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RIGHTS THAT "INHERE IN THE TITLE ITSELF": THE IMPACT OF THE *LUCAS* CASE ON WESTERN WATER LAW

*Joseph L. Sax**

Commentary on the decision in *Lucas v. South Carolina Coastal Council*¹ has focused overwhelmingly on the so-called nuisance exception: Where regulation entirely devalues property, compensation must be paid unless the regulation does "no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance."² This rule is viewed as potentially very favorable to property owners and very unfavorable to government regulation. The reason is that most controversy over asserted regulatory takings involves conduct that was *not* previously viewed as a nuisance. The *Lucas* decision seems to characterize a conservative Supreme Court ready to rein in state and local governments that appear ready to sacrifice established property rights to the public agenda of the day.

Another aspect of *Lucas*, however, has received little attention—the Court's view of the rights that inhere in a property owner's title. Discussing regulations that prohibit all economically beneficial use of land, the Court wrote: "Any limitation so severe 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."³ The Court then went on to speak only of nuisance (as have most commentators):

A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally⁴

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1. 112 S. Ct. 2886 (1992).

2. *Id.* at 2900.

3. *Id.*

4. *Id.*

Perhaps little attention has been paid to the property half of the Court's "property and nuisance" formulation because it seems self-evident. One cannot claim that property was taken away if one did not have property to begin with. The very first issue in a "takings" case, to use the Court's own words, is for owners to identify those interests that "were . . . part of [their] title to begin with,"⁵ those things included in "the 'bundle of rights' that they acquire[d] when they obtain[ed] title."⁶

The Court in *Lucas* adopted a definitional/historical, rather than a functional, view of property.⁷ This characterization of property rights may very well lead in a direction the *Lucas* Court did not intend to go. Simply stated, the *Lucas* rule says that government's right to constrain the use of property without paying compensation is limited by what it withheld from owners at the outset. Government cannot change the rules of the game after the game has started. To find the rules articulated when the game began, one is directed to historical definition.⁸

In the nuisance category, the Court's view is destined to lead to more compensation. The reason is that relatively few things were traditionally categorized as nuisances because there was relatively little governmental regulation of land.⁹ Property in water, however, is quite a different situation. Definitionally, property rights in water have been delineated in very limited terms. Water has been described as merely usufructuary; as belonging to the public; as subject to public servitudes; as incapable of full ownership; as subject to constraints that it be used nonwastefully, reasonably, beneficially, etc.¹⁰

The *Lucas* Court seems to have forsaken familiar notions of reasonable expectations as a measure of property rights in favor of what Justice

5. *Id.* at 2899.

6. *Id.*

7. This is in part what Professor Thompson calls a dispositive, rather than a normative, view of property. Law is what the state says it is, rather than what in some sense it "ought" to be, or what it actually is, as measured in the marketplace. See Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1523 (1990). As noted below, even if the Court has articulated normative standards (protecting settled expectations), it appears to subordinate such norms to a clearly articulated definition. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (discussed *infra* text accompanying notes 34-50); *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41 (1986); *United States v. Fuller*, 409 U.S. 488 (1973).

8. One of the ambiguities in the *Lucas* opinion is that it refers to some not very clear past time, such as the time of "title to begin with." *Lucas*, 112 S. Ct. at 2899.

9. There was, however, considerable regulation of the economy when mercantilism still held sway. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 10-36 (1985).

10. See Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990).

Scalia calls a "categorical" rule; in this instance a rule drawn from a historical definition that is quite different from a rule of expectation. Expectational rules are based on experience rather than definition. Whether and to what extent the Court is leaving behind ordinary expectational notions remains to be seen. Justice Scalia referred to expectations only twice,¹¹ neither time to state the basic ruling of the case, and each time in a rather ambiguous way. Once, he invoked expectations to distinguish expectations about personal property from those about real property. Elsewhere he spoke of "the property" against which measures of diminution must be made in terms of "expectations shaped by the State's law of property."¹² But that is only to say that the expectations the law recognizes are those created by the definition of the property at issue. The Court probably assumed that its definitional rule will usually be congruent with marketplace expectations. But it does not choose to let expectations in the market shape its rule. Why? I suggest the following explanation.

The tone and rhetoric of *Lucas* seems deliberately calculated to cut off arguments that changing times create changing needs, and with them changing (diminished) expectations that property owners must internalize. Indeed the question, how responsive must property owners be to changing public goals and values, is the central point of dispute between the majority and the dissent in *Lucas*. Justice Stevens's dissent said: "The human condition is one of constant learning and evolution Legislatures . . . must often revise the definition of property and the rights of property owners."¹³ As contrasted with such a view, the majority opinion in *Lucas* was all about definitional fixity of rights, and notions of security that arise from such fixity. Definitional/historical standards usually leave the least room to argue that owners should have anticipated change and provide the strongest claims that the public should compensate those who are the casualties of a changing world.

Paradoxically, the majority's rejection of evolution, change and contemporary expectations is calculated to work against the owners of water rights. Such owners—opposing new regulatory schemes like those designed to restore instream fishery or recreational values—might have argued that traditional definitional limits on water rights had been displaced in practice by rules that tolerated waste, permitted total dewatering of streams, encouraged destruction of wetlands, and so forth. All that is true, and it has no doubt shaped the expectations of water users.

11. *Lucas*, 112 S. Ct. at 2894 n.7, 2899 (describing risks of which owners should be aware).

12. *Id.* at 2894 n.7.

13. *Id.* at 2921 (Stevens, J., dissenting).

But if the question is what their "title to begin with" was, rather than what practice long permitted, such arguments are unlikely to carry much weight.

Lucas was not the first case in which the Supreme Court has been guided by formal property definitions. In a variety of contexts the Court has asserted the view that the only property rights one has are those that have been formally granted, and that limitations on clearly defined property rights will be respected even though practice has long been at odds with them.

In *United States v. Fuller*¹⁴ the Court held that a compensable property interest was *not* involuntarily created when government makes clear in a statute that it does not intend to create a property right. *Fuller* involved a permit to graze livestock on federal land.¹⁵ Such permits are granted to ranchers, and though they are revocable, they are hardly ever revoked. As a result they become very valuable and add considerably to the worth of nearby private ranches owned by permit holders. *Fuller* raised a claim that the value of a federal grazing permit must be compensated when it is lost through condemnation of a permit holder's nearby private land.¹⁶ The fact that the grazing permit in fact had many of the indicia of property—that it was subject to exclusive possession and use, bought, sold, traded and mortgaged in the market—carried no weight with the Court. The statute authorizing the grant of such permits was unmistakable in its intent. It said: "[T]he issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands."¹⁷ Congress did not intend to create a property right; it said so explicitly; and therefore it did not create such a right. "Government . . . may not be required to compensate . . . for elements of value that the Government has created."¹⁸

14. 409 U.S. 488 (1973). The personnel of the Court has changed so much in recent years that conclusions drawn from earlier cases often seem in doubt today. It is notable, however, that the *Fuller* majority opinion was written by Justice Rehnquist, joined by then Chief Justice Burger and Justices Stewart, White and Blackmun. Justice Powell dissented, and his dissent was joined by Justices Douglas, Brennan and Marshall. None of the dissenters are still on the Court, while three members of the majority are still sitting Justices.

15. *Id.* at 489.

16. *Id.*

17. 43 U.S.C. § 315b (1988).

18. *Fuller*, 409 U.S. at 492. *Fuller* involved a claim to use the public domain, and the Court seems to have been especially troubled by the assertion that Congress could lose control of its own property despite its unmistakable intention not to do so. The precedent the case sets does not appear to be limited to government-owned property, however. Though the question of valuation in the setting of condemnation generated a dissent in *Fuller*, all nine Justices seemed in accord that no compensation would have been required if the government had simply exercised its expressly reserved authority to revoke the permits, despite the economic loss

The Court has made clear elsewhere that property rights do not arise simply because expectations are formed, even if those expectations grow out of governmental action.¹⁹ Thus in one celebrated case, *Reichelderfer v. Quinn*,²⁰ the government had established a park across the street from a private home. Proximity to the park increased the home's value. Later the government ceased to use the land across from the home as a park and built a fire station on the site. The result was to devalue the home. The Court held that no property interest had been created by the establishment of the park, and no compensation was due when the use of the land was changed. The Court stated: "Existence of value alone does not generate interests protected by the Constitution against diminution by the Government."²¹ In that case the law establishing the park had said the land was "perpetually dedicated and set apart as a park,"²² but the Court said even such language is not to be taken as creating private property rights.²³ "Statutes said to restrict the power of government by the creation of private rights are . . . to be strictly construed for the protection of the public interest."²⁴ "For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise,"²⁵ and government would have constrained its freedom to legislate or regulate in the public interest in the future.²⁶

that would thereby have been inflicted on the permittees. *Id.* at 497 (Powell, J., dissenting). The dissenting Justices were troubled by the fact that the market value of a condemned tract of land often includes values that are not the owners' property, such as proximity to a park or proximity to a public highway. *Id.* at 502-03 (Powell, J., dissenting).

19. The only possible exceptions are if the government has created a debt it owes, or an obligation to provide benefits under a contract for which the obligee paid a monetary premium to the government; that is, circumstances in which the government's own economic interests are at issue. *See Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 55 (1986). There is some dicta to the contrary in state law, but it is inapposite. *See, for example, County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975), in which the court stated: "[T]he right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether . . . his right can technically be called an 'estate' or 'interest' in land." *Id.* at 690-91, 532 P.2d at 143, 119 Cal. Rptr. at 495. But that case involved exclusively a dispute among private parties, about how a compensation award was to be shared among various private parties.

20. 287 U.S. 315 (1932).

21. *Id.* at 319.

22. *Id.* at 317.

23. *Id.* at 318.

24. *Id.* at 321.

25. *Id.* at 319.

26. As noted in the discussion of the *Bowen* case, the Court has expressed the same concern whether the property right is a claim for compensation or for injunctive relief. *See infra*, notes 27-33 and accompanying text. The no compensation rule also supports the federal gov-

Recently the Court reaffirmed its view that property rights cannot arise against reserved governmental regulatory power that inheres in an original definition of property, even if the circumstances seem quite sympathetic. *Bowen v. Public Agencies Opposed to Social Security Entrapment*²⁷ was decided by a unanimous Court. In that case the United States had entered into an agreement with various states providing that, upon two years notice, a state could withdraw from the social security system for state and local government employees.²⁸ Subsequently a federal law was enacted prohibiting such withdrawals.²⁹ The Court sustained the validity of the later-enacted statute, which withdrew the contractually created opportunity to withdraw, rejecting the state claim that it had a contractually created property right.³⁰

A crucial fact for the Court was that the statute authorizing voluntary state participation in social security and authorizing agreements to set the terms of state participation contained a provision that expressly reserved: "[t]he right to alter, amend, or repeal any provision"³¹ of the statute. Because Congress retained the right to amend the statute, and thus to alter the terms on which participation in the program could be terminated, the Court determined that a contract implementing the statute could not be interpreted to create a property right at odds with the right of amendment retained in the statute.

The Court's reluctance to recognize the creation of property rights by implication is founded in a concern—like that in the park case discussed above—that the existence of such rights would constrain the sovereign in exercising governmental authority to achieve important public purposes.³² Arrangements said to create property rights "should be construed, if possible, to avoid foreclosing exercise of sovereign authority."³³

ernment's navigation servitude, where definitionally no private property exists, but an interest in land adjacent to the navigable water might have a very high market value. *See, e.g., United States v. Twin City Power Co.*, 350 U.S. 222 (1956).

27. 477 U.S. 41 (1986).

28. *Id.* at 45.

29. *Id.* at 48.

30. *Id.* at 50-51.

31. 42 U.S.C. § 1304 (1988).

32. The concern extended not only to a fear that a public program would be enjoined, but that it would be deterred if compensation had to be paid as a price for implementing the program. The complaint in *Bowen* included a claim for taking property without payment of just compensation, as well as for injunctive relief. *Bowen*, 477 U.S. at 50 n.16. The Court made no distinction between damages and injunctive relief in its ruling. *See id.* at 51.

33. *Id.* at 52. *See Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933) ("This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy . . ."). The same concern

Cases like *Fuller* and *Bowen* show the Court taking a strong definitional posture in deciding whether a private property right existed. But those were both cases in which the government had been more or less explicit about not wanting to create private rights (however much the market may have treated the interests as property). What of the more common case in which intent is less clear; in which definitions (perhaps very old ones) are in tension with longstanding governmental behavior and expectations to which that behavior gives rise; and in which government, perhaps to implement some modern policy, seeks to rely on its old definitions to insulate itself against a takings claim?

At least one contemporary illustrative case exists, the 1988 decision in *Phillips Petroleum Co. v. Mississippi*.³⁴ *Phillips* involved the ownership of land beneath non-navigable tidal waters.³⁵ The Court split five-to-three on the question of whether such lands passed into state ownership as public trust lands upon the state's admission to the Union.³⁶ The majority held that the lands did pass into state ownership.³⁷ The interesting question—from the perspective of *Lucas*—was how to analyze the subsequent status of those lands. The facts were that Phillips and its predecessors had been the record owner, and had paid taxes, on the tract in question for more than a century.³⁸ Record title is not a decisive fact for private claimants because conveyances of public trust lands are deemed to be subject to trust rights. The question was whether Mississippi ultimately held or implicitly relinquished its rights in lands under non-navigable waters, such as these.³⁹ Does one look to old definitions in state law? to the state's actual behavior over many years? to expectations revealed by private transactions?

The majority opinion in *Phillips* is by no means perfectly clear, but it seems to exalt definitional statements of property rights over behavior or expectational claims. Phillips and those who supported it as *amici* urged the Court to interpret Mississippi law in terms of the expectations and interests that had developed over more than a century during which Phillips paid taxes on the land, appeared to have fee simple title, and

has led the Court to reject retroactivity claims against new regulatory standards applied to pre-existing programs. See *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992) (holding that statute retroactively imposing liability for additional worker's compensation benefits for closed disability period does not violate due process or impairment of contracts clauses of U.S. Constitution).

34. 484 U.S. 469 (1988).

35. *Id.* at 472.

36. *Id.* at 471.

37. *Id.* at 484.

38. *Id.* at 482.

39. *Id.* at 472.

during which Mississippi was said to have shown no interest in the disputed land for public trust purposes such as fishing.⁴⁰ Mississippi evinced no interest in these lands until 1973 when, in the interest of protecting wetlands, it authorized a mapping project to show state-owned wetlands.⁴¹ With the maps in hand showing the disputed lands as state-owned, Mississippi proceeded to lease the lands to a private company, Saga Petroleum, for oil and gas development.⁴² Phillips then brought suit to quiet title, asserting its record ownership and tax history.⁴³

The majority's disposition of Phillips's expectation claim is interesting. "We have recognized the importance of honoring reasonable expectations of property interests,"⁴⁴ the Court stated. But, it continued, "such expectations can only be of consequence where they are 'reasonable' ones."⁴⁵ Mississippi law had consistently *said* that the state held a public trust title in all lands under the tidewater.⁴⁶ The Court concluded, therefore, that "any contrary expectations cannot be considered reasonable."⁴⁷ That is, an expectation however real, functionally speaking, cannot be considered reasonable if it is at odds with a definition of property.⁴⁸ In addition, because state law prohibits acquisition of property against the state by adverse possession, laches or other equitable doctrines,⁴⁹ paying taxes and holding record title could not operate to transfer title to Phillips.

The opinion in *Phillips* invites the conclusion that definitions of property are of primary, if not determinative, importance, notwithstanding their non-enforcement for many years, and notwithstanding government behavior to suggest that the law is different from its formal statement.⁵⁰ The implications of such a rule for western water law in

40. *Id.* at 481-82.

41. *Id.* at 492 (O'Connor, J., dissenting).

42. *Id.* (O'Connor, J., dissenting).

43. *Id.* at 472, 482.

44. *Id.* at 482.

45. *Id.*

46. Mississippi law had never actually dealt with a case involving non-navigable lands, and the state had apparently never actually acted as the owner against deed holders of non-navigable tidelands, like Phillips. *Id.*

47. *Id.*

48. I referred to this determination earlier when I stated that the Court was subordinating expectations to definitions.

49. *Phillips*, 484 U.S. at 484.

50. The majority's conclusion that its decision will "do no more than confirm the prevailing understanding," *id.* at 482-83, appears to be directed to its federal ruling that the state originally obtained title to non-navigable tidal waters, and is free to hold title or to relinquish it. The Court does not appear to suggest that Phillips's expectations, or those of others in its

states which now stand ready to implement long-moribund precepts of waste and beneficial use, or the public trust, are obvious.

How far the present Court is willing to follow a categorical/definitional approach, as opposed to an equitable/expectational one, remains uncertain. Interestingly, Justice Scalia, who authored *Lucas*, joined Justice O'Connor's dissent, which expressed great unhappiness at what was viewed as inequitable treatment of Phillips. The dissent was not written on expectational grounds. Rather, it interpreted federal public trust law differently. The dissent never hinted at constitutionally nullifying Mississippi's implementation of its own law, though it expressed dismay at the result its interpretations created for "innocent property owners."⁵¹

Owners of water rights ought to be especially uneasy. Under the *Lucas/Phillips* approach, property rights in water are not only restrictively defined, but the definitions openly anticipate changes that may diminish or abolish uses that were once permitted. For example, the requirement that uses be reasonable and beneficial, and not wasteful, is central to water law doctrine. In a leading California case in 1935, the California Supreme Court noted: "What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time."⁵² This very point was made by Special Master Simon H. Rifkind in his report to the United States Supreme Court in *Arizona v. California*,⁵³ speaking of the Imperial Valley:

The supply of available water . . . has in the past been substantially larger than the demand for it In such circumstances it is not surprising that a great deal of water has been wasted, as is apparent, for example, from the very large unused runoff each year into the Salton Sea. Undoubtedly when and if water becomes scarce in this area, its use will be regulated much more efficiently than at present.⁵⁴

position, are *not* disappointed, though it does imply that not many claimants are in Phillips's position.

51. *Id.* at 494 (O'Connor, J., dissenting).

52. *Tulare Dist. v. Lindsay-Strathmore Dist.*, 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935) (quoted in *People ex rel. State Water Resources Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750, 126 Cal. Rptr. 851, 856 (1976)); see also *In re Willow Creek*, 144 P. 505, 522 (Or. 1914) ("[C]rude and wasteful manner of irrigating must be replaced by modern, economical methods"); N. DAK. CENT. CODE § 61-04-06.3 (1985) (setting forth priority system for water rights).

53. 373 U.S. 546 (1963).

54. H.R. REP. NO. 780, 100th Cong., 2d Sess. 21 (1988) (recommending passage of S. Res. 795, 100th Cong., 2d Sess. (1988)).

This is a standard definition for water rights of what the Court in *Lucas* described as “the bundle of rights that [appropriators] acquire when they obtain title to property”⁵⁵ in water rights.

A parallel definition applies to the rights one obtains in waters subject to the public trust. A 1928 decision of the California Supreme Court, *Boone v. Kingsbury*,⁵⁶ is illustrative. Despite the objection of certain parties concerned about protecting the state’s waters, the State issued an offshore oil and gas lease to a private company.⁵⁷ The court rejected assertions that state waters could not be leased at all.⁵⁸ But, focusing on the limited nature of the rights that leaseholders could obtain in public waters, the court stated:

Nor is there any substantial cause of alarm lest the twelve hundred miles of our sea coast will be barricaded by “a forest of oil derricks,” which will interfere with commerce or navigation. The state may at any time remove structures from the ocean erected by its citizens, even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce.⁵⁹

The California Supreme Court cited *Boone* as authority when it decided *National Audubon Society v. Superior Court*,⁶⁰ the Mono Lake case, fifty-five years later. In that case, the court held that the state bears a continuing duty of supervision over appropriators of the state’s waters in order to protect the public trust.⁶¹ To implement that duty the state may require even long-standing appropriators to leave water *in situ* in order to maintain the integrity of natural systems. This, of course, is precisely the sort of regulation the United States Supreme Court found so objectionable in *Lucas*. But in the *National Audubon* case, restrictions imposed on the property owner were arguably consistent with the limitations on its “title to begin with,” and thus not a taking of anything the owner definitionally—if not functionally—had.

In light of *Lucas*, the question most likely to be raised today in the context of western water law is how the United States Supreme Court would treat a case like *National Audubon*. If, as seems to be the case, the

55. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

56. 206 Cal. 148, 273 P. 797 (1928).

57. *Id.* at 193, 273 P. at 816-17.

58. *Id.* at 191, 273 P. at 816.

59. *Id.* at 192-93, 273 P. at 816.

60. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983).

61. *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369.

Court will look to state property law definitions for guidance, it might first look to *Boone*. That decision seems to offer little comfort to owners of water rights. But the relevant time for determining the definition of property rights can be very uncertain, as California public trust law illustrates. *Boone* was not decided until 1928. It is not at all clear what public trust law was, in regard to owners of rights in water, prior to 1928. When property is defined by common-law litigation, many issues of ownership remain unlitigated. Moreover, *Boone* did not deal with environmental interests beyond navigation and commerce. Application of the public trust to ecological values was not articulated until 1971, when the California Supreme Court decided *Marks v. Whitney*.⁶² Nor did *Boone* deal with non-navigable tributaries of navigable waters. That issue only arose in 1983 when the Court decided *National Audubon*. On the other hand, prior to 1913, California public trust law may have been even more protective of public rights than it is now. Until the California Supreme Court decided *People v. California Fish Co.*,⁶³ it was still being argued that public trust land could not under any circumstances be alienated to the exclusion of the public.

If and when the question arises, what will the United States Supreme Court hold the definition of water rights, as "part of . . . title to begin with,"⁶⁴ in California is? No one can say with confidence. Will it say that California has changed the law and has transgressed the "'background principles' of its own property law"?⁶⁵ Or will it say that California has simply been articulating, in the common-law manner, what was always its law of beneficial use—that the scope of private rights changes in response to changing circumstances? The search for a historical defi-

62. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). It is worth noting that in *Phillips*, the United States Supreme Court referred to a 1967 Mississippi decision for authority that Mississippi public trust law was not limited to protecting navigation, as against a private party property title that went back 150 years. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988) (citing *Trouting v. Bridge & Park Comm'n*, 199 So. 2d 627, 632-33 (Miss. 1967)).

63. 166 Cal. 576, 138 P. 79 (1913).

64. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

65. Ordinarily the Court looks to state law to determine whether a property right has been created, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), with limited federal court scrutiny to assure that state law definitions do not in themselves violate federal constitutional protections. *Hughes v. Washington*, 389 U.S. 290, 294 (1967) (Stewart, J., concurring). The United States Supreme Court has on several occasions suggested that a "sudden change in the law, unpredictable in terms of the relevant precedents, would be an unconstitutional taking." *Id.* at 296-97 (Stewart, J., concurring); see *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). In *Sotomura v. County of Haw.*, 460 F. Supp. 473 (D. Haw. 1978), the court held that the Hawaii court violated the Takings Clause by radically departing from prior state law. *Id.* at 482-83. The Hawaii Supreme Court had held that the vegetation line, rather than the line of mean high tide, was the seaward boundary of private property. *Id.*

dition of property rights, especially those established through common-law adjudication, is problematic at best. Time alone will tell how the Court will administer its definitional/historical view of property rights. But at least this much can be said: As far as owners of western water rights are concerned, the *Lucas* decision is no obvious occasion for celebration.