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## Lucas Unspun

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# LUCAS UNSPUN

RICHARD J. LAZARUS\*

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## I. INTRODUCTION

I distinctly remember my first visit to South Carolina. I arrived in Charleston from St. Louis on the evening of Friday, January 17, 1992. I flew to meet with Cotton Harness, counsel of record for the South Carolina Coastal Council in the *Lucas v. South Carolina Coastal Council*<sup>1</sup> case then pending<sup>2</sup> before the United States Supreme Court. Harness had already completed an ambitious draft of the brief that was due to be filed fairly soon. My primary task was somewhat daunting: I wanted to explain to him that his brief was well-written and included some excellent research ideas, but that it was misdirected before this particular Court at this time. I then had to hope he did not throw me out of his office in the first few seconds after my

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\* Professor of Law, Georgetown University Law Center. The author can be contacted at [lazarusr@law.georgetown.edu](mailto:lazarusr@law.georgetown.edu). This essay is based on remarks delivered at the Conference *Balancing Private and Public Rights in the Coastal Zone in the Era of Climate Change: The Fifteenth Anniversary of Lucas v. South Carolina Coastal Council*, held at the University of South Carolina School of Law in Columbia, South Carolina, on September 20-21, 2007, and co-sponsored by the Georgetown University Law Center. I served as co-counsel to respondent South Carolina Coastal Council in the *Lucas* case and the views expressed in this essay are mine alone and do not reflect the views of my client in that case or likely anyone else. Thanks are owed to Julia Stein, Georgetown University Law Center Class of 2009, for her excellent research assistance in the initial preparation of my talk and then of this published essay.

<sup>1</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>2</sup> *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 502 U.S. 966 (1991) (No. 91-453).

explanation. Egos often dominate in Supreme Court litigation and skirmishes over the opportunity to bask in the corresponding limelight abound. Happily, this difficulty never materialized, and what transpired instead was one of the best working relationships I have ever experienced in Supreme Court litigation.

Harness's draft made an impressive effort to persuade the Supreme Court that it had made a doctrinal mistake in 1922 by embracing the notion of a "regulatory takings" in *Pennsylvania Coal v. Mahon*.<sup>3</sup> A fair number of noted academics had advanced similar claims in legal scholarship<sup>4</sup> and some parties, including even the United States,<sup>5</sup> had presented this theory to the Court in recent litigation. However, based on the Court's cold reception,<sup>6</sup> it was fairly clear that there were nowhere near the five votes necessary on the Court to prevail on such a sweeping theory, regardless of what one might think of its merits. What Harness and I discussed that first night in Charleston was the need to craft a legal position that, in contrast to his initial draft, did not seek the equivalent of a "Hail Mary" pass for a touchdown, but instead simply tried to hold the line of scrimmage and, at most, possibly even gain a couple of yards. Given the facts of the case, the membership of the Court, and the Court's grant of review, any further ambition was unlikely to succeed and might even backfire.

An attorney from the California Attorney General's Office joined me that weekend. He focused on the ripeness issue while I focused on the merits of the taking issue. The three of us quickly developed a constructive working relationship and we hunkered down all day and much of both Saturday and Sunday nights drafting another brief. We put the final touches on a significantly revised draft Monday morning, rendering it ready for distribution. We all felt good about the new draft. The new draft was strategically pitched to the mix of Justices deciding the case and we presented the case in the most positive light possible, notwithstanding the challenging factual assumption upon which the Court had apparently granted review.

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<sup>3</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (finding that the Kohler Act was not a legitimate exercise of police power, but rather was an unconstitutional taking of defendant's contractual and property rights because it served to take away those valid rights without adequate and just compensation).

<sup>4</sup> See J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 239 (1990); Brief of the U.S. Conference of Mayors, et al. as Amici Curiae in Support of Respondent, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1991) (No. 91-453), 1992 WL 12006600, at 6-12.

<sup>5</sup> See Brief for United States as Amicus Curiae in Support of Respondents, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (No. 79-678).

<sup>6</sup> See *San Diego Gas & Elec. Co.*, 450 U.S. at 646-61 (Brennan, J., dissenting).

Immediately before getting on the airplane to fly home to St. Louis on Monday morning, I purchased the *New York Times*, as is my habit. As the plane took off, I opened it up and immediately saw the front-page headline above the fold in the right hand premier spot: an article by Keith Schneider entitled "*Environmental Laws Face a Stiff Test from Landowners*."<sup>7</sup> The article, which focused on the pending *Lucas* case before the Court, quickly reminded me of the stakes and why so much potentially turned on the outcome. I shared the vision of those who viewed a strengthening of the nation's environmental protection laws as one of the great legal achievements of the latter half of the twentieth century.<sup>8</sup> But I was well aware that there were those whose views of these laws were dramatically different.<sup>9</sup> They perceived the same laws that I trumpeted as ones which unduly interfered with the free market forces that they believed made the nation great and which undermined personal liberty by eroding the private property rights upon which the nation had been founded.<sup>10</sup> By then, the regulatory takings issue had become the primary battleground for the conflict between these two visions and now, in *Lucas*, the Supreme Court was on the verge of taking sides.

This essay revisits the *Lucas* litigation fifteen years after the Court's ruling. It is divided into three parts. The first part returns to a behind-the-scenes description of some of respondent South Carolina Coastal Council's litigation strategy in presenting its case before the Court. The second part reviews the *Lucas* decision's actual impact on the law, in terms of both its impact on the development of the relevant law and its impact on the actual land use decisions of government agencies charged with protecting public health and welfare by restricting environmentally destructive land uses. The third part briefly considers the questions presented by *Lucas* in light of what we know today, more than fifteen years later, about the dangers presented by global climate change.

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<sup>7</sup> Keith Schneider, *Environmental Laws Face a Stiff Test from Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1.

<sup>8</sup> See, e.g., Byrne, *supra* note 4; Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739 (1992); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

<sup>9</sup> See, e.g., Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517 (1992).

<sup>10</sup> See *id.* at 536-39 (arguing that modern-day environmental protection favors centralized control by Congress and the EPA to the detriment of private property rights).

## II. LOOKING BACK AT THE *LUCAS* LITIGATION

When the Court granted review in *Lucas* in November of 1991,<sup>11</sup> there was little question why. The property rights bar had successfully persuaded a majority of the Justices that environmental land use restrictions were unduly eroding private property rights in natural resources and that the Fifth Amendment's Just Compensation Clause provided an appropriate constitutional ground for reining in government.<sup>12</sup> Throughout the 1980s, the Court reviewed a series of cases at the behest of private landowners who claimed that environmental restrictions amounted to an unconstitutional taking of their property.<sup>13</sup> While the landowners lost almost every one of those cases,<sup>14</sup> *Lucas* offered the prospect of a different and, for me, troubling result.

*Lucas* was one of a trilogy of property rights cases accepted for review in the October Term of 1991; the other two cases were *Yee v. City of Escondido*<sup>15</sup> and *PFZ Properties v. Rodríguez*.<sup>16</sup> Even more portentously, the Court granted review almost immediately after Justice Clarence Thomas joined the Court in the Fall of 1991. It was no secret, then, that property rights were a primary concern of Justice Thomas or that his addition to the bench potentially cemented a five-Justice majority ready to reinvigorate the regulatory takings doctrine.<sup>17</sup> During the Senate confirmation hearings on the Thomas nomination, the very first line of questioning directed by Senate Judiciary Committee Chair Joseph Biden concerned the nominee's views on

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<sup>11</sup> *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 502 U.S. 966 (1991) (No. 91-453).

<sup>12</sup> See Lazarus, *supra* note 8, at 1755 n.104.

<sup>13</sup> See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

<sup>14</sup> The exception was the ruling in *Keystone Bituminous*, 480 U.S. 470 (1987), in which the Court upheld a land use restriction on coal mining, notwithstanding the fact that the restriction significantly reduced the amount of coal that could be mined. The Court split five to four, with Justice Stevens writing the opinion for the Court, joined by Justices Brennan, White, Marshall, and Blackmun, and Chief Justice Rehnquist authored the dissenting opinion, joined by Justices Powell, O'Connor, and Scalia.

<sup>15</sup> 503 U.S. 519 (1992).

<sup>16</sup> 504 U.S. 935 (1992).

<sup>17</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1005 (1992) (Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joining Scalia's majority opinion).

private property rights.<sup>18</sup> For this reason, when the Court granted review in *Lucas* literally days after Justice Thomas took the oath of office, the judicial handwriting seemed very much on the wall.

After all, on its face, *Lucas* seemed like the perfect setting for the property rights movement. The plaintiff, David Lucas, was a landowner who simply wanted to build a home.<sup>19</sup> Furthermore, the plaintiff's property was zoned residential at the time of his purchase, which was before the land use restriction he challenged took effect.<sup>20</sup> Making matters worse for the government (and correspondingly better for Mr. Lucas), the plaintiff's two vacant lots were surrounded by homes on both sides.<sup>21</sup> All David Lucas wanted to do was build single-family homes, just as everybody else in the area with identically-situated property had already done.<sup>22</sup> Finally, in ruling that a taking had occurred, the trial court had found that the restriction on development rendered Lucas's property without any economic value.<sup>23</sup> No matter how unlikely the validity of that factual finding, the state supreme court did not disturb it when it reversed the trial court and ruled that the restriction on development was not a taking of his property without just compensation.<sup>24</sup>

The goal of the brief filed on behalf of the South Carolina Coastal Council was thus simultaneously modest and ambitious. We needed the Court to appreciate that the case was not nearly as one-sided as the clerks and some of the Justices might have thought when certiorari was granted. In fact, the equities were in much closer balance.

We had two possible strategies for convincing the Justices of our position. The first was to prompt the Justices to be more skeptical of the validity of the factual finding of no remaining economic value. To be sure, the trial court had found no remaining economic value<sup>25</sup> and the state supreme court accepted that determination,<sup>26</sup> but it seemed so patently

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<sup>18</sup> Linda Greenhouse, *The Thomas Hearings: The Opening Skirmish; Thomas Scores Points in the Crucial Battle for the First Impression, But So Do Critics*, N.Y. TIMES, Sept. 11, 1991, at A1.

<sup>19</sup> See *Lucas*, 505 U.S. at 1007.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1009.

<sup>24</sup> *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 907 (S.C. 1991).

<sup>25</sup> See *id.* (stating that the trial judge accepted Lucas' appraiser's conclusion that the lots were valueless).

<sup>26</sup> *Id.* at 901 ("It is clear, however, that the plaintiffs in *Carter* were as much deprived of all economically viable use of their lands as Lucas is.").

absurd on its face to be an untenable factual premise for such an important question of constitutional law. Of course, the value of the property was far less due to the restriction on residential construction.<sup>27</sup> But zero? No way. Those with neighboring homes would clearly have been willing to purchase the property to expand the size of their lots. Would they be willing to pay anything remotely approximate to the value of the property as a buildable lot? Of course not. But they would just as certainly have been willing to pay some positive, nontrivial sum.

Making the Justices aware of that fact, however, was plainly tricky. Whatever its absurdity, the trial court had found no remaining economic value and we were stuck with that finding before the High Court.<sup>28</sup> Our brief in opposition at the certiorari stage had failed to object to that factual finding or otherwise contest petitioner's repeated assertion of an economic wipeout.<sup>29</sup> Under the Court's Rules, any objection we might have had to that factual assertion could accordingly be deemed waived.<sup>30</sup> We therefore needed to cast doubt on the finding's merits in order to make the Court less sympathetic to petitioner's claimed equities, while remaining well aware that this was unlikely to be the silver bullet necessary to unravel the case given its procedural posture.

The more promising basis for possibly unraveling petitioner's case was to stress that, although the procedural posture of the case might not permit a revisiting of the trial court's factual finding of no economic value, that same procedural posture provided good reason to discount the legal significance of that factual finding in the state supreme court. Both in its petition and its opening brief, petitioner had characterized the state supreme court as ruling that valid police power regulations could *never* constitute a taking requiring the payment of just compensation, even if they deprived a landowner of all economic value.<sup>31</sup> My own view was that if the U.S. Supreme Court agreed with petitioner that such a characterization of the state supreme court ruling was correct, we would clearly lose. However, I did not think there was a majority on the Court ready to endorse such a legal proposition. There might not even be one vote, let alone the requisite five.

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<sup>27</sup> See Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. URB. ECON. 420 (2006).

<sup>28</sup> *Lucas*, 505 U.S. at 1007.

<sup>29</sup> See Respondent's Brief on the Merits, *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1991) (No. 91-453), 1992 WL 672613.

<sup>30</sup> SUP. CT. R. 15.2.

<sup>31</sup> Petitioner's Brief on the Merits at 10, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453), 1991 WL 626699, at \*10.

The good news was that the state supreme court had not held that a valid police power regulation is never a taking regardless of the extent of the economic deprivation.<sup>32</sup> The bad news was that petitioner had effectively used language in the state court's opinion to make it seem as though the court had nonetheless done so.<sup>33</sup> And, now that the Court had accepted jurisdiction on this ground, it would not be easy to persuade the Justices that the legal issue, which at least four had thought was presented by the decision below, was not, in fact, before the Court. Those Justices who had voted in favor of review would naturally resist the conclusion that the legal issue they had wanted to reach was not presented by the case.

The simple truth, however, was that petitioner's characterization of the lower court ruling was misleading. The state supreme court's actual ruling held that a valid police power regulation was *not always* a taking, even if it deprived a landowner of all economic value, not that it was *never* a taking.<sup>34</sup> The extreme nature of petitioner's taking theory, both at trial and before the state supreme court, was the source of the confusion.

In the state courts, petitioner's exclusive argument advanced the theory that a land use restriction *always* constituted a taking if there was no remaining economic value, even if the challenged restriction functioned only as a bar to an activity that amounted to a nuisance under the common law.<sup>35</sup> Consistent with its legal argument, petitioner objected at trial to the introduction of any evidence regarding the harm that might be caused by development so close to the ocean on the ground that such evidence was irrelevant under their legal theory that economic deprivation was itself dispositive.<sup>36</sup>

The state supreme court had merely rejected petitioner's extreme *per se* takings argument.<sup>37</sup> The court did not deny that some total economic

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<sup>32</sup> See *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 901 (S.C. 1991).

<sup>33</sup> See Petitioner's Brief on the Merits, *supra* note 31, at \*12.

<sup>34</sup> See *Lucas*, 404 S.E.2d at 908 n.4 ("In *Carter*, we held that every regulation 'will not necessarily be a (taking) in the constitutional sense.' Implicit in this is a recognition that there nonetheless will be situations where regulation will be a taking. As indicated by the analysis in this opinion, I would hold that this is one of those situations.").

<sup>35</sup> See *id.* at 898 ("In lieu of any attack whatsoever on the statutory scheme, *Lucas* rests on a solitary argument, *viz.*, that he is still, despite these concessions, entitled to compensation from the State. He contends that a single legal test exists which, if failed, conclusively establishes that a 'regulatory taking' has occurred. *Lucas* maintains that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration.").

<sup>36</sup> See Respondent's Brief on the Merits, *supra* note 29, at \*12.

<sup>37</sup> See *Lucas*, 404 S.E.2d at 900.



wipeouts could be takings.<sup>38</sup> Nor did the court say a ban on residential construction in the Isle of Palms was doing nothing more than preventing a common law nuisance.<sup>39</sup> The court never reached that issue because petitioner's argument was that there was no nuisance exception.<sup>40</sup>

Therefore, our challenge was to demonstrate that petitioner erred in framing the issue as being whether valid police power regulations are never takings. That issue was not before the Court because the judgment below did not rest on that theory.<sup>41</sup> The judgment was not the product of the state supreme court's embrace of an extreme *per se* no taking rule, but rather the court's rejection of petitioner's far more extreme *per se* taking rule that did not even concede a nuisance exception.<sup>42</sup> Moreover, because longstanding Supreme Court rulings contradicted petitioner's proposed rule that prevention of a nuisance is not a taking, no matter how severe the corresponding economic deprivation, the state supreme court's judgment should be affirmed.<sup>43</sup> What we needed to suggest, therefore, was not that valid police power regulations were never regulatory takings, but that instead, consistent with the Supreme Court's 1978 ruling in *Penn Central Transportation Co. v. City of New York*,<sup>44</sup> which endorsed a three-factor balancing test, economic deprivation alone did not prove that a taking had occurred.<sup>45</sup>

It seemed clear that the Court granted review in *Lucas* to reverse. But, after completing our merits brief, we were optimistic that we had a real chance of pulling a rabbit out of a hat on this one and achieving an affirmance. Admittedly, it would not be easy to shake the Justices loose of

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<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* at 898.

<sup>41</sup> See *id.* at 897-98.

<sup>42</sup> See *id.* at 900.

<sup>43</sup> See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); *Miller v. Schoene*, 276 U.S. 272, 280 (1928); *Gorieb v. Fox*, 274 U.S. 603, 609 (1927); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915); *Plymouth Coal Co. v. Pa.*, 232 U.S. 531 (1914); *Welch v. Swasey*, 214 U.S. 91, 107 (1909); *Camfield v. United States*, 167 U.S. 518, 522-23 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888); *Mugler v. Kansas*, 123 U.S. 623, 664-65 (1887).

<sup>44</sup> 438 U.S. 104 (1948).

<sup>45</sup> See *id.* at 138 (holding that the refusal of the New York City Landmarks Preservation Commission to approve plans for construction of a 50-story office building over Grand Central Terminal did not constitute a taking of the property without just compensation). Justice Brennan, writing for the majority, established a three-part test for a court's evaluation of a regulatory takings claim. The court must conduct its evaluation based on: (1) the economic impact of the regulation, (2) the owner's reasonable investment-backed expectations and (3) the character of the regulatory action. *Id.* at 124.

their initial conception of the case at the jurisdictional stage. Yet, we thought our brief was effective and we believed that we had a distinct advantage because our characterizations of the arguments below and the state supreme court's ruling were entirely accurate. More often than not, but not always, that is in fact sufficient to carry the day.

We had additional reason to be hopeful after oral argument. Going in, we assumed that Justices John Paul Stevens and Harry Blackmun would be sympathetic and that Chief Justice William Rehnquist, and Justices Antonin Scalia and Clarence Thomas would be our most difficult votes to secure. Justices Byron White, Sandra Day O'Connor, Anthony Kennedy, and David Souter appeared more up for grabs and we needed the votes of at least three out of the four. During oral argument, questions raised by Justices Souter and Kennedy, in particular, but also by Justice O'Connor, suggested that they had well grasped the extreme nature of the other side's argument.<sup>46</sup> Some of the questions, however, seemed directed to rehabilitating the landowner's argument by offering an opportunity for petitioner's embrace of a less extreme back up argument.<sup>47</sup> Much to our delight, petitioner had aided our position by consistently rejecting a back-up argument, but now at oral argument, petitioner's counsel seemed willing to accept the lifeline some of the swing Justices were throwing his way.<sup>48</sup>

Events soon after the argument raised our hopes once again. Both of the other two property rights cases before the Court that Term fizzled. The week following the oral argument in *Lucas*, the Court dismissed the writ in *PFZ*

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<sup>46</sup> See Transcript of Oral Argument at 25-26, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (No. 91-453), 1992 WL 687838, at \*25-26.

"QUESTION: You want the per se rule, and you argued it below. If it takes away all the economic value, it is a taking that has to be compensated. They are saying that is so sometimes but not all the time, that if there is a nuisance, if it is threatening to the public safety, you can take it all away without paying and you deny that.

MR. LEWIS: I deny that, yes, sir.

QUESTION: You denied it below and you continue to deny it here.

....

QUESTION: You always have to pay even if it is to save the city, right?"

<sup>47</sup> See *id.* at 26-27.

"QUESTION: But, Mr. Lewis, you do have a fallback position, do you?

MR. LEWIS: Yes, ma'am.

QUESTION: That if we don't agree with that and think there is a nuisance exception, that this doesn't fall within it, is that it?"

<sup>48</sup> See *id.* at 27.

"MR. LEWIS: We call it a public necessity exception, if there is such one, and that is has to be imminent danger of such a magnitude to justify denial of just compensation and that the action's purpose is to control the imminent danger, not in this case—and that this case would not meet that test whatsoever, and I would reserve the rest for rebuttal."

*Properties* as improvidently granted.<sup>49</sup> Furthermore, four weeks after the argument, Justice O'Connor announced the opinion of the Court in *Yee* and the opening paragraphs of her opinion for the Court were heartening.<sup>50</sup> They seemed to eschew the kind of *per se* approach that petitioner advanced in *Lucas* in favor of the kind of *Penn Central* balancing approach we urged on the *Lucas* Court, which we thought supported affirmance of the South Carolina Supreme Court's judgment.<sup>51</sup>

### III. LUCAS'S IMPACT

We lost.<sup>52</sup> Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas.<sup>53</sup> Justice Kennedy concurred in the judgment, without joining the majority opinion.<sup>54</sup> Justice Souter filed a "statement" expressing his distinct view that the petition should be dismissed because of the unlikely nature of the factual finding of no economic value upon which the case rested.<sup>55</sup> Justices Stevens and Blackmun dissented.<sup>56</sup>

Not surprisingly, my initial reaction to the opinion included a share of annoyance. I was pleased that not a single Justice accepted petitioner's view that a regulation depriving a landowner of all economic value was a taking even if it merely barred what would otherwise be a nuisance at common law.<sup>57</sup> Indeed, the majority opinion expressly confirmed the existence of such a nuisance exception.<sup>58</sup> What annoyed me was the Court's refusal, notwithstanding the procedural posture of the case, to affirm the judgment, and instead its allowing petitioner a second chance to reargue its case on remand based on a legal theory petitioner had steadfastly rejected throughout the litigation. I was well aware of the propriety of the Court's

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<sup>49</sup> *PFZ Properties v. Rodriguez*, 504 U.S. 935, 935 (1992).

<sup>50</sup> See *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992).

<sup>51</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) ("Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment. In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any, 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'").

<sup>52</sup> *Id.* at 1032.

<sup>53</sup> *Id.* at 1006.

<sup>54</sup> *Id.* at 1032.

<sup>55</sup> *Id.* at 1076.

<sup>56</sup> *Id.* at 1036.

<sup>57</sup> See generally *Lucas*, 505 U.S. at 1003-78 (showing that the Court unanimously recognized the existence of a nuisance exception to the doctrine of regulatory takings).

<sup>58</sup> *Id.* at 1027-29.

*affirming* a judgment on grounds not relied on by the lower courts, so long as a party advanced the issue below. But it seemed improper for the Court to be *reversing* a judgment on a ground not raised by the party seeking that reversal. Yet, that is precisely what the Court had done while simultaneously refusing to question the trial court's finding of no economic value on the ground that the state had failed to challenge that finding in the state supreme court.

All annoyance and sour grapes aside, it was also immediately obvious that there was a silver lining to our loss. Indeed, it was apparent to many that the Court's opinion was virtually "dead on arrival" in terms of its potential to establish significant precedent favorable to the property rights movement. In a misguided effort to announce a *per se* takings test, Justice Scalia had created an opinion for the Court that had no legs at all. If Scalia had been willing to rely on a *Penn Central* balancing test<sup>59</sup> and, relying on that analysis, ruled that a taking had occurred, he likely could have obtained at least a six, if not seven Justice majority and produced an opinion capable of putting significant judicial wind behind the sails of property rights plaintiffs in the lower courts. Kennedy would have likely joined. So too would Justice O'Connor. There is even reason to believe that Justice Souter would have joined as well based on the official papers of Justice Harry Blackmun, released five years after his death, which report that Souter voted at conference in favor of petitioner and reversal.<sup>60</sup>

But Justice Scalia, stubbornly wed to his preference for *per se* rules in legal analysis, created a *per se* test that was internally inconsistent and utterly incoherent. While claiming that its takings test was a *per se* rule, the opinion no sooner announced the test than it, a few paragraphs later, created an exception for background principles of property and tort law (including nuisance law) that rendered the meaning of *per se* wholly illusory.<sup>61</sup> As

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<sup>59</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1948).

<sup>60</sup> Harry A. Blackmun, Conference Notes, *Penn Cent.*, No. 77-444 (Apr. 19, 1978). The papers of Harry A. Blackmun, lawyer, judge, and Associate Justice of the United States Supreme Court, were given to the Library of Congress by Justice Blackmun in 1997, with the understanding that they would not be made generally available to researchers at the Library of Congress until five years after his death. The papers became available in March 2004 [hereinafter *The Blackmun Papers*]. See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1.

<sup>61</sup> See *Lucas*, 505 U.S. at 1029 ("We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of the land: 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.").

other commentators have since pointed out, the background principles exception invited back into the takings analysis the very same balancing analysis the opinion purported to repudiate.<sup>62</sup>

To maintain both a majority and the pretense of a *per se* rule, Scalia's opinion for the Court was compelled to be inextricably tied to the trial court's finding of no economic value. It was an anchor doomed to sink the opinion. A complete economic wipeout never happens and was, as previously described, undoubtedly a fiction even in *Lucas* itself. Justice Kennedy questioned the finding in his separate concurrence<sup>63</sup> as did Justice Souter in his "statement."<sup>64</sup> The most Justice Scalia could muster for the majority was that the Court was procedurally barred from questioning it.<sup>65</sup> Here again, the official papers of Justice Blackmun reveal that at least one clerk fully appreciated the "fishy" nature of that finding.<sup>66</sup> Perhaps that is why, while the factual finding served as the linchpin of the majority opinion, Justice Scalia seemed to struggle with how best to describe it, utilizing a variety of differing phrases and thereby further undermining any prospect of the new *per se* test providing judicial clarity.<sup>67</sup>

Another casualty of Scalia's *per se* approach was any hope he might have had to persuade the Court to revisit the "parcel as a whole" rule announced by the Court in *Penn Central*.<sup>68</sup> Instead, Scalia was forced to

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<sup>62</sup> See Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993); Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 335-36 (1995).

<sup>63</sup> *Lucas*, 505 U.S. at 1034 ("The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach-front lot loses all value because of a development restriction.").

<sup>64</sup> *Id.* at 1076 ("The petition for review was granted on the assumption that the State by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the State Supreme Court did not review. It is apparent now that in light of our prior cases, . . . the trial court's conclusion is highly questionable.") (citations omitted).

<sup>65</sup> *Id.* at 1020 n.9.

<sup>66</sup> Clerk Memorandum to Justice Harry A. Blackmun, *Lucas*, No. 91-453 (Feb. 28, 1992), noted in The Blackmun Papers, *supra* note 60.

<sup>67</sup> See *Lucas*, 505 U.S. at 1016, 1028-31.

<sup>68</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1948) ("Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'").

acknowledge that the significance of the *per se* approach turned on how to define the property and his opinion was thereby deprived of all but "rhetorical force."<sup>69</sup> Justice O'Connor sharply rebuffed his effort to include a footnote suggesting that the *Penn Central* opinion was not good law.<sup>70</sup> The Blackmun papers include correspondence from O'Connor to Scalia insisting that he take out a negative reference to *Penn Central's* reliance on the parcel as a whole rule, or she would decline to sign on to that part of the opinion.<sup>71</sup> The final opinion, accordingly, eliminated the reference to the Court's opinion, replacing it with a curious and far less meaningful reference to the state court's opinion in that case.<sup>72</sup>

The upshot of the decision was a *per se* test that was riddled with exceptions and caveats. No doubt those exceptions and caveats were all necessary for Scalia to maintain his majority. But it was a high price to pay and the final product was far less effective than an explicit invocation of *Penn Central* balancing, no matter how factbound. Moreover, because Justice Scalia failed to retain the vote of Justice Kennedy, notwithstanding all those exceptions and caveats, the *Lucas* majority opinion had no judicial half-life. Justice Kennedy was, and still is, a critical vote on the Court, and Scalia pushed him away. Once separated, Kennedy's own concurring opinion amounted to a wholesale abandonment of virtually all of the Scalia majority opinion.<sup>73</sup> Kennedy eschewed a *per se* approach in favor of a "reasonable expectations" analysis more in line with *Penn Central*.<sup>74</sup> He also expressly acknowledged that protection of fragile ecosystems warranted restrictions on development exceeding those contemplated by Scalia's

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<sup>69</sup> See *Lucas*, 505 U.S. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").

<sup>70</sup> Letter from Justice Sandra Day O'Connor to Justice Antonin Scalia, *Lucas*, No. 91-453 (June 26, 1992), noted in The Blackmun Papers, *supra* note 60 ("I notice that the second draft of *Lucas* now says, at page 11, note 6, that *Penn Central* was 'unsupportable.' I hope you will consider taking this out, as I am not prepared to disapprove of *Penn Central* as part of the resolution of this case. If you do not decide to remove it, please show me as joining all but note 6.").

<sup>71</sup> *Id.*

<sup>72</sup> See *Lucas*, 505 U.S. at 1016 n.7.

<sup>73</sup> *Id.* at 1032-34 (Kennedy, J., concurring).

<sup>74</sup> See *id.*

notions of background principles of tort and property law, even when extended to include nuisance law.<sup>75</sup>

Like every other environmental academic, I wrote about *Lucas* soon after it was decided. The article, published in the *Stanford Law Review*, was puckishly entitled "Putting the Correct 'Spin' on *Lucas*" in reference both to the tendency of parties to try to promote a "spin" on a court ruling that favors their interests and as an implicit admission that I was doing just that in the article.<sup>76</sup> I made two predictions at the time. The first was that the *Lucas* majority would be short-lived because of its logical incoherence and the extreme implications of its rhetoric.<sup>77</sup> Indeed, because Justice Kennedy did not join the majority and White had since announced his departure from the Court, it was clear there were no longer five votes on the Court willing to embrace Scalia's reasoning.<sup>78</sup> I remained confident that O'Connor would split from the *per se* approach. I relied on the fact that she had joined Justice Stevens's dissent in the 1987 regulatory takings case of *First English Evangelical Lutheran Church v. City of Glendale*,<sup>79</sup> as well as her opinion for the Court in *Yee*.<sup>80</sup> The former reflected her concern with governmental liability,<sup>81</sup> and the latter, her preference for balancing tests rather than *per se* rules.<sup>82</sup>

My second prediction was that *Lucas* would, ironically, lead to fewer successful takings challenges.<sup>83</sup> My intuition was that *Lucas* would ultimately be relegated to the rare instance of a judicial determination of no remaining economic value and that courts, upon concluding that *Lucas* did not apply to the facts of a case before them, would then jump to the final conclusion that there were no merits to the takings claim whatsoever.<sup>84</sup> Although, in theory, post-*Lucas* landowners could prevail under either the

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<sup>75</sup> *Id.* at 1035.

<sup>76</sup> See generally Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993).

<sup>77</sup> See *id.* at 1412-13 ("The Supreme Court based its ruling for the landowner on the factual assumption that the challenged developmental restriction had deprived the landowner of the entire economic value of his property. But no member of the Court seemed to believe that this assumption was valid. Four Justices explicitly questioned its accuracy, and the majority opinion carefully avoided any intimation to the contrary.").

<sup>78</sup> *Id.* at 1426.

<sup>79</sup> *Id.* at 1427 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (Stevens, J., dissenting)).

<sup>80</sup> *Id.* at 1416 (citing *Yee v. City of Escondido*, 503 U.S. 519, 519 (1992)).

<sup>81</sup> See *First English*, 482 U.S. at 322-41 (O'Connor, J., dissenting).

<sup>82</sup> See *Yee*, 503 U.S. at 519.

<sup>83</sup> See Lazarus, *supra* note 76, at 1413.

<sup>84</sup> *Id.* at 1427.

*Lucas per se* approach or the *Penn Central* balancing approach, the former would squeeze out the latter.<sup>85</sup> Now forewarned by *Lucas*, government defendants would not repeat the mistake made in *Lucas* of introducing too little evidence of remaining market value and, once courts found that remaining value, they would routinely equate the absence of a *Lucas* taking with there being no taking at all.<sup>86</sup>

I am happy to report that this is precisely what happened, on both counts. Justice O'Connor did subsequently abandon Justice Scalia, and relied on the viability of the *Penn Central* approach. Several years later in *Palazzolo v. Rhode Island*,<sup>87</sup> O'Connor and Scalia filed dual concurring opinions making explicit the depth of their disagreement. O'Connor insisted that *Penn Central* remained the "polestar" for regulatory takings analysis,<sup>88</sup> while Justice Scalia pointedly commenced his separate opinion by explaining that its purpose was to make plain his view that Justice O'Connor was "wrong."<sup>89</sup>

The Court made it official in 2002 with its opinion in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>90</sup> Justice Stevens, who dissented in *Lucas*,<sup>91</sup> *Palazzolo*,<sup>92</sup> and virtually every other takings case decided by the Court,<sup>93</sup> now commanded the majority, relegating Chief Justice Rehnquist and Justices Scalia and Thomas to the dissent.<sup>94</sup> In *Tahoe-Sierra*, Stevens embraced both Kennedy's reasonable expectations analysis in *Lucas* and O'Connor's *Penn Central* balancing approach in *Palazzolo*.<sup>95</sup> Both O'Connor and Kennedy joined Stevens's opinion as he methodically

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<sup>85</sup> *Id.* at 1428.

<sup>86</sup> *Id.*

<sup>87</sup> 533 U.S. 606 (2001).

<sup>88</sup> *Id.* at 633 (O'Connor, J., concurring) ("Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.").

<sup>89</sup> *Id.* at 637 (Scalia, J., concurring) ("I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not Justice O'Connor's.").

<sup>90</sup> 535 U.S. 302 (2002).

<sup>91</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting).

<sup>92</sup> *Palazzolo*, 533 U.S. at 637 (Stevens, J., partially concurring and partially dissenting).

<sup>93</sup> See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987) (Stevens, J., dissenting).

<sup>94</sup> *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 306, 343.

<sup>95</sup> *Id.* at 321, 348, 352.



dismantled what was then left of *Lucas*.<sup>96</sup> Stevens disputed the connection between physical takings and regulatory takings that *Lucas* sought to draw, reaffirmed the validity of the “parcel as a whole rule” from *Penn Central* that Scalia had sought to discard, and repudiated the property rights movement’s claim that a *Lucas per se* taking was triggered by a denial of “use” rather than of all economic “value.”<sup>97</sup> Stevens effectively buried *Lucas*.<sup>98</sup>

Scalia’s rhetoric in *Lucas* seduced members of the property rights movement and they sought to squeeze all of their takings claims into the *Lucas* rubric. But, as in *Tahoe-Sierra*, courts routinely concluded that economic value remained and therefore *Lucas* did not apply.<sup>99</sup> The property rights movement might well have won in *Tahoe-Sierra* had they pressed a *Penn Central* argument instead. Certainly, the majority made clear that a *Penn Central* argument would have been far more forceful.<sup>100</sup> Nevertheless, launched by the *Lucas* rhetoric, the property rights advocates insisted on the extreme argument and lost big.

Lower courts have repeated this pattern. There have literally been hundreds of cases since *Lucas* in which courts had maintained a *Lucas* taking.<sup>101</sup> But in more than fifteen years of litigation, there are only a handful of cases—fewer than ten—in either federal or state court in which courts have relied on *Lucas* in concluding that a taking occurred.<sup>102</sup>

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<sup>96</sup> See *id.* at 306.

<sup>97</sup> *Id.* at 322-24 (“This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.”); *id.* at 331 (“Petitioners’ ‘conceptual severance’ argument is unavailing because it ignores *Penn Central*’s admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’”); *id.* at 334.

<sup>98</sup> See Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 364 (2005); Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, 57 HASTINGS L.J. 759, 817-18 (2006); Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVTL. L. 1, 9 (2003).

<sup>99</sup> See, e.g., *Rith Energy v. United States*, 270 F.3d 1347, 1349 (2001) (holding revocation of mining permit did not remove all economic value of the mining property); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1366 (1999) (upholding Court of Federal Claim’s decision that “there is substantial economic value remaining in the parcel as a whole”).

<sup>100</sup> See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 331.

<sup>101</sup> See Statistics on *Lucas* citations (Sept. 2007) (on file with author).

<sup>102</sup> Since the decision in *Lucas*, only 80 cases in which the decision has been cited were successful in either federal or state court. Of those decisions, only 9 used the *Lucas* test to conclude that a taking had occurred. See *id.*; Blumm & Ritchie, *supra* note 98, at 322.

Apart from its soaring rhetoric, the *Lucas* ruling was a doctrinal misstep for the property rights movement. The rhetoric made Scalia a hero to many in the movement, but he was not their savior in reality. By insisting on a *per se* rule that ultimately destroyed a potential majority on the Court favorable to heightened constitutional protection of private property rights, Scalia stumbled in *Lucas*. And the property rights movement has since taken the fall.

#### IV. LUCAS'S FINAL IRONY

*Lucas's* final irony, however, offers no silver lining for the State of South Carolina, its citizens, and those concerned about environmental protection. The State of South Carolina was more than justified in its reasons for enacting the Beachfront Management Act<sup>103</sup> that led to the *Lucas* litigation. All too often, environmentalists are accused of "crying wolf" based on exaggerated claims of the environmental risks we face. Not so when it comes to South Carolina and its coastal zone.

In the late 1980s, South Carolina was at the forefront of coastal environmental protection. Its Blue Ribbon Commission responsibly surveyed the coastal zone<sup>104</sup> and sought to promote legislation that would plan and restrict development in light of the true physical characteristics of the coastal zone.<sup>105</sup> The State was aware of the fragility of the coastal zone and of the corresponding human and environmental costs of not planning, specifically the danger of succumbing to the unrelenting economic pressures favoring short-term profit maximization.<sup>106</sup> The Beachfront Management Act sought to put an end to the human folly of placing people, lives, livelihoods, and homes in those places most exposed to the destructive forces of nature.<sup>107</sup>

What we have learned since is that South Carolina was not foolhardy, but prescient. Although the State recognized that its coastline was at risk, the risk was actually greater than they perceived. In the late 1980s, all but a few scientists appreciated the dangers of global climate change, including its

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<sup>103</sup> S.C. CODE ANN. §§ 48-39-10 to -360 (1988).

<sup>104</sup> See SOUTH CAROLINA BLUE RIBBON COMM., REPORT OF SOUTH CAROLINA BLUE RIBBON COMM. ON BEACHFRONT MANAGEMENT 1-2 (1987).

<sup>105</sup> See *id.*

<sup>106</sup> See S.C. CODE ANN. §§ 48-39-250, -260 (1988); SOUTH CAROLINA BLUE RIBBON COMM. REPORT, *supra* note 104, at 1-2.

<sup>107</sup> See S.C. CODE ANN. §§ 48-39-20, -30 (1988).

significance for the nation's coastal zone.<sup>108</sup> When the South Carolina Coastal Council was acting in the late 1980s, the United Nations had not yet established the Intergovernmental Panel on Climate Change ("IPCC"). Established in 1988,<sup>109</sup> the IPCC issued its first, very tentative report in 1990.<sup>110</sup> It described the phenomenon of climate change, but was initially hesitant in its scientific assessments of the extent of the risks presented and their linkage to human activities.<sup>111</sup>

The IPCC issued its fourth report in late 2007, thereby repudiating any pretense of scientific uncertainty.<sup>112</sup> Global climate change, including global warming, is happening.<sup>113</sup> That is "unequivocal."<sup>114</sup> Furthermore, the IPCC determined, with over a ninety percent confidence level, that human activity is the main driver of that warming.<sup>115</sup> The IPCC now forecasts that sea level

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<sup>108</sup> See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451 (1993).

<sup>109</sup> About IPCC, <http://www.ipcc.ch/about/index.htm> (last visited Dec. 11, 2007).

<sup>110</sup> See *id.*

<sup>111</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SCIENTIFIC ASSESSMENT OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP I TO THE FIRST ASSESSMENT REPORT OF THE IPCC (J.T. Houghton et al. eds., Cambridge Univ. Press 1990).

<sup>112</sup> See Richard B. Alley et al., *Summary for Policymakers*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 5 (Susan Solomon et al. eds., Cambridge Univ. Press 2007), available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html> [hereinafter IPCC REPORT 2007 PART I]; Ulrich Cubasch et al., *Historical Overview of Climate Change Science*, in IPCC REPORT 2007 PART I, *supra*, at 100; William D. Collins et al., *Global Climate Projections*, in IPCC REPORT 2007 PART I, *supra*, at 749; David J. Karoly et al., *Assessment of Observed Changes and Responses in Natural and Managed Systems*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 81 (Martin Perry et al. eds., Cambridge Univ. Press 2007), available at <http://www.ipcc-wg2.org> [hereinafter IPCC REPORT 2007 PART II]; Knut Alfsen et al., *Issues Related to Mitigation in the Long-Term Context*, in INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 173 (Bert Metz et al. eds., Cambridge Univ. Press 2007), available at <http://www.ipcc.ch/ipccreports/ar4-wg3.htm> [hereinafter IPCC REPORT 2007 PART III].

<sup>113</sup> See Neil Adger et al., *Technical Summary*, in IPCC REPORT 2007 PART II, *supra* note 112, at 26.

<sup>114</sup> Alley et al., *Summary for Policymakers*, in IPCC REPORT 2007 PART I, *supra* note 112, at 5 ("Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level.").

<sup>115</sup> *Id.* at 10.

risers in the twenty-first century will be between seven and twenty-three inches.<sup>116</sup>

As a nation, we did not know in the 1980s what we know now about climate change. But a central lesson of environmental law teaches us that we cannot afford to wait until we know for sure. We must act before we know for sure or we are likely to act too late. This includes taking actions necessary to reduce the contamination causing the problem in order to reduce the degree and pace of the ecological transformation. But it also includes undertaking requisite adaptations to reduce the adverse effects to human health and welfare for the transformation that cannot now be avoided.

Indeed, South Carolina's merits brief before the Supreme Court in 1992 made just that argument.<sup>117</sup> It was the only brief out of many filed with the Court that expressly relied on global warming as a justification for the state's action.<sup>118</sup> The brief argued that South Carolina's development restriction was justified, notwithstanding the severe economic deprivation caused to some landowners, because of the need to protect public health and safety.<sup>119</sup> And the brief pointed out that South Carolina was acting in direct response to a federal statute that called on states to prepare for global warming.<sup>120</sup>

It does not require much imagination to appreciate what happens when a regulator fails to take such preventive action to adapt and instead makes residential homes rather than the natural coastal ecosystems the frontline of defense against the forces of nature. The reason is because we have already witnessed the brutal tragedy that ensues. We can see it in Florida.<sup>121</sup> We can

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<sup>116</sup> The range described is based on six climate models projecting sea level rise as a function of temperature change. Seven inches corresponds to the lower end of the range using the lowest temperature scenario. Twenty-three inches corresponds to the higher end of the range using the highest temperature increase scenario. *Id.* at 13 tbl.SPM.3; *see also id.* at 17.

<sup>117</sup> *See* Respondent's Brief on the Merits, *supra* note 29, at 29-30.

<sup>118</sup> *See id.* at 30.

<sup>119</sup> *Id.* at 13 ("Where, moreover, as in this case, the restriction on development is necessary to prevent serious injury to public health and safety and substantial physical harm to nearby properties, no taking has resulted."); *id.* at 26 ("Here, the challenged power measure is not merely distributional in its purpose. It is not just striking a balance between competing economic interests. The challenged law is designed to prevent affirmative injury to public health and safety and to the environment from which comes further protection of public health, safety and welfare concerns.").

<sup>120</sup> *Id.* at 30.

<sup>121</sup> *See* Ed Rappaport, National Hurricane Center, *Hurricane Andrew*, available at <http://www.nhc.noaa.gov/1992andrew.html> (last visited Dec. 11, 2007); *see also* Richard J.

also see it in Louisiana in the aftermath of Katrina.<sup>122</sup> While those storms and their immediate destruction have long passed, their destructive effects remain notwithstanding the passage of time. For those who lost their lives, health, homes, livelihoods, and communities there is no quick recovery from such devastation. It is simply not possible to put it all back together again. Nor is it sensible even to try in many respects, because doing so would place another generation back in the firing line rather than adapt to nature transformed.

## V. CONCLUSION

South Carolina is to be commended for its efforts in the early 1990s to plan for the future in a way that sought to protect the health and safety of its citizens. Of course, its efforts were not perfect. And it is always important to include transitional measures that, out of a matter of legislative grace, not constitutional compulsion, address the hardships faced by those individuals whose legitimate, reasonable, investment-backed expectations are unduly burdened during the transition period. For its misguided opinion in *Lucas*, however, and the confusion that it has caused to governmental efforts to address real and pressing environmental problems, the United States Supreme Court merits no such commendation. It can do better and since has done just that.

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Pasch, National Hurricane Center, *Hurricane Gordon*, available at <http://www.nhc.noaa.gov/1994gordon.html> (last visited Dec. 11, 2007).

<sup>122</sup> See ERIC S. BLAKE ET AL., THE DEADLIEST, COSTLIEST, AND MOST INTENSE UNITED STATES TROPICAL CYCLONES FROM 1851 TO 2006 (AND OTHER FREQUENTLY REQUESTED HURRICANE FACTS) 5 (2007), available at <http://www.nhc.noaa.gov/pdf/NWS-TPC-5.pdf> (last visited Dec. 11, 2007); FEMA, HURRICANE KATRINA RAPID RESPONSE WIND WATER LINE REPORT—LOUISIANA (2006); RICHARD D. KNABB ET AL., NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT: HURRICANE KATRINA 1 (2005), available at [http://www.nhc.noaa.gov/pdf/TCR-AL122005\\_Katrina.pdf](http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf) (last visited Dec. 11, 2007); Richard J. Lazarus, *Environmental Law After Katrina: Reforming Environmental Law by Reforming Environmental Lawmaking*, 31 TUL. L. REV. 955 (2007).