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A Retrospective on Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century

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A RETROSPECTIVE ON *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*: PUBLIC POLICY IMPLICATIONS FOR THE 21ST CENTURY

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I. INTRODUCTION

In 1992, the United States Supreme Court held that David Lucas' two beachfront lots on the northern end of the Isle of Palms had been "taken" by the State of South Carolina.[1] Twelve years later, as the nation moves forward into the 21st century with booming coastal development and rising sea levels,[2] certain fundamental issues that underlie the *Lucas* debate[3] soon will resurface and require resolution. The following reflection on *Lucas* is meant to help enlighten decision-makers as they confront the inevitable beachfront and land use challenges of the coming decades.

This retrospective begins by providing a brief overview of the laws governing takings, including the *Lucas* decision, as well as an analysis of the outcomes of the decision. It then examines the economic and geologic contexts of the *Lucas* case and the response (or lack thereof) of the U.S. Supreme Court to these factors. In addition, this retrospective briefly summarizes the origins of the constitutional protection of property and the Court's applications of these principles to *Lucas*. The paper concludes by pointing out the power of public subsidies to distort the free market and the regulatory process, and the urgent need for state legislatures, not courts, to resolve this radical divergence of public fiscal policy and government regulation.

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[1] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

[2] Colin Woodroffe, *Coasts: Form, Process and Evolution* 48-67 (Cambridge U. Press, 2002).

[3] *See infra* nn. 10-21 and accompanying text.

II. THE TAKINGS CLAUSE AND OVERVIEW OF THE *LUCAS* DECISION

The Fifth Amendment to the United States Constitution (through the "Takings Clause") prevents the government from taking private land for public use without providing just compensation.[4] The Fourteenth Amendment makes the prohibition applicable to states.[5] The Takings Clause thus acts as a restraint on government authority to appropriate and regulate private property, and protects individual liberty from inappropriate governmental intrusions.[6] Although the language of the Takings Clause appears clear and simple, applying its language has proven to be extremely troublesome for the U.S. Supreme Court.[7]

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[4] U.S. Const. amend. V. ("nor shall private property be taken for public use without just compensation.")

[5] U.S. Const. amend. XIV, § 1. ("nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

[6] *See generally Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999) (holding that government authorities may not burden property owners with imposition of repetitive or unfair land-use procedures in order to avoid a final decision); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1985) (holding that final decisions as to whether a property owner may develop the property should not occur until the responsible agency determines the extent of permitted development on the land); *Penn Central Transp. Co. v. City of York*, 438 U.S. 104, 124 (1978) (holding that where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex number of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action).

[7] *See* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1, 1 (1995). For other observations of the Court's difficulties in *Lucas* and beyond, *see* Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of Lucas)*, 13 J. Land Use & Envtl. Law 161 (1997) (analyzing the state of property law after *Lucas* and *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825 (1987)); Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are?*, 85 Iowa L. Rev. 849 (2000) (suggesting that *Lucas* was a failure as an attempt by the Court to simplify "the judicial task of resolving...land use disputes"); Katherine A. Bayne, *Lucas v. South Carolina Coastal Council: Drawing a Line in the Sand*, 42 Cath. U. L. Rev. 1063 (1993) (concluding that *Lucas* is consistent with the Fifth Amendment); Bruce W. Burton, *Post-Lucas Regulatory Takings and the Supreme Court's Riddle of the R.I.B.E.: Where No*

Mind Has Gone Before, 25 U. Tol. L. Rev. 155 (1994) (illustrating how regulations can constitute a taking with regard to reasonable investment-backed expectations); David L. Callies, *After Lucas: Land Use Regulation and the Taking of Property Without Compensation*, 107 Harv. L. Rev. 506 (1993) (a collection of essays outlining the fundamental issues raised by *Lucas*); Jennifer L. Chapman, *Navigable Purpose? Prove it. Rethinking the Role of the Navigational Servitude in Regulatory Takings Claims After Lucas v. South Carolina Coastal Council*, 35 Ga. L. Rev. 1195 (2001) (outlining the effects of *Lucas* on the traditional takings analysis and the potential effect on takings claims involving navigational servitudes); John H. Davidson & Martin Weeks, Jr., *Drainage in South Dakota: Wetlands, Lucas, Watersheds, and the 1985 Drainage Legislation*, 42 S.D. L. Rev. 11 (1997) (reconciling drainage laws with the *Lucas* holding); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955 (1993) (dissecting the arguments against the Court's effort to reinvigorate the Takings Clause); John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 Puget Sound L. Rev. 1260 (1993) (identifying, in light of *Lucas*, potential trouble sports in the Washington State Growth Management Act of 1990); F. Patrick Hubbard, *Palazzolo, Lucas, and Penn Central: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 Neb. L. Rev. 465 (2001) (contrasting the symbolic and managerial perspective on Supreme Court regulatory takings opinion); Brian D. Lee, *Fifth Amendment - Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance Or Property Principles Furthered by the Regulation - Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)*, 23 Seton Hall L. Rev. 1840 (1993) (asserting that Fifth Amendment analysis has resulted in one of the most muddled areas of the Supreme Court's jurisprudence); Laura McKnight, *Regulatory Takings: Sorting Out Supreme Court Standards After Lucas v. South Carolina Coastal Council*, 41 Kan. L. Rev. 615 (1993) (identifying an implied but critical distinction in the two-step analysis for understanding regulatory takings); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301 (1993) (discussing takings jurisprudence in light of judicial conservatism); Jamie Mueller, *Developments in Case Law: South Carolina Supreme Court Finds That a Lucas "Taking" Also Applies to Personal Property*, 4 S.C. Envtl. L.J. 198 (1995) (analyzing a case in which the court applied the Lucas test where the value of a development permit was reduced by a land management ordinance that restricted land use); Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. Envtl. L. & Policy 119 (1993) (stating that "the takings jurisprudence prior to *Lucas* [and arguably post-*Lucas*] is, at a minimum, confusing and, at most, incomprehensible"); Gregory Daniel Page, *Lucas v. South Carolina Coastal Council and Justice Scalia's Primer on Property Rights: Advancing New Democratic Traditions by Defending the Tradition of Property*, 24 Wm. & Mary Envtl. L. & Policy Rev. 161 (2000) (proposing that the Court's changing definitions of Fifth Amendment property have confused litigants); Jamee Jordan Patterson, *California Land Use Regulation Post Lucas: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 UCLA J. Envtl. L. & Policy 175 (1993) (contending that takings

Furthermore, states such as South Carolina have similar state law takings provisions,[8] typically in their state constitutions.[9]

The *Lucas* case originated with the 1986 purchase by David H. Lucas of two residential lots in the Wild Dune development on the Isle of Palms, a barrier island to the east of Charleston, South Carolina.[10] A contractor, manager, and part owner of the development, Lucas had lived in the area for eight years.[11] The lots were on land known to be unstable and subject to daily floods and a shifting shoreline – so much so, that for "roughly half of the last 40 years, all or part of [the] property was part of the beach or flooded twice daily by the ebb and flow of the tide."[12] Specifically, between 1957 and 1963, the property was under water. [13] The following decade, the shoreline was 100 to 150 feet onto Lucas'

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jurisprudence has become "more complicated and confused than ever" since 1987); Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 Va. Envtl. L.J. 537 (1994) (looking at takings jurisprudence in light of the fact that the majority of remaining U.S. wetlands is under private ownership); Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law*, 26 Loy. L.A. L. Rev. 943 (1993)(questioning whether water rights inhere in the title of a property owner after *Lucas*); Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 Va. Envtl. L.J. 439 (1993) (suggesting that *Lucas* has had very little practical effect on regulation of real property); Victoria Sutton, *Constitutional Taking Doctrine - Did Lucas Really Make a Difference?*, 18 Pace Envtl. L. Rev. 505 (2001) (examining the impact of *Lucas* on private property rights); Russell Traw, *Developments in Case Law: The Authority of the South Carolina Coastal Council*, 4 S.C. Envtl. L.J. 201 (1995); James B. Wadley, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 Wm. Mitchell L. Rev. 331 (1993) (implying not only that Lucas created confusion, but also that it was too broad); Robert M. Washburn, *Land Use Control, the Individual, and Society:* Lucas v. South Carolina Coastal Council, 52 Md. L. Rev. 162 (1993) (examining the breadth of the fundamental, constitutional right to be secure in the use of one's own property).

[8] The South Carolina Constitution provides that "private property shall not be taken . . . for public use without just compensation being first made therefor." S.C. Const. art. I, §13. *See also* National Conference of State Legislatures, *Evaluating the Effects of State Takings Legislation, State Legislative Report*, <http://www.ncsl.org/programs/esnr/slr232.htm> (accessed Oct. 30, 2003).

[9] For an excellent discussion of the South Carolina takings jurisprudence and its implications, *see* F. Patrick Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C. L. Rev. 93 (1998).

[10] *Lucas*, 505 U.S. at 1006. Lucas paid $975,000 for the two lots. *Id.*

[11] *Id.* at 1038 (Blackmun, J. dissenting).

[12] *Id.*

[13] *Id.*

property.[14] The instability of the land in the Wild Dune development prompted the Town of Isle of Palms to issue twelve emergency orders for sandbagging to protect existing structures between 1981 and 1982 alone. The South Carolina Coastal Council subsequently issued permits for two rock revetments[15] to be placed close to Lucas' property.[16] In fact, one of the revetments extends more than halfway onto one of the Lucas lots.[17]

In 1988, the South Carolina Legislature enacted the Beachfront Management Act (BMA),[18] which amended and strengthened South Carolina's 1977 Coastal Zone Management Act.[19] The retreat provision of the Beachfront Management Act, designed to prevent construction in such erosional areas, stopped Lucas from building any permanent buildings on his lots.[20] Lucas filed suit against the South Carolina Coastal Council, the state agency responsible for implementing the Beachfront Management Act, alleging that his property had been taken without just compensation.[21] Specifically, Lucas claimed the Act deprived him of all

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[14] *Id.*

[15] Revetments are "structures placed on banks or bluffs in such a way as to absorb the energy of incoming waves. They are usually built to preserve the existing uses of the shoreline and to protect the slope. Like seawalls, revetments armor and protect the land behind them. They may be either watertight, covering the slope completely, or porous, to allow water to filter through after the wave energy has been dissipated." <http://www.usna.edu/NAOE/courses/en420/bonnette/revetments.html> (last visited Jan. 10, 2004).

[16] *Lucas*, 505 U.S. at 1038.

[17] *Id.*

[18] S.C. Code Ann. § 48-39-10 to 48-39-360 (Supp. 2002). The Beachfront Management Act created baselines, taking into account erosion levels from year to year, from which setbacks were created where development could begin. *See* South Carolina Department of Health and Environmental Control, *The South Carolina Beachfront Management Act, Preface,* <http://www.scdhec.net/eqc/ocrm/pubs/uoce.pdf> (accessed Jan. 30, 2004).

[19] S.C. Code Ann. § 48-39-10 - 48-39-360 (1987). This state law was passed in accordance with the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1465 (2000). The state Coastal Zone Management Act was amended further in 1990. *See* 1990 S.C. Acts 607.

[20] The Act prohibited building seaward of a line drawn 20 feet landward to, and parallel to, a "baseline" connecting the landwardmost "points of erosion . . . during the past forty years." *Lucas,* 505 U.S. at 1008-1009 (citing S.C. Code Ann. § 48-39-280(A)(2)).

[21] *Lucas*, 505 U.S. at 1009.

"economically viable use" of his property, and was therefore an uncompensated taking under the Fifth and Fourteenth Amendments.[22]

The state trial court agreed with Lucas, finding that the ban on building rendered his lots "valueless" and entering an award for $1.2 million.[23] In 1991, the South Carolina Supreme Court reversed, noting the Legislature's findings that new construction in a coastal zone threatened a public resource.[24] Citing the 1887 case of *Mugler v. Kansas,*[25] the South Carolina Supreme Court ruled that when a regulation is designed to prevent "harmful or noxious uses" of property, no compensation is owed under the Takings Clause, regardless of the regulation's effect on property value.[26]

The United States Supreme Court reversed the South Carolina Supreme Court's decision and ruled that a regulation that deprives a property owner of all "economically viable uses of his land" constitutes a regulatory taking that requires just compensation.[27] This decision energized a simmering private property rights[28] debate that continues to this day.[29]

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[22] *Id.*

[23] *Lucas v. S.C. Coastal Council*, Charleston County Court of Common Pleas, 1989 CP 10 #000066 <http://www3.charlestoncounty.org/connect/LU_GROUP_1> (accessed December 3, 2003).

[24] The court noted that "[a]lthough the regulatory takings question is a complex one, and although regulations affecting coastal property are especially problematic, this appeal presents, in the end, what in our view is a relatively straightforward issue." *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896-898 (1991).

[25] 123 U.S. 623 (1887).

[26] *Lucas*, 404 S.E.2d at 900.

[27] *Lucas,* 505 U.S. at 1004.

[28] We will not attempt to define "private property rights" here, but note that we agree with the concept that "the definition of private property rights - and, as appropriate, the redefinition of private property rights over time - must generally be left to democratically elected representatives of the people rather than to the judiciary." Georgetown Envtl. L. & Policy Inst., *The Takings Issue*, <http://www.law.georgetown.edu/gelpi/takings/index.htm> (accessed Jan. 13, 2004).

[29] The private property rights movement has many national organizations. *See e.g.* American Land Rights Assn., <http://www.landrights.org> (accessed Jan. 13, 2004); Coalition for Property Rights, *Home Page* <http:www.proprights.com> (accessed Jan. 13, 2004); Defenders of Property Rights, *Home Page* <http://www.yourpropertyrights.org> (accessed Jan. 13, 2004); Prop. Rights Cong. of Am., Inc., *Home Page*, <http://www.freedom.org/prc> (accessed Jan. 13, 2004). For general information on the property rights debate, *see* Georgetown Envtl. L. & Policy Inst., *supra* n. 28.

III. OUTCOMES OF THE *LUCAS* DECISION

Perhaps the most significant outcome of the *Lucas* holding is its lack of impact on general land use regulation. Following the decision, some environmental advocates worried that local governments and state agencies would forgo important regulatory initiatives for fear of having to compensate a new class of property owners.[30] Property rights advocates heralded *Lucas*, along with three other United States Supreme Court cases dealing with takings – *First Evangelical,*[31] *Nollan,*[32] and *Dolan*[33] – as signaling a new era in the battle against regulation.[34] Justice Blackmun, in his *Lucas* dissent, had warned of the potential for misinterpretation:

> The Court makes sweeping and in my view, misguided and unsupported changes in our takings doctrine. While it limits these changes to the most narrow subset of government regulation – those that eliminate all economic value from land – these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One

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[30] *See* South Carolina Coastal Conservation League, *The Coastal Guardian*, 3.4 (newsletter of the S.C. Coastal Conservation League) 1-2 (July/Aug. 1992).

[31] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304 (1987). A church complained that a county flood control district ordinance prohibiting construction on the church's property denied it the use of its property. The Supreme Court ruled that when a government has taken property by a land use regulation, the landowner may recover damages for the period before it is finally determined that the regulation constitutes a taking of property.

[32] *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825 (1987). The California Coastal Commission imposed a condition to a rebuilding permit requiring owners to provide lateral public beach access to cross private property. The Supreme Court ruled that Commission could not, without paying just compensation, impose, as a condition on a rebuilding permit, that property owners transfer to the public an easement across beachfront property.

[33] *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The city imposed a condition on a building permit requiring a landowner to dedicate a portion of her land lying within a flood plain for improvement of storm drainage and land adjacent to floodplain be dedicated for a bicycle and pedestrian pathway. The Supreme Court held that the city's dedication requirements constituted an uncompensated taking of property.

[34] Nancy G. Marzulla, *Land Rights: The 1990's Property Rights Rebellion*, 15 (Bruce Yandle ed., Rowman and Littlefield 1995).

> hopes they do not go beyond the narrow confines the Court assigns them to today.[35]

The actual lack of collateral damage from *Lucas* is due, we believe, to the generally high quality of commentary following the release of the decision[36] and the fact-specific nature of takings jurisprudence, as demonstrated by subsequent cases.[37] Observers agreed with the dissent's description of *Lucas*-type instances as "*relatively rare situations* where the government has deprived a landowner of all economically beneficial uses."[38] Such an analysis seems to have filtered rapidly to local planning departments, state agencies, and subsequent court decisions.[39] Although there undoubtedly have been misinterpretations of *Lucas,*[40] on balance the decision and its counterparts provided additional clarity on the permissible boundaries of regulation.[41]

Subsequent United States Supreme Court holdings in the takings arena have not resulted in broad expansion of the protection afforded property owners. In the 2002 *Lake Tahoe*[42] decision, for example, the Court sustained local development moratoria on grounds that protecting critical environmental resources is a proper exercise of the police power of the state.[43] Likewise, in the 2001 *Palazzolo* decision,[44] a landowner invested in property containing salt marshes designated by the local

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[35] *Lucas*, 505 U.S. at 1061 (Blackmun, J., dissenting).

[36] *See supra* n. 7.

[37] The U. S. Supreme Court acknowledges that its regulatory takings jurisprudence is characterized by "essentially ad hoc, factual inquiries," *Penn Central*, 438 U.S. at 124, designed to allow "careful examination and weighing of all the relevant circumstances," *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). For an interesting discussion of the *Lucas* case in the energy law context, *see* Paul Turner & Sam Kalen, *Takings and Beyond: Implications For Regulation*, 19 Energy L.J. 25 (1998).

[38] *Lucas*, 505 U.S. at 1018. (Emphasis added).

[39] A LEXIS Shepard's search on Jan. 29, 2004 shows that the 1992 U.S. Supreme Court decision in *Lucas*, 505 U.S. 1003, has been cited close to 2,800 times.

[40] Interview with Chris Brooks, Deputy Director, S.C. DHEC Office of Coastal Resources Management (OCRM), and Deborah Hernandez, Engineer, S.C. DHEC/OCRM. Hernandez stated that not allowing a landowner to build a bridge across public trust marsh could be a taking. (1999).

[41] *See supra* n. 38.

[42] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency,* 535 U.S. 302 (2002).

[43] *Id.* at 343.

[44] *Palazzolo*, 533 U.S. 606 (2001).

regulatory agency as protected coastal wetlands.[45] When repeatedly denied permission to fill the wetlands, the landowner filed a takings action, which the state court rejected.[46] The Supreme Court affirmed in part, holding the state court correct in finding that the landowner failed to establish a deprivation of all economic value when the upland portion of the parcel retained significant worth for construction of a residence.[47] The case was remanded[48] so the claims could be examined under a more traditional takings analysis set forth in the 1978 Penn Central case.[49] Twelve years after *Lucas*, therefore, governmental bodies can proceed with regulation with an elevated, although by no means clear, understanding of its constitutional limits.[50] In light of these recent cases, maybe other aspects and outcomes of the *Lucas* case – and the property involved in that case – deserve more attention.

IV. ECONOMIC AND GEOLOGIC CONTEXTS OF *LUCAS*

Perhaps the most important lessons from *Lucas* for this century have less to do with its legal implications than with the economic and geological context that gave rise to the case. Understanding this context is critical for policy makers confronting beachfront and land use challenges in the coming decades.

Beaches along the Atlantic and Gulf coasts always have been unstable, dynamic places.[51] South Carolina's barrier islands are virtual geological infants, having been formed only 10,000 or so years ago.[52]

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[45] *Id.* at 611.

[46] *Palazzolo v. State*, 746 A.2d 707 (2000).

[47] *Palazzolo*, 533 U.S. at 632.

[48] *Id.*

[49] The test set forth by this case involved a conclusion that "the application of New York City's Landmarks Law has not effected a 'taking' of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties." *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104, 138 (1978).

[50] *See* U. S. Govt. Acct. Off., *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property* <http://www.gao.gov/new.items/d031015.pdf> (accessed Jan. 13, 2004).

[51] *See* Orrin Pilkey, *A Celebration of the World's Barrier Islands* 38-88 (Columbia U. Press, 2003).

[52] Gered Lennon, William J. Neal, David M. Bush, Orrin H. Pilkey, Matthew Stutz, & Jane Bullock, *Living With the South Carolina Coast* 15-16 (Duke U. Press, 1996).

Erosion and accretion are facts of life in these areas.[53] However, two additional factors have converged to create a fiscal and political powder keg. First, intense and extensive development of coastal barrier islands has exploded in the past three decades.[54] The investment of billions of dollars of private and public capital to develop these areas is historically unprecedented.[55] Further, the pace of development and redevelopment in these areas does not appear to be slowing.[56] The second factor is rising sea levels associated with global warming.[57]

A. *Development on the Isle of Palms*

In 1968, Congress established the National Flood Insurance Program,[58] which provides flood insurance coverage in areas where private insurance either was not available or was extremely expensive.[59] It seems no coincidence that five years later, in 1973, a group of investors formed the Isle of Palms Beach and Racquet Club and purchased 1,537 acres on the eastern end of the Isle of Palms for $638,000, or $1,649 per acre.[60]

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[53] *See* Pa. St. U., *Georgia-South Carolina Coastal Erosion Study Bibliography, Pt. 1* <http://www.personal.psu.edu/users/i/m/imh113/geoscience/Biblio111.pdf> (accessed Jan. 21, 2004) (a list of many studies demonstrating S.C.'s coastal erosion and accretion).

[54] Jeffrey S. Allen, Kang Shou Lu, & Thomas D. Potts., *A GIS-Based Analysis and Prediction of Parcel Land Use Change In a Coastal Tourism Destination Area* (World Congress on Coastal & Marine Tourism, Vancouver, B.C., Canada, 1999) <http://www.strom.clemson.edu/publications/coastal/cmt.pdf> (accessed Dec. 1, 2003).

[55] *See* Federal Emergency Management Agency, *National Flood Insurance Program: Fiscal Year 2002 Statistics by State* <http://www.fema.gov/nfip/fy02st.shtm> (accessed Dec. 1, 2003).

[56] *Id.*

[57] For a list of studies on sea level rise associated with global warming, *see* U.S. EPA, *Global Warming Publications, Sea Level Rise Reports*, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsSeaLevelRiseIndex.html> (accessed Jan. 30, 2004).

[58] 42 U.S.C. §§ 4011 – 4029 (2003).

[59] For more about the federal flood insurance program, *see* Federal Emergency Management Agency, Flood Insurance, <http://www.fema.gov/nfip> (accessed Jan. 30, 2004).

[60] Charleston County Property Records, < http://www.taxweb.charlestoncounty.org> (accessed Jan. 30, 2004)

Shortly thereafter, the Isle of Palms Beach and Racquet Club began the development of Wild Dunes,[61] building a golf course, marina, clubhouse, roads, and sewer and water lines. Over the coming decade, local property prices escalated dramatically. In 1979, lot 22, one of the lots at issue in the *Lucas* case, sold for $96,660.[62] This lot resold in 1984 for $200,000, resold again in 1985 for $260,000, and was purchased by David Lucas in 1986 for $475,000.[63] Lucas also purchased lot 24 for $500,000 in the same year.[64]

What is particularly striking about these price increases is the fact that these ever-increasing-in-value lots are on an especially unstable part of the Isle of Palms.[65] In light of this instability, the Beachfront Management Act[66] even designated this area as an "inlet erosion zone"[67] in 1988. The Act established a "baseline" where the high tide line reached its landward most point over a 40-year period.[68] In other words, everything seaward of the baseline had been under water for at least one extended period between 1948 and 1988. Both of Lucas' lots were located in this dynamic area.[69]

B. Sea Level Rise and Global Warming

Sea level is predicted to rise over this century from one to three feet.[70] In South Carolina, this rise will translate into a minimum of 200

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[61] For more information about the Wild Dunes Resort today, *see* <http://www.wilddunes.com/> (accessed Jan. 30, 2004).

[62] Charleston County Property Records, *supra* n. 60.

[63] *Id.*

[64] *Id.*

[65] David Bush, Orrin H. Pilkey Jr. & William J. Neal, *Living by the Rules of the Sea,* 19-40 (Duke U. Press, 1996).

[66] S.C. Code Ann. §§ 48-39-10 – 48-39-360 (Supp. 2002).

[67] S.C. Code Ann. § 30-1(D)(26) (2002) (A segment of shoreline along or adjacent to tidal inlets which is directly influenced by the inlet and its associated shoals).

[68] S. C. Code Ann. § 48-39-280(A)(2) (Supp. 2002).

[69] *Lucas*, 505 U.S. at 1008.

[70] Stephen P. Leatherman, *Modeling Shore Response to Sea Level Rise on Sedimentary Coasts*, 14 *Progress in Physical Geography* 447, 447-464 (1991). *See also* Bruce C. Douglas, *Global Sea Level Change: Determination and Interpretation* <http://www.agu.org/revgeophys/dougla01/dougla01.html> (accessed Jan. 30, 2004); James G. Titus & Vijay K. Narayanan, *The Probability of Sea Level Rise* <http://www.gcrio.org/EPA/sealevel/seatitle.html> (accessed Jan. 30, 2004).

feet of inland migration of the ocean, even absent local erosion trends.[71] As is true in other coastal regions, South Carolina structures collectively worth billions of dollars now stand within this 200-foot zone.[72] In the absence of major policy reforms, the convergence of sea level rise, natural erosion, and massive development along the beach, create a certain prescription for economic and political disaster in South Carolina.[73]

These revelations regarding the increasing danger faced by coastal property due to global warming are fairly recent. In fact, the *Lucas* Court noted that when Lucas purchased the lots in 1986, "no portion of the lots, which were located approximately 300 feet from the beach, qualified as a critical area under the 1977 [South Carolina Coastal Zone Management] Act."[74] Accordingly, at the time, Lucas was not legally bound to obtain permits in advance from the Coastal Council in order to develop his lots.[75] Yet extensive trial testimony meant the Court was aware of the erosional history of the lots.[76] Furthermore, the Beachfront Management Act was passed after an Environmental Protection Agency conference that discussed global warming and sea-rise.[77]

Despite abundant evidence of the instability of this area and the potential for property damage from storms and erosion, the Court ruled against the state's effort to ban construction.[78] Even in his dissent, Justice Blackmun focused more heavily on procedural issues than on advancing a substantive argument in defense of the Coastal Council's actions.[79] He objected to the majority's assumption that the property had lost all value, calling the state trial court's finding on that point "unreviewed (and

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[71] *Leatherman, supra* n. 70.

[72] *See generally* U.S. Geological Survey, *South Carolina Assessment GIS Data Compilation*, <http://coastal.er.usgs.gov/national_assessment/scarolina> (accessed Jan. 30, 2004).

[73] *See* Lennon, *supra* n. 52 (a compilation of perspectives about property ownership on South Carolina's shore); Wallace Kaufman & Orrin H. Pilkey, Jr., *The Beaches Are Moving: The Drowning of America's Shoreline* (Duke U. Press 1983).

[74] *Lucas*, 505 U.S. at 1008.

[75] *Id.*

[76] *Id.* at 1038.

[77] Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?* <http://lic.law.ufl.edu/~page/been.pdf%20> (accessed Mar. 25, 2004).

[78] *Lucas*, 505 U.S. at 1032.

[79] *Id.* at 1041-1061.

implausible)."[80] He went on to argue against the concept that eliminating economic use constitutes a categorical taking, calling instead for a return to the Court's unanimous approach in *Agins v. Tiburon,*[81] where each situation in which a taking is alleged "requires a weighing of public and private interest."[82] Yet even Justice Blackmun did not follow that line of reasoning to the conclusion that the specific state regulation in question, South Carolina's Beachfront Management Act, was justified by the public interest protected (or the public harm averted).[83] One is left to wonder whether, if the current science demonstrating sea level rise due to global warming had been a part of the South Carolina General Assembly's rationale for the Beachfront Management Act, the analysis would have been different.

C. Epilogue: Implications of the Lucas Property's Eventual Development

After modifying the test for a takings claim,[84] the United States Supreme Court sent the *Lucas* case back to the South Carolina Supreme Court to determine whether the Beachfront Management Act restrictions could be justified under "background principles of nuisance and property law."[85] Under this approach to the analysis, the State court did not find

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[80] *Id.* at 1036. Justice Blackmun also argued that the case was not ripe, because Lucas could have applied for a special permit under the 1990 amendment to the 1988 Beachfront Management Act, asserting "the concern [over Lucas' ability to obtain relief for a temporary taking] would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments." *Id.* at 1045.

[81] 447 U.S. 255, 260 (1980) (Land developers challenged a municipal zoning ordinance restricting construction on a five-acre tract of unimproved land in a desirable suburban area to five single-family residences. The plaintiffs had planned to construct an apartment building on the lot. The Supreme Court rejected the argument that the enactment of the ordinance constituted a taking of the property.)

[82] *Lucas,* 505 U.S. at 1049.

[83] *Id.* at 1053.

[84] Most scholars agree that the Supreme Court set forth a modified test in Lucas. *See, e.g.,* Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation,* (Island Press 1999); Henry N. Butler, *Regulatory Takings after Lucas,* <http://www.cato.org/pubs/regulation/reg16n3g.html> (accessed Jan. 20, 2004); David L. Callies, *Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas* (ABA 1996).

[85] *Lucas,* 505 U.S. at 1031.

this to be the case and directed the S.C. Coastal Council[86] to pay Lucas $1,575,000 for the lots and legal fees, and take title to the lots.[87]

Ironically, upon taking title to the Lucas property, the state agency proceeded to enable the very action – that of development – which it had spent years arguing was inappropriate. The agency sold both lots to a private buyer for development.[88] The buyer paid $360,000 for 11 Beachwood East and $425,000 for 13 Beachwood East.[89] In 1996, that buyer built a five- bedroom house of approximately 4,200 square feet on the first lot.[90] The County's assessed value for this lot was $1,318,000.[91] The second lot sold again in April 1999 for $650,000.[92] In 2001, the new buyer built a 3,200-square-foot, four-bedroom house, assessed at $1,235,000.[93]

In the final analysis, the government and taxpayers ended up paying twice for the Lucas lots – first, by subsidizing flood insurance and public funding of such activities as emergency sand scraping, and second, by forced outright purchase of the lots at prices that were higher than they would have been had the landowner shouldered all of the risk. Instead of furthering the goals of the Coastal Zone Management Program,[94] these actions worked against the public interest and wasted tax dollars.[95]

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[86] As part of a 1994 state government reorganization, the S.C. Coastal Council has been replaced by the S.C. Dept. of Health & Envtl. Control's Office of Ocean & Coastal Resource Mgmt. S.C. Dept. of Health & Envtl. Control, *Coastal Management in South Carolina, Fact Sheet, Coastal Program Time Line,* <http://www.scdhec.net/eqc/ocrm/IMAGES/CCF/Fact_Sheet_Time_Line.pdf> (accessed Jan. 30, 2004).

[87] *Lucas*, 424 S.E.2d 484 (1992).

[88] Charleston County Auditor, *Charleston County Public Records ONLINE System* <http://prcweb. charlestoncounty.org> (accessed Jan. 30, 2004).

[89] *Id.*

[90] Charleston County Online Tax System, *Charleston County Online Tax System: Real Property Detail* <http://taxweb.charlestoncounty.org> (accessed Jan. 30, 2004).

[91] *Id.*

[92] *See* Charleston County Auditor, *supra* n. 88.

[93] *Id.*

[94] S.C. Dept. of Health & Envtl. Control, *OCRM Organization and Staff*, <http://www.scdhec.com/ocrm/HTML/org.html> (accessed Jan. 30, 2004) (The South Carolina Ocean and Coastal Resource Management's home page states the primary goals of the program "are to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone for the people of the state.").

[95] *See* Town of Hilton Head Island, The Flood Hazard, <http://www.ci.hilton-head-island.sc.us/Safety/floodhaz.html> (accessed Jan. 30, 2004) (Local governments are forced to help their citizens manage the risks associated with coastal living.).

Although the South Carolina coast has not been hit by another major storm since Hurricane Hugo in 1989,[96] the beach in front of the two Lucas lots experienced severe erosion in the early and mid-1990s.[97] A significant amount of artificial manipulation has been necessary to protect coastal property in the area. For example, immediately following Hugo, extensive sand scraping[98] was performed in the area, as was true on many beaches in South Carolina.[99] Between 1995 and 1997, several emergency orders were issued to the Wild Dunes Community Association for sand scraping.[100] In 1997, a lot owner applied for a permit to place 5-foot by 10-foot sand bags to protect oceanfront lots.[101] After much public debate, the S.C. Department of Health and Environmental Control (DHEC) – the parent agency of what was the S.C. Coastal Council and what is now the Office of Ocean Coastal Resource Management (OCRM)[102] – denied the permit, agreeing to allow the use of smaller sand bags instead.[103]

In 2001, the Wild Dunes Community Association was issued a beach scraping permit by OCRM to place a maximum of 25,000 cubic

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[96] *See* Natl. Oceanic & Atmospheric Admin., Natl. Weather Serv. Forecast Office, <http://wchs.csc.noaa.gov/hugo.htm> (accessed Jan. 20, 2004) (contains a detailed accounting of the path and destruction of Hurricane Hugo).

[97] *See* Christopher P. Jones, *Temporal Shoreline Changes and Trends Along South Carolina Inlet Shorelines*, Natl. Oceanic & Atmospheric Admin. Shoreline Change Conference Proceedings, <http://www.csc.noaa.gov/shoreconf/session4.html#jones> (accessed Jan. 20, 2004). *See also* Surfrider Foundation, *South Carolina Beach Erosion* <http://beach.com/stateofthebeach/6-state/beach_erosion.asp?state=SC> (accessed Jan. 20, 2004) ("2% of South Carolina's shoreline is critically eroding, according to the report 'State Coastal Program Effectiveness in Protecting Natural Beaches, Dunes, Bluffs, and Rock Shores.' (T. Bernd-Cohen and M. Gordon), Coastal Management, 27:187-217, 1999.") For a discussion of erosion generally on South Carolina's shorelines, *see* Jeffrey Pompe, *The Nature of Sand: South Carolina's Shifting Shoreline*, <http://www.cla.sc.edu/poli/courses/scgov/Articles/Sand.htm> (accessed Jan. 20, 2004).

[98] Sand scraping entails excavating near the low tide line and placing the material in front of threatened houses and condominiums. It is considered part of beach renourishment by the S.C. Dept. of Health & Envtl. Control. *See* S.C. Dept. of Health & Envtl. Control, *State of the Beaches 2001,* <http://www.scdhec.net/eqc/ocrm/images/sob301_v2.html> (accessed Jan. 20, 2004).

[99] *See* Coastal Science & Engineering, *Emergency Beach & Dune Restoration Along S.C.'s Grand Strand Following Hurricane Hugo,* <http://www.coastalscience.com/acrobat/projectpapers/Hugo%20Web%20Page.pdf> (accessed Jan. 20, 2004).

[100] Interview with Bill Eiser, Geologist, S.C. DHEC, OCRM (2003).

[101] S.C. DHEC/OCRM, Permit No. OCRM-97-189-H.

[102] Coastal Mgt. In S.C., Fact Sheet, *supra* n. 89.

[103] Interview with Bill Eiser, Geologist, OCRM (2003).

yards of sand on the edge of eroding lots.[104] This permit was appealed; a final decision has not yet been rendered.[105] Nevertheless, on May 23, 2002, OCRM issued to the Wild Dunes Community Association another emergency order for beach scraping.[106] This level of beachfront manipulation in a period of relative calm is prophetic of the problems that almost certainly will occur in the future. It does not, however, offer any evidence that might cause the Court to rule differently today than it did in 1992.

In one sense, the *Lucas* case is straightforward. The state of South Carolina passed a law that prohibited the construction of houses on two beachfront lots.[107] The U.S. Supreme Court, agreeing with the South Carolina lower courts' analysis, decided that this prohibition had removed all economic value from the two lots.[108] From earlier jurisprudence,[109] the Court determined that the removal of all economic value constitutes a taking, unless the state can show that the action was grounded in "background principles of nuisance and property law."[110] On remand, the South Carolina Supreme Court determined that was not the case and ordered the S.C. Coastal Council to compensate Lucas.[111]

Yet certain questions remain unresolved. If the lots were located in such a hazardous location, why would a rational investor pay hundreds of thousands of dollars for them? And why, eventually, did the owners expend even more money to build large houses - houses that extensive evidence[112] suggested were likely to be damaged or destroyed over the next few decades? Was the state overselling the risk, or was the string of investors who drove the lot prices up at an annual rate of 20% misled about what they were buying? Further, what role should the U.S. Supreme

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[104] S.C. DHEC/OCRM, Permit No. OCRM-00-715-E (Feb. 8, 2001) (authorizing the Wild Dunes Community Association to perform beach sand scraping under certain conditions. No work has ever been done under this permit, which expires February 8, 2006. The permit states that the excavation zone will be on the intertidal beach to a depth of 18", not to exceed 25,000 cubic yards per month.).

[105] Interview with Bill Eiser, Geologist, S.C. DHEC/OCRM (2003).

[106] *Id.*

[107] *Lucas*, 505 U.S. 1003 (referring to the Beachfront Management Act, S.C. Code Ann. §§ 48-39-250 *et seq* (Supp. 1990)).

[108] *Id.* at 1031.

[109] *See Agins*, 447 U.S. 255.

[110] *Lucas*, 505 U.S. at 1004.

[111] *Lucas*, 424 S.E.2d at 486.

[112] *See supra* nn. 73-79 and accompanying text.

Court have, if any, in resolving what appear to be radically different economic points of view? Answering these questions involves the discussion of the origins of the constitutional protection of property presented in the next section.

V. ABANDONING THE ORIGINS OF CONSTITUTIONAL PROTECTION OF PROPERTY AND DISTORTING OF THE TRUE FREE MARKET AND REGULATORY PROCESSES

Over the past 200 years, the U. S. Supreme Court has adhered to the proposition that the free market should be protected from interference by the states.[113] Laissez-faire[114] capitalism is a cornerstone of American prosperity, and the courts have been zealous defenders of that system.[115]

During the drafting of the United States Constitution, South Carolina's Charles Pinckney advocated constitutional limitations on the states' power to impair contracts.[116] He argued this limitation was critical to restore American credit, which was instrumental to national commerce and prosperity:[117] "[n]o more shall paper money, no more shall tender laws, drive their (European) commerce from our shores. . ."[118]

Over the succeeding two centuries, judicial rulings on property were imbedded with the notion that free trade was the foundation of

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[113] *See Adams v. Tanner*, 244 U.S. 590 (1917) (overturning a Washington statute that prevented employment agencies from conducting business). *See also New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Oklahoma declared the making and selling of ice to be a business affected with a public interest and required a certificate for entering the business. In order to obtain such a certificate an applicant had to show "necessity" and the inadequacy of existing facilities. The Court noted that the certificate provision was clearly aimed to shut out new enterprises; thus creating a monopoly in existing ice companies, and that it further unreasonably curtailed the right to engage in a lawful private business in violation of the due process clause. *Id.* at 279-280)

[114] Laissez-faire is the governmental abstention from interfering in economic or commercial affairs. *Black's Law Dictionary* (7th ed. 1999).

[115] *See* Laissez-Faire League, *Laissez-Faire Primer*, available at <http://www.laissez-faire.org/lfprimer.html> (accessed Jan. 30, 2004). *See also* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Calif. L. Rev. 431 (1993); Jeffrey N. Gordon, *Corporations, Markets, And Courts*, 91 Colum. L. Rev. 1931 (1991).

[116] James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 50 (2d ed., Oxford Press 1998).

[117] *Id.*

[118] *Id.*

national prosperity.[119] In the early 20th century, the Court expressed its commitment to laissez-faire capitalism in *Lochner v. New York* when it overturned a New York law that restricted workers in bakeries to 10 hours a day or 60 hours a week.[120] Constitutional historian James W. Ely, Jr. explains that because the majority of the Supreme Court justices were influenced by laissez-faire values, they remained leery of economic regulations that altered free-market ordering or infringed on property rights.[121] Justice Holmes took exception to these principles in his dissent in the *Lochner* decision, squarely attacking the Court's use of the Fifth Amendment to promote unfettered capitalism. He stated, "[t]his case is decided upon an economic theory which a large part of the country does not entertain."[122] Justice Holmes argued in favor of a state role in setting working conditions, noting that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[123] Although subsequent rulings retreated from *Lochner* and gave the state more latitude to enact worker protection laws,[124] the basic principle remained that the constitutional protection of property was central to a free and prosperous economy.[125]

In this context, what distinguishes *Lucas* from virtually all prior takings cases is the extent to which the property values and uses under debate were not products of a truly free market. Instead, the extraordinarily high lot prices emerged from substantial federal and state market intervention, in the form of federal flood insurance subsidies[126] and

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[119] *Id.*

[120] *Lochner v. N.Y.*, 198 U.S. 45 (1905). (The Supreme Court overturned a New York State law that limited the employment in bakeries to 60 hours a week and 10 hours a day. The Court ruled that the New York law could not be sustained as a valid exercise of the police power to protect the public health, safety, and general welfare.).

[121] Ely, *supra* n. 116, at 120.

[122] *Lochner*, 198 U.S. at 75.

[123] *Id. See* Herbert Spencer, On Social Evolution, 38-52 (U. Chicago Press 1972).

[124] *See West Coast Hotel Co. v Parrish* 300 U.S. 379 (1937) (refusing to invalidate a Washington minimum wage law for women, noting that this class has been exploited and the community law-making power may correct this abuse), *Muller v. Oregon*, 208 U.S. 412 (1908)(ruling that an Oregon law limiting the amount of hours women could work in a laundry did not infringe upon the 14th Amendment, and that had this law applied to men, it would have been invalid).

[125] Ely, *supra* n. 116 at 101-18.

[126] *See* U.S. EPA, *supra* n. 57.

the South Carolina Wind and Hail Underwriting Association (the "wind pool").[127]

Such subsidies make it possible to obtain insurance in areas that the private sector had deemed too risky to insure.[128] The rapid increase in lot prices that occurred in the 1970s reflects, in part, the transfer of risk from the lot owner to the public.[129] Such a risk transfer benefits the owner at the time of transfer, in this case the Beach Company, and not David Lucas.[130] Once the risk transfer has been "internalized" in the price, subsequent owners do not reap further benefits.

How then can the *Lucas* circumstances, in which value and use emerge as a result of public subsidies distorting market forces, be reconciled with the U.S. Supreme Court's long tradition of defending free-market capitalism? There are two courses of inquiry the Court could have pursued. The first entails analyzing the economic context that gave rise to the case and factoring that into the decision regarding the consequences of the limitations placed on property development by the Beachfront Management Act. The second requires scrutiny of South Carolina's fiscal policies, namely public subsidies, and how they radically contradict government regulation.

A. Economic Context of Applying the Beachfront Management Act

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[127] *See* S.C. Wind & Hail Underwriting Assn., *About Us,* <http://www.scwhua.com/about> (accessed Jan 19, 2004) ("In 1971, the South Carolina Legislature required the insurance industry to make wind and hail insurance coverages available to home and business owners in the coastal area. This action was necessary because some residents and business owners were unable to obtain wind and hail coverages due to close proximity to coastline.") The state's decision to mandate the extension of insurance to an area that the industry had determined was unacceptably risky represents another market distortion that has the effect of encouraging beachfront development.

[128] Beth Millemann, *Flood Insurance Unmasked*, 25(2) Underwater Naturalist (Aug. 2000) 13-19. *See generally* Insurance Journal, *South Carolina Property Policies Dwindling* (Dec. 6, 2001) available at <http://www.insurancejournal.com/news/newswire/south/2001/12/06/15092.htm> (accessed Jan 30, 2004).

[129] *Id.* It is important to note that Lucas, as the fourth property owner of the lots, did not benefit directly from the subsidy. Because the flood insurance program and the wind pool were enacted long before Lucas purchased his lots, in 1968 and 1971 respectively, the price he paid reflected the risk transfers. In fact, of all of the individuals who owned these two lots, Lucas' profit, in terms of annual appreciation, was the smallest.

[130] Charleston County Tax Records, *supra* n. 60.

Professor John Nolan discusses economics in his 1992 article, *Private Property Investment, Lucas and the Fairness Doctrine.*[131] He writes, "most lots in this area of disability [the high-risk area where private insurance was not available] would not be developed but for the availability of government sponsored insurance programs."[132] He raises the question of whether this risk is a limitation that "'inhere[s] in the title [of the property] itself' as the majority decision required not because of common law nuisance limitations but due to local industry practices . . . ."[133] In other words, does the determination that the property is too risky to be covered by private insurance qualify as the limitation present in the title that the Court asserted must exist to justify a total taking?

This is an intriguing inquiry, but the Court did not choose to follow this path. They did not question the economic circumstances that gave rise to the case. The dissent did point out that Hurricane Hugo in 1989 "caused 29 deaths and approximately $6 billion in property damage"[134] and that the lots in question had been sold frequently at rapidly escalating prices before Lucas purchased them.[135] But beyond these issues, Justice Blackmun entertains no further speculation on the economics of beachfront development. Neither he nor the majority even mention the National Flood Insurance Program[136] or the state wind pool,[137] which effectively subsidizes building on high-risk properties.[138]

B. When Public Subsidies Trump Public Regulatory Efforts

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[131] John R. Nolan, *Private Property Investment, Lucas and the Fairness Doctrine*, 10 Pace Envtl. L. Rev. 43 (1992).

[132] *Id.* at 55 (quoting *Lucas*, 505 U.S. 1003, 1029 (1992)).

[133] *Id.* at 57.

[134] *Lucas,* 505 U.S. at 1037. (Blackmun, J., dissenting).

[135] *Id.* at 1039. ("The record does not indicate who purchased the lots prior to Lucas, or why none of the purchasers held on to the lots and built on them. . .")

[136] *See supra* n. 58-59.

[137] *See supra* n. 128-129.

[138] It is worth noting that a few years ago the state of South Carolina evinced an eagerness to increase coastal insurance opportunities for its residents. *See* S.C. Coastal Property Ins. Forum, Nov. 29-31 2001, <https://www.doi.state.sc.us/Eng/Public/PressReleases/ForumBooklet.pdf> (accessed Jan. 30. 2004) ("On November 21, 2001, the South Carolina Department of Insurance partnered with insurance agent associations and insurer representatives to sponsor a Coastal Property Insurance Forum. The purpose of the Forum was to bring to insurers attention the many positive opportunities for conducting business in our friendly regulatory environment.").

Because the web of public policies that affect property values is extraordinarily complex,[139] it is not surprising that the *Lucas* Court simply accepted the economic context rather than attempting to disentangle forces that underlie private value and use decisions. In our society, property prices are accepted at face value and reflect the conditions that prevail at the time.[140]

However, *Lucas* should be a warning to governments that regulatory goals and fiscal programs must not diverge radically in purpose and outcome. In the face of historically unprecedented rises in sea level combined with continued coastal development over the next century, federal flood insurance, state mandatory wind pools, publicly-funded beach nourishment projects, and other programs that reduce or remove risk from building in hazardous coastal areas should be reformed. This fact is especially true when the state decides that discouraging construction in certain areas is so detrimental as to warrant prohibiting it by regulation.[141] It is clearly the role of the legislative branch, not the courts, to rationalize regulation with fiscal policy.[142] The *Lucas* case illustrates the power of public subsidies to trump regulatory efforts. As such, it underscores the urgent need to reform programs that pay homeowners to build in our nation's most hazardous places. Such reforms will likely start with concerned citizens understanding the economic and environmental ramifications of subsidies for coastal development.[143] We

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[139] *See supra* nn. 58-83 and accompanying text.

[140] Coastal property prices continue to rise. Retirement Living Information Center, *Home Prices Soar for Coastal Property*, <http://www.retirementliving.com/RLart243.htm> (accessed Jan. 30, 2004) ("While overall home-price appreciation currently stands at 7%, prices along the coasts have posted double-digit growth. The average sales price has surged 78% to $457,000 over the last three years in North Carolina's Outer Banks, for instance; and prices have risen rapidly in San Diego, Cape Cod, South Florida and South Carolina's Hilton Head as well.").

[141] Often, instead of regulating, states attempt to inform citizens of the ramifications of choices related to coastal living. *See, e.g.*, S.C. Dept. of Health and Envtl. Control, *Coastal Management in South Carolina, Fact Sheet, The Changing Faces and Places of Coastal South Carolina*, <http://www.scdhec.net/eqc/ocrm/IMAGES/CCF/Fact%20Sheet%20Changing%20Faces.pdf> (accessed Jan. 30. 2004).

[142] For an interesting discussion of the difficulties associated with takings jurisprudence, *see* Marc R. Poirier, *The Virtues of Vagueness in Takings Doctrine* 24 Cardozo L. Rev. 93 (2002).

[143] Susanne C. Moser, *Union of Concerned Scientists, Community Response to Coastal Erosion: Implications of Potential Policy Changes to the National Flood Insurance Program Global*, F-5, <http://www.heinzctr.org/Programs/SOCW/

must go beyond shifting responsibilities to purchasers,[144] and implement sound state and federal policies that will reflect the true risk and costs associated with coastal development.

Erosion_Appendices/Appendix%20F%20-%20FINAL.pdf> (accessed Mar. 24, 2004) ("The community level thus is a crucial one for understanding management responses to coastal erosion. It is the level at which all individual and higher-order efforts (regional, state, and federal) ultimately intersect. It is the level at which governmental or permit-requiring erosion response actions are implemented. As such, it is also the level at which economic, political, legal, and social pressures to enforce or evade rules and regulations stemming from any governmental level become most immediate and take on a personal face. Any change in federal, state, or local shoreline development and protection policy will affect these communities and the erosion management actions they take.").

[144] S.C. Sea Grant Extension Program & S.C. DHEC, Office of Ocean and Coastal Resource Management, *Q&A On Purchasing Coastal Real Estate in South Carolina*, <http://www.scdhec.com/ocrm/PUBS/qa_realestate.pdf> (accessed Mar. 24, 2004) ("Most oceanfront property is vulnerable to natural forces such as storms and beach erosion, which can pose threats to your prospective property and undercut its value. This guide focuses on basic questions you should ask as a potential purchaser of coastal real estate. Whether you are considering an undeveloped lot or an existing building, there are critical issues you should examine before committing to purchase.").