal turn was taken. In most of the arid states, riparian rights were abolished entirely in favor of rights of prior appropriation, again to promote and facilitate economic development. This is the real "historical connection between the law of nuisance and the proper scope of the police power."⁴⁵ Today, as concern about maintenance and restoration of fisheries rises, natural flow is having a revival and rules are again being changed to permit the acquisition of instream flow rights.

It may be urged that changes such as those that occurred in the redefinition of riparian rights may be allowed, but that they should only be done with compensation. That is, existing permissible uses should not be made impermissible in the absence of compensation, otherwise expectations will be disappointed. This has not traditionally been the law, as the preceding examples make clear. But the question is serious and worthy of serious consideration. Indeed, I think it is among the most interesting and most profound questions raised by the takings issue. Why not impose the economic burden of change of all kinds—whether brought about by technological advance, new knowledge, new social values, or changed circumstances—on the public, rather than on individuals who happen to be in the way of change? Whatever the nature of social transformation in a given era, the individual owner cannot be expected to anticipate it. The new environmental consciousness and knowledge was no more amenable to foresight than the invention of the airplane, or the discovery of DNA.

Again the Industrial Revolution provides a useful setting in which to consider the issue. If all the preexisting property owners—largely the landed gentry—had been viewed as having compensable property rights in the uses they had, the cost of achieving industrialization would have been multiplied enormously.⁴⁶ Exactly how much this would have constrained the process of industrialization has not been calculated, but it

44. *Lancey*, 54 Me. at 489-90.

45. Brief for the Institute of Justice as Amicus Curiae in Support of Petitioner at 16, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), *reprinted in* 25 *LOY. L.A. L. REV.* at 1245.

46. Of course enormous costs were borne to achieve industrialization, but they were distributed in a way—as by rigorous working conditions and low wages—that promoted rather than retarded change. Parallel distributional choices—in the sense of retarding or expediting desired changes—are presented today in the environmental context.

would no doubt have been enough to affect markedly the rate of change. The compensation question is often discussed as if it had no impact on the possibility of change or the rate of change, but that is certainly not the case.

The example of industrialization suggests that the realistic possibility of change may be tied to whether compensation must be paid. It may well be that the new use is more valuable than the old, but the amount that the new use must pay to compensate, which determines the profitability and attractiveness of the new use, may be crucial. Surely, it would have made a considerable difference if those who used the automobile had to compensate all those who depended on horses; or if the supermarket could only come into being upon paying off the mom and pop industry that it largely replaced.

All this is to say that treatment of the compensation question reveals, as much as anything, a society's attitude about change. The more that existing uses are granted status as compensable property rights, the less likely it is that change will be seen as desirable. I do not urge that change, per se, is either a good or a bad thing; obviously it can be either desirable or undesirable. I only say that the way property is defined does more to describe attitudes about change than it does to reveal some inherent quality of concepts like "nuisance" or "expectations."

How does a society, which is congenial to change, and which has a limited view of compensable property rights, expect those in the path of change to behave? I suspect the answer is that such societies put a high value on human adaptiveness. Those who are most adaptive will accommodate change most easily and least painfully. The displaced landed gentry are expected to find their place in a new, industrialized world; the denizens of agricultural village life are expected to learn to live in an urbanizing world. There comes a time when people can no longer rely on child labor, or indentured servants, or assert a right to be insulated from the inevitable impacts of coal mines or nearby railroads.

In a more modern sense, businesses learn how to thrive in an atmosphere of taxes and regulation, and those that have lived under regulation may have to re-adapt when deregulation becomes the order of the day. In our own day, similarly, there are those who find themselves in possession of fragile lands, asbestos mines and asbestos-laden buildings, or waste sites now known to be contaminating ground water aquifers. All such people are, in a sense, the victims of a changing world. If societal rules put a premium on adaptability, the most adaptive owners will lose the least. Of course some loss is irreducible; not every lemon can be turned to lemonade. However, there are many kinds of adaptiveness.

For landowners, two obvious adaptive strategies are diversification and timely disinvestment. I shall end with a last look at *Lucas* from the perspective of a world that accepts change as normal, and that values adaptive behavior.

Public legislation aimed at control of destructive development in the coastal zone has been a prominent item on the national agenda at least since 1972, when the first federal Coastal Zone Management Act⁴⁷ was enacted.⁴⁸ Public regulation of development in areas subject to flooding goes back nearly thirty years, to the early 1960s.⁴⁹ Wetlands regulation has been a familiar feature of state law and prominent for mostly unsuccessful claims of interference with property rights, for more than two decades.⁵⁰ South Carolina itself has had a coastal zone management law since 1977.⁵¹ That legislation's goal was protection of the beach/dune system as its goal, though it was largely ineffective in its earlier forms.⁵² Lucas himself had been associated since 1979 with developmental activity on the Isle of Palms, during a period when the island suffered serious erosion problems.

How should experienced and sophisticated investors in land behave in 1986, in light of such a history? Is it prudent to assume that the decades-long history of increasing regulation will cease to increase? Is barrier island development a judicious place to invest large sums of other-than-speculative money? Would discerning and adaptive investors usually opt to diversify out of this sort of land investment? Has the market been giving disinvestment signals for years and years? Who but an individual determined to ignore the changes going on around him or her would lay out so much money in 1986 for beach property on a barrier island like the Isle of Palms?

47. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. § 1451 (1988)).

48. Respondent's Brief at 28-29, *Lucas* (No. 91-453).

49. See, e.g., *Dooley v. Town Plan & Zoning Comm'n*, 197 A.2d 770, 771 (Conn. 1964); see Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 & n.4 (1971).

50. See, e.g., *MacGibbon v. Board of Appeals*, 255 N.E.2d 347 (Mass. 1970); see Sax, *supra* note 49, at 159 n.28, 159-60.

51. See *supra* note 5 and accompanying text.

52. Respondent's Brief at 34, *Lucas* (No. 91-453).

