

Time to overturn 'Lucas'

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Special to *The National Law Journal*

Published November 14, 2005

The coastal devastation caused by hurricanes Katrina, Rita and Wilma, and the recent and imminent turnover of seats on the U.S. Supreme Court, make this a propitious time to raise the question of whether the court should, and perhaps would be willing, to revisit one of the more problematic constitutional rulings of the Rehnquist era: *Lucas v. South Carolina Coastal Council*.

The 1993 *Lucas* case addressed the question of whether the state of South Carolina effected a "taking" under the Fifth Amendment by prohibiting new development along the ocean's edge. David Lucas, the owner of two oceanfront lots covered by the ban, persuaded the court, by a relatively narrow 6-3 vote, that the lower courts had erred in rejecting his property rights claim. Lucas eventually received the compensation he demanded.

As a result of this case, and the threat of similar claims mounting into the hundreds of millions of dollars, South Carolina withdrew its strict coastal setback requirement. Other states and local governments along the U.S. shoreline also responded to the decision by abandoning (or declining to adopt) similar requirements. This regulatory abdication, along with misguided federal subsidies encouraging coastal development, helped produce a building boom that contributed to the tragic losses in this year's hurricanes.

A cavalier attitude

In retrospect at least, it is clear that the court in *Lucas* adopted a too cavalier attitude toward the hazards of coastal development. The court acknowledged that the Constitution does not bar government officials from addressing, without fear of massive financial liabilities, certain types of public hazards. Thus, the court said that the takings clause does not require the public to pay to prevent placement of a nuclear power plant above an earthquake fault, or prohibit development that would cause flooding of neighbors' lands.

But the court was not persuaded by South Carolina's arguments that its restriction on coastal development addressed the same kind of exigency by reducing property damage and loss of life from wind and water. In an opinion by Justice Antonin Scalia, the court ignored South Carolina's argument that a retreat from the shore was necessary to respond to the steady rise in sea level along the state's shore.

In the dozen years since the decision, the evidence in support of South Carolina's former policy has grown stronger, given the devastation along the Gulf Coast, the increasing frequency of hurricanes across the southeastern United States, and the mounting evidence

of global warming and the threat it poses to coastal areas.

A mistaken approach

More fundamentally, *Lucas* represents a mistake in judgment about the proper role of the courts in our constitutional system. While the court recognized that elected officials must have the authority to respond to serious threats to public welfare, the court improperly arrogated to itself the job of making the policy judgment about which threats are serious enough to justify a public response.

The court certainly has no relevant expertise to make this kind of judgment, which depends on technical scientific analysis. The court is, of course, responsible for enforcing the takings clause of the Fifth Amendment. But it also has a duty in applying the Constitution to assume a modest role that respects the considered judgments of elected policymakers informed by expert advice.

Fortunately, the court may be open to reconsidering *Lucas*.

Justice Anthony Kennedy joined in overruling the lower court ruling. But he wrote a concurring opinion refusing to accept the majority's view that a prohibition on coastal development should virtually always lead to a finding of a taking. He said that "coastal property may present such unique concerns for a fragile land system" that the government can go further in regulating coastal development than development in other areas. Also, former Justice Byron White, who joined Scalia's opinion, retired the following year.

How new justices might vote

Furthermore, the newest members of the court, both of whom are replacing justices who joined the *Lucas* majority, might be open to Kennedy's nuanced approach. Chief Justice John Roberts, while in private practice, successfully defended land-use regulations protecting Lake Tahoe against a takings challenge before the high court. And President Bush, in announcing the nomination of Samuel Alito as associate justice, assured the public that the judge shared his commitment to judicial restraint, an attribute of sound judging plainly absent in the *Lucas* decision.

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The National Law Journal

Letters to the editor

Published January 9, 2006

On the 'Lucas' decision

Here is a quick, if belated, response to John Echeverria's misguided suggestion [[NLJ, 11-14-05](#)] that we should overrule *Lucas v. South Carolina Coastal Council* because it took too cavalier an attitude to coastal protection. Echeverria is surely right to note that excessive development in exposed coastal areas should not be supported by state subsidies. Those should be promptly withdrawn in favor of market-rate insurance. But once that is done, all that is left to do to *Lucas* is to expand its scope so that it covers all losses in value attributable to state regulation, not just those which wipe out all economic use.

Any valuation of land for ordinary uses will take into account the risk of its destruction. If that evaluation is positive, then there is no reason to drive it down to zero through regulation once that subsidy is eliminated. State officials rightly have to trade off private harms for public benefits in all cases of regulation. They will never make the right judgments if all private losses are kept off the societal books, which is just what is done when no compensation is required. State expertise is important to determine which safety measures are needed, but it will operate in a distorted way if public officials and their experts need not take into account the private losses that their initiatives impose on people who have committed no harm to anyone else.

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The National Law Journal

Letters to the editor

Published February 20, 2006

More on the 'Lucas' case

Richard A. Epstein's response to my suggestion that the Supreme Court should repudiate *Lucas v. South Carolina Coastal Council* is mistaken on two counts. [Letter, NLJ, Jan. 9.] First, he says that, assuming subsidies for coastal development can be eliminated, property owners should be able to make wise land use decisions simply by assessing the benefits and risks of coastal development for themselves personally. But the recent hurricanes showed that ill-advised coastal development produces serious external harms, not only in terms of lives lost but in damage to neighboring owners. So, contrary to the libertarian philosophy, there is a role for government in controlling destructive coastal development beyond eliminating subsidies.

Second, Epstein says that courts should impose a broad duty to "compensate" so that government officials will take into account the private costs of their decisions. But, like the subsidies Epstein (and I) deplore, a promise of financial payments to those barred from engaging in destructive coastal development would only encourage more investment in hazardous coastal areas. Furthermore, the economic calculus is flawed because government officials cannot "internalize" the diffuse benefits of regulation in terms of lives, properties and communities protected in the same fashion that a court can force officials to internalize the costs of regulation through takings awards. Thus, takings awards seriously skew government decision-making in favor of property developers and against protection of neighbors and communities. The upshot is that, if Epstein's view were adopted, government officials frequently wouldn't regulate at all, even if the strictest cost-benefit analysis showed that they should.

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