Who Owned the Lucas Lots; What No Property Looks Like on the Beach

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WHO OWNED THE LUCAS LOTS?
WHAT "NO PROPERTY" LOOKS LIKE ON THE BEACH

Josh Eagle*

Editor's Synopsis: The Lucas majority opinion raises difficult doctrinal issues including (1) whether courts ought to use a special takings test when a regulation eliminates all economically viable use of a piece property, and (2) the scope of the potential government defense that "no property" has been taken. This Article further explores these issues by examining shoreline change, harm/benefit distinction, and the public nuisance doctrine. Additionally, this Article argues that the specific facts of Lucas suggest that Mr. Lucas may not have owned the property in question at the time he filed the case.

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I. INTRODUCTION

Not surprisingly, the Supreme Court's opinion in Lucas v. South Carolina Coastal Council has framed subsequent commentary on the case. Reflecting the analytical structure used by the Lucas majority, much of the writing about the decision relates in some way to two difficult doctrinal issues. The first of these issues is whether courts ought to use a special takings test when a regulation eliminates all economically viable use of a piece of property. The second, and more important, issue

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* Solomon Blatt Professor of Law and School of Law Professor of Environmental and Natural Resources Law, and Director, The Coastal Law Field Lab, University of South Carolina School of Law, Georgetown University Law Center, JD; Colorado State University, MS, Forest Sciences.
concerns the scope of the most potent government defense to regulatory takings claims: the "no property" defense. 3

When the government raises a no property defense to a regulatory takings claim, it is arguing that there has been no taking because the regulation in question did not actually alter the plaintiff's prior property rights. 4 For example, the government might argue that a ban on backyard nuclear generators did not effect a taking because the plaintiff did not have a prior right to use her land to create a public nuisance, that is, in a way that would "generate" substantial threats to public health and safety. Because the regulation did not alter, diminish, or otherwise impact the plaintiff's property rights, a claim alleging harm to rights—a regulatory takings claim—cannot move forward. 5

The no property line of Lucas scholarship focuses almost exclusively on the problem of identifying public nuisances. 6 The most accurate one-sentence explanation for why the majority wrote what it did is that the five Justices did not think building homes close to the ocean qualified as a public nuisance in the same way a backyard nuclear plant would.

For those who would disagree with this view, such as Justices Blackmun and Stevens, the most poignant facts in Lucas relate to the geological history of the land at issue. As Justice Blackmun wrote,

[in roughly half of the last 40 years, all or part of [Lucas's oceanfront land] was part of the beach or flooded twice daily by the ebb and flow of the tide. Between 1957 and 1963, [the land alleged to have been taken by the State of South Carolina] was under water. 7

While it might not be dangerous to build a house, it could be dangerous to build a house on land that is part of the ocean every other year on average.


5 See id.


This Article makes a different and novel use of these same facts: viewing the dynamic geology of the land at issue in Lucas through the lens of coastal property law. The rules of coastal property law are quite old, dating back in the common law of England to the early 1300s, but are also still vibrant in every state with an ocean shoreline. Perhaps the most oft-cited recitation of the coastal property rules is found in Blackstone’s Commentaries on the Laws of England.

The coastal common law Blackstone reported includes rules for locating (or, more accurately, relocating) the ocean side boundary of private beachfront property after nature has altered the beach—washed some of it away or added more sand to it. It is clear that the land Mr. Lucas claimed to own was regularly altered by these kinds of geomorphological changes. As explained infra, it is very possible that, due to coastal property rules, Mr. Lucas did not actually own the two beachfront lots at the time he filed his case. Had the state raised the issue, the mere possibility that this was true would have derailed his claim that the state had taken his land. And, of course, if it turned out that it was true—that the State of South Carolina and not Mr. Lucas owned the land—the case would have ended quietly.

While the Lucas facts provide the case study in this Article, the same analysis has implications for how courts and scholars view past and future takings cases involving waterfront, and particularly beachfront, property. As I have argued elsewhere, courts in cases like Nollan v. California Coastal Commission and Stop the Beach Renourishment v. Florida Department of Environmental Protection failed to properly address fundamental questions about the property at stake. As oceans rise,

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10 See 2 WILLIAM BLACKSTONE, COMMENTARIES *262.
11 See id.
12 See infra Part III.
13 See infra Part III.
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17 See Josh Eagle, Taking the Oceanfront Lot, 91 IND. L.J. 851 passim (2016).
causing rates of shoreline change and shoreline litigation to accelerate, it is important that courts keep the law of erosion, accretion, and avulsion in mind.

II. SHORELINE CHANGE, HARM/BENEFIT, AND PUBLIC NUISANCE

One of the undisputed facts in Lucas was that the properties in question were located on a highly dynamic beach. Cotton Harness, III, who argued the case on behalf of the state, added some additional details about the geological history of the lots at oral argument:

Currently, the property is behind the dunes, but the evidence presented by the South Carolina Coastal Council said 20 percent of the time in the last 40 years, the shoreline has been landward of the road behind him, and 50 percent of the time this lot has either been on the active beach or under water.\(^{18}\)

This map reflects the instability of the area in which the Lucas property is located by showing changes in the many locations of the vegetation line between 1949 and 1997.\(^\text{19}\)

Figure 1
Movement of the Vegetation Lines Between 1949-1997 at Wild Dunes

In Mr. Lucas’s lawsuit—an effort to obtain Fifth Amendment compensation for state building restrictions that limited construction on the two lots—his attorneys did not challenge these facts nor the state’s power to regulate construction near unstable beaches.\(^\text{20}\) At oral argument, the Lucas team made the argument that, while the state had the power to regulate, it could only regulate scot-free if the purpose of the regulation was to address “great public harm.”\(^\text{21}\) The state was not trying to prevent

\(^{19}\) Christopher P. Jones, Local Comprehensive Beach Management Plan: City of Isle of Palms 51 (2017), http://www.scdhec.gov/HomeAndEnvironment/Docs/LCBMP.pdf (last visited Jan. 23, 2018). The vegetation line, or the most seaward point of freshwater dependent vegetation, is used in some jurisdictions to indicate the highest reach of the wave. See, e.g., Haw. Rev. Stat. § 205A-1. All state statutory citations in this Article refer to the current statute unless otherwise indicated.

\(^{20}\) See generally Transcript of Oral Argument, supra note 18, at 3–27.

\(^{21}\) See id. at 4, 17–19. The majority opinion argues that Mr. Lucas conceded that building close to the beach could cause “great public harm” by failing to contest statements in the legislation along those lines. Lucas v. S.C. Coastal Council, 505 U.S. at 1021–22.
harm according to Camden Lewis, Lucas’s attorney at the Supreme Court, but was rather trying to provide a benefit to the citizens of South Carolina.22 According to Mr. Lewis, the purpose of the South Carolina statute was “to protect the beaches.”23

In the historical context of takings law precedents circa 1992, the debate in Lucas about whether building too close to the beach would constitute a public nuisance was an important one. Earlier Supreme Court decisions had relied on what was known as the “harm/benefit distinction” to decide whether the state action required compensation.24 In the Lucas majority opinion, Justice Scalia explained why the distinction was not a viable tool for deciding the issue of compensation: “A given restraint will be seen as mitigating ‘harm’ to the adjacent parcels or securing a ‘benefit’ for them, depending upon the observer’s evaluation of the relative importance of the use that the restraint favors.”25

Justice Scalia’s opinion attempted to relocate the question of public harm within the takings analysis. In the most significant sentences of the Lucas holding, the majority explained that legislatures, if they wanted to avoid compensating property owners for regulating, could find a safe harbor only in the relevant state’s common law of nuisance.26 If a court would have enjoined the regulated activity in a public nuisance case brought by the state against the plaintiff, then and only then would the state be able to regulate the activity without fear of liability:

Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the

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22 See Transcript of Oral Argument, supra note 18, at 17.
23 Id. at 16, 18.
25 Lucas, 505 U.S. at 1025 (citing Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 49 (1964)).
26 See id. at 1031–32.
State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.  

III. OWNERSHIP OF THE LUCAS LOTS

In prior scholarly articles written about the Lucas case, authors have referred to the instablility of the Wild Dunes beach in the context of these kinds of questions: harm/benefit and public nuisance. This Article is meant to draw attention to a previously unexamined, and extremely powerful, potential use of those same facts: to prove that Mr. Lucas, at the time he filed his case, may not have owned the lots in question. If Mr. Lucas did not own them, or could not prove that he did, his takings case would have been futile.

Questions about title to the Lucas lots in the context of Mr. Lucas’s lawsuit have never before been asked or answered. What the lawyers, courts, and commentators have failed to notice is the potential impact on the case the common law of waterfront property, specifically the law of erosion, accretion, and avulsion. Since before the 1400s, the common law has included special boundary rules for waterfront property (land that borders rivers, lakes, marshes, and the ocean). Courts adopted these rules to accommodate the instability of waterfront shorelines exactly like the one at Wild Dunes.

I and others have explained these rules and their history in great detail elsewhere. For the purposes of my argument here, it is necessary to know only the following under the common law:

1. The property boundary between private, waterfront property owners and the state, which holds title to tidal and submerged lands that are regularly or always inundated, is what is known in

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27 Id.
29 See Sax, supra note 8, at 312–20.
30 See, e.g., JOSH EAGLE, COASTAL LAW 12–14, 89–99, 304 (Erwin Chemerinsky et al. eds., 2d ed. 2015) (hereinafter COASTAL LAW); Katrina M. Wyman & Nicholas R. Williams, Migrating Boundaries, 65 FLA. L. REV. 1957 (2013); see also Eagle, supra note 17, at 87–88; Sax, supra note 8, at 314–20.
the common law as the high-water mark.\textsuperscript{31} Today, most states interpret the term high-water mark to be the mean high-tide line.\textsuperscript{32}

2. When the mean high-tide line moves landward or seaward at a slow and imperceptible rate due to physical changes to the shoreline or to water levels, the property boundary remains identical to the mean high-tide line.\textsuperscript{33} Title follows nature. Slow and imperceptible landward movement is known in the law as erosion; similarly paced seaward movement is known in the law as accretion.\textsuperscript{34}

3. When the mean high-tide line undergoes a rapid change, moving landward or seaward at a pace that is faster than "slow and imperceptible," the property boundary does not follow the mean high-tide line.\textsuperscript{35} Rather, the boundary remains where it was prior to the occurrence of the rapid change.\textsuperscript{36} In other words, the property boundary diverges from the mean high-tide line. Title does not follow nature here. Both rapid landward and rapid seaward movement of the mean high-tide line are known in the law as "avulsion."\textsuperscript{37} It is useful to use the terms "negative avulsion" and "positive avulsion" to denote rapid landward and seaward change, respectively.

4. There is no objective test for what rate of changes constitute slow and imperceptible change or rapid change.\textsuperscript{38} Courts decide this question on a case-by-case basis after considering the geological history of the land in question.\textsuperscript{39}

After reading this list, it should be easy to understand how the Lucas facts might trigger erosion, accretion, and avulsion questions, and thus,

\textsuperscript{31} See Wyman & Williams, supra note 30, at 1964–65.
\textsuperscript{32} See id. at 1965.
\textsuperscript{33} See Sax, supra note 8, at 306; BLACKSTONE, supra note 10, at *262.
\textsuperscript{34} See Sax, supra note 8, at 306 n.2.
\textsuperscript{35} See id. at 306.
\textsuperscript{36} See id.
\textsuperscript{37} See COASTAL LAW, supra note 30, at 304.
\textsuperscript{38} See Sax, supra note 8, at 344 (emphasis in original) (discussing the variable holdings of courts ranging from "the inability to know at any given moment that change [in the shoreline] is happening," to "whether one could identify (perceive) the exact amount of change that had occurred from each time period to the next").
\textsuperscript{39} See id. at 345–46.
questions about title to the property. Figure 1 provides the basis for some hypotheticals that show how coastal common law would apply.\(^{40}\) Although Figure 1 illustrates movement of the vegetation line, we can use that data as a proxy for movement of the mean high-tide line.\(^{41}\) To make it easier to visualize the issues, assume that the lines in Figure 1 represent the location of the mean high-tide line, and not the vegetation line, at various points in time.

The following is a hypothetical, but realistic, interpretation of line movement and title-relevant impacts in the years leading up to Mr. Lucas's acquisition of the land in 1986. Note that the line is seaward of the lots in 1957. By 1967, the line was well behind the Lucas lots. Let's make our first assumption and characterize the change that occurred between 1957 and 1967 as erosion (and not negative avulsion). Slow and imperceptible change moves the boundary. Based on the common law, this would mean that the title to all land seaward of the 1967 line would be held by the State of South Carolina. For our second assumption, let's characterize the change that moved the line from its 1967 location to its 1983 location as positive avulsion (and not accretion). Perhaps, for example, the sand was added to the location in the course of a hurricane. (The data on the map does not allow us to tell exactly how or when between 1967 and 1983 the changes occurred.) Again, based on the common law, the boundary would not have moved following the addition of sand through positive avulsion.

In other words, the private-public boundary would remain as the 1967 line. If these two assumptions were correct, it would mean that the State of South Carolina would be the owner of the dry sand seaward of the 1967 line as well as the tidal and submerged lands beyond.

There are several small points to add that are relevant to thinking about the hypothetical. First, as a general rule, a private party cannot claim adverse possession with respect to government owned property.\(^{42}\) The only way that a private party could have owned the Lucas lots in 1983—under our hypothetical facts—would be through a formal transfer by the

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\(^{40}\) See supra Figure 1. Figure 1 will illustrate the following hypothetical.

\(^{41}\) The vegetation line, at the top of the beach, will rarely if ever be in same exact place as the mean high-tide line. The distance between the two lines can vary, but the vegetation line moves much less frequently than the mean high-tide line.

\(^{42}\) See United States v. California, 332 U.S. 19, 40 (1947) ("The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, tactics, or failure to act.").
state. Second, it would not have been necessary for all of the shoreline change between 1967 and 1983 to be avulsion for the 1967 line to be the public-private boundary. If a rapid event added just a small amount of sand, moving the mean high-tide line even a foot seaward, the 1967 line would be locked in. In that case, the state would have owned the one-foot strip, and any change—avulsion or accretion—after that time would legally attach to the state’s one-foot wide oceanfront parcel.

The most important observation to make about the hypothetical is that the scenario described—even if it did not match the actual history of change and rates of change on Wild Dunes—could have served as a powerful defense for the state in the Lucas case. The state could have denied in its answer to the complaint that Mr. Lucas owned the parcels in question and could have asserted that title to the land in question was uncertain. This would have been entirely fair and accurate. The only way to determine who owned the Lucas lots would have been through a quiet title action. Prior to the end of the quiet title case, the takings case could not have moved forward—given the takings law prerequisite that the plaintiff establish ownership of property affected by the state action in question.

What would this kind of a quiet title action entail? In essence, it would be a proceeding to determine the kinds and rates of change that had affected the specific area. The court would likely hear from expert witnesses familiar with the geomorphology of Wild Dunes over time. In the end, the court would have to decide whether the changes described by the experts constituted slow and imperceptible change or rapid change, and then use those determinations to reconstruct title to the land at issue.

One of the most difficult questions to answer in this area of law is the question of how far back in time a beach quiet title action should look for

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43 Note that the state could not have deeded the land without a prior quiet title proceeding.

44 See Melitz, supra note 4, at 317.

45 Two appropriate examples of such an action come from lengthy Supreme Court of Texas opinions wherein the court had to determine the appropriate delineation between public and private property, and thus, who holds title to certain accreted lands, by using extensive historical and geological accounts of the area to determine the rate and nature of the change in the shoreline. See John G. & Marie Stella Kennedy Memorial Found. v. Dewhurst, 90 S.W.3d 268, 278–80 (Tex. 2002); Luttes v. State, 324 S.W.2d 167, 168–70 (Tex. 1958).

46 See generally Dewhurst, 90 S.W.3d at 278–80 (discussing what is looked at to determine shoreline boundaries).

47 See id.
evidence of change.\textsuperscript{48} After all, a one-foot ribbon of avulsion laid down by a storm in 1820 would still be state property.\textsuperscript{49} And, more important, everything seaward of that ribbon would also be state property. There is no easy answer to this question.\textsuperscript{50}

It is also worth pointing out that the quiet title action would be of limited value moving forward. Put differently, the court’s boundary determination at the conclusion of the action would be valid only until such time as more change to the beach occurred.\textsuperscript{51} On a dynamic beach like the one at Wild Dunes, it is likely that changes that affect the location of the mean high-tide line occur on an almost-daily basis.\textsuperscript{52}

The constant movement (or the possibility of constant movement) creates the possibility of some very problematic outcomes. Let’s assume that a court, after a quiet title proceeding, decided that Mr. Lucas owned the two lots. The next question would be: as of when? The court would only be equipped to determine title to the land in question up to the last date on which evidence it received was gathered. In other words, the title situation could change, because the beach could change, within days or weeks after the court issues its title determination. Suppose that, notwithstanding the limited duration of the title determination, Mr. Lucas went ahead with his takings case. It is possible that, at some point during the litigation, Mr. Lucas would no longer own any of the land due to shoreline changes. The court could continue to hear the takings case, leaving open the possibility of damages for a temporary taking.\textsuperscript{53} However, the court would have to undertake a second quiet title action before awarding

\textsuperscript{48} See Eagle, \textit{supra} note 9.

\textsuperscript{49} See id.

\textsuperscript{50} In title disputes between private parties and states concerning potential public trust lands, courts regularly go back in time to consider facts from the moment the state came into being and before. \textit{See}, e.g., PPL Mont., LLC v. Montana, 565 U.S. 576, 580 (2012); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472 (1987); Pollard v. Hagan, 44 U.S. 212, 212–16 (1845).

\textsuperscript{51} See Eagle, \textit{supra} note 9.

\textsuperscript{52} See id.

\textsuperscript{53} “Temporary takings” are those claims in which the landowner is denied use of his or her property for a limited period of time by regulatory action that is ultimately either invalidated by the courts or abandoned by the regulatory body. \textit{See}, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 347–52 (2002 Rehnquist, J., dissenting); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 310–20 (1987); Sun Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 657–60 (1981).
damages: it would have to figure out when the property ceased to belong to Mr. Lucas!

IV. CONCLUSION

Waterfront property is very different from ordinary land with fixed boundaries on all sides. It is arguable that the Supreme Court historically applied a specialized takings test to cases alleging takings of waterfront property.54 In recent decades, however, most courts—including the Supreme Court, as evidenced by the Lucas decision—apply the same tests to cases involving both types of land.

Before a court gets to the stage of the regulatory takings analysis in which it applies a test, it must first determine, as Justice Scalia explained in Lucas, whether there is property at stake. In this context, cases involving waterfront property, and beachfront property in particular, will present difficult threshold issues. Such cases require a title examination, but not the kind to which property lawyers and courts are likely accustomed. Instead, courts should insist that plaintiffs provide evidence of ownership—specifically, the historical geology of the land at issue—at the start of a waterfront property takings case to determine if there is even property at issue.

54 See generally Eagle, supra note 17.
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I. INTRODUCTION

Not surprisingly, the Supreme Court's opinion in Lucas v. South Carolina Coastal Council\(^1\) has framed subsequent commentary on the case. Reflecting the analytical structure used by the Lucas majority, much of the writing about the decision relates in some way to two difficult doctrinal issues. The first of these issues is whether courts ought to use a special takings test when a regulation eliminates all economically viable use of a piece of property.\(^2\) The second, and more important, issue

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concerns the scope of the most potent government defense to regulatory takings claims: the "no property" defense.³

When the government raises a no property defense to a regulatory takings claim, it is arguing that there has been no taking because the regulation in question did not actually alter the plaintiff’s prior property rights.⁴ For example, the government might argue that a ban on backyard nuclear generators did not effect a taking because the plaintiff did not have a prior right to use her land to create a public nuisance, that is, in a way that would “generate” substantial threats to public health and safety. Because the regulation did not alter, diminish, or otherwise impact the plaintiff’s property rights, a claim alleging harm to rights—a regulatory takings claim—cannot move forward.⁵

The no property line of Lucas scholarship focuses almost exclusively on the problem of identifying public nuisances.⁶ The most accurate one-sentence explanation for why the majority wrote what it did is that the five Justices did not think building homes close to the ocean qualified as a public nuisance in the same way a backyard nuclear plant would.

For those who would disagree with this view, such as Justices Blackmun and Stevens, the most poignant facts in Lucas relate to the geological history of the land at issue. As Justice Blackmun wrote,

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While it might not be dangerous to build a house, it could be dangerous to build a house on land that is part of the ocean every other year on average.

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This Article makes a different and novel use of these same facts: viewing the dynamic geology of the land at issue in \textit{Lucas} through the lens of coastal property law. The rules of coastal property law are quite old, dating back in the common law of England to the early 1300s,\(^8\) but are also still vibrant in every state with an ocean shoreline.\(^9\) Perhaps the most oft-cited recitation of the coastal property rules is found in Blackstone’s \textit{Commentaries on the Laws of England}.\(^{10}\)

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While the \textit{Lucas} facts provide the case study in this Article, the same analysis has implications for how courts and scholars view past and future takings cases involving waterfront, and particularly beachfront, property. As I have argued elsewhere, courts in cases like \textit{Nollan v. California Coastal Commission}\(^{15}\) and \textit{Stop the Beach Renourishment v. Florida Department of Environmental Protection}\(^{16}\) failed to properly address fundamental questions about the property at stake.\(^{17}\) As oceans rise,


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\(^{11}\) See \textit{id}.

\(^{12}\) See \textit{infra} Part III.

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\(^{14}\) See \textit{infra} Part III.


\(^{16}\) \textit{560} U.S. \textit{702} (2010).

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causing rates of shoreline change and shoreline litigation to accelerate, it is important that courts keep the law of erosion, accretion, and avulsion in mind.

II. SHORELINE CHANGE, HARM/BENEFIT, AND PUBLIC NUISANCE

One of the undisputed facts in *Lucas* was that the properties in question were located on a highly dynamic beach. Cotton Harness, III, who argued the case on behalf of the state, added some additional details about the geological history of the lots at oral argument:

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Figure 1
Movement of the Vegetation Lines Between 1949-1997 at Wild Dunes

In Mr. Lucas's lawsuit—an effort to obtain Fifth Amendment compensation for state building restrictions that limited construction on the two lots—his attorneys did not challenge these facts nor the state's power to regulate construction near unstable beaches.20 At oral argument, the Lucas team made the argument that, while the state had the power to regulate, it could only regulate scot-free if the purpose of the regulation was to address "great public harm."21 The state was not trying to prevent

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Justice Scalia’s opinion attempted to relocate the question of public harm within the takings analysis. In the most significant sentences of the Lucas holding, the majority explained that legislatures, if they wanted to avoid compensating property owners for regulating, could find a safe harbor only in the relevant state’s common law of nuisance. If a court would have enjoined the regulated activity in a public nuisance case brought by the state against the plaintiff, then and only then would the state be able to regulate the activity without fear of liability:

Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the

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The majority then proceeded to explain why the legislature’s subjective view of harm was not necessarily a “get out of takings free” card. *Id.* at 1022–25.


23 *Id.* at 16, 18.


26 See *id.* at 1031–32.
III. OWNERSHIP OF THE LUCAS LOTS

In prior scholarly articles written about the Lucas case, authors have referred to the instability of the Wild Dunes beach in the context of these kinds of questions: harm/benefit and public nuisance. This Article is meant to draw attention to a previously unexamined, and extremely powerful, potential use of those same facts: to prove that Mr. Lucas, at the time he filed his case, may not have owned the lots in question. If Mr. Lucas did not own them, or could not prove that he did, his takings case would have been futile.

Questions about title to the Lucas lots in the context of Mr. Lucas's lawsuit have never before been asked or answered. What the lawyers, courts, and commentators have failed to notice is the potential impact on the case the common law of waterfront property, specifically the law of erosion, accretion, and avulsion. Since before the 1400s, the common law has included special boundary rules for waterfront property (land that borders rivers, lakes, marshes, and the ocean). Courts adopted these rules to accommodate the instability of waterfront shorelines exactly like the one at Wild Dunes.

I and others have explained these rules and their history in great detail elsewhere. For the purposes of my argument here, it is necessary to know only the following under the common law:

1. The property boundary between private, waterfront property owners and the state, which holds title to tidal and submerged lands that are regularly or always inundated, is what is known in

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27 Id.
29 See Sax, supra note 8, at 312–20.
30 See, e.g., JOSH EAGLE, COASTAL LAW 12–14, 89–99, 304 (Erwin Chemerinsky et al. eds., 2d ed. 2015) [hereinafter COASTAL LAW]; Katrina M. Wyman & Nicholas R. Williams, Migrating Boundaries, 65 FLA. L. REV. 1957 (2013); see also Eagle, supra note 17, at 87–88; Sax, supra note 8, at 314–20.
the common law as the high-water mark. Today, most states interpret the term high-water mark to be the mean high-tide line.

2. When the mean high-tide line moves landward or seaward at a slow and imperceptible rate due to physical changes to the shore-line or to water levels, the property boundary remains identical to the mean high-tide line. Title follows nature. Slow and imperceptible landward movement is known in the law as erosion; similarly paced seaward movement is known in the law as accretion.

3. When the mean high-tide line undergoes a rapid change, moving landward or seaward at a pace that is faster than "slow and imperceptible," the property boundary does not follow the mean high-tide line. Rather, the boundary remains where it was prior to the occurrence of the rapid change. In other words, the property boundary diverges from the mean high-tide line. Title does not follow nature here. Both rapid landward and rapid seaward movement of the mean high-tide line are known in the law as "avulsion." It is useful to use the terms "negative avulsion" and "positive avulsion" to denote rapid landward and seaward change, respectively.

4. There is no objective test for what rate of changes constitute slow and imperceptible change or rapid change. Courts decide this question on a case-by-case basis after considering the geological history of the land in question.

After reading this list, it should be easy to understand how the Lucas facts might trigger erosion, accretion, and avulsion questions, and thus,

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31 See Wyman & Williams, supra note 30, at 1964–65.
32 See id. at 1965.
33 See Sax, supra note 8, at 306; Blackstone, supra note 10, at *262.
34 See Sax, supra note 8, at 306 n.2.
35 See id. at 306.
36 See id.
37 See Coastal Law, supra note 30, at 304.
38 See Sax, supra note 8, at 344 (emphasis in original) (discussing the variable holdings of courts ranging from "the inability to know at any given moment that change [in the shoreline] is happening," to "whether one could identify (perceive) the exact amount of change that had occurred from each time period to the next").
39 See id. at 345–46.
questions about title to the property. Figure 1 provides the basis for some hypotheticals that show how coastal common law would apply.\(^{40}\) Although Figure 1 illustrates movement of the vegetation line, we can use that data as a proxy for movement of the mean high-tide line.\(^{41}\) To make it easier to visualize the issues, assume that the lines in Figure 1 represent the location of the mean high-tide line, and not the vegetation line, at various points in time.

The following is a hypothetical, but realistic, interpretation of line movement and title-relevant impacts in the years leading up to Mr. Lucas’s acquisition of the land in 1986. Note that the line is seaward of the lots in 1957. By 1967, the line was well behind the Lucas lots. Let’s make our first assumption and characterize the change that occurred between 1957 and 1967 as erosion (and not negative avulsion). Slow and imperceptible change moves the boundary. Based on the common law, this would mean that the title to all land seaward of the 1967 line would be held by the State of South Carolina. For our second assumption, let’s characterize the change that moved the line from its 1967 location to its 1983 location as positive avulsion (and not accretion). Perhaps, for example, the sand was added to the location in the course of a hurricane. (The data on the map does not allow us to tell exactly how or when between 1967 and 1983 the changes occurred.) Again, based on the common law, the boundary would not have moved following the addition of sand through positive avulsion.

In other words, the private-public boundary would remain as the 1967 line. If these two assumptions were correct, it would mean that the State of South Carolina would be the owner of the dry sand seaward of the 1967 line as well as the tidal and submerged lands beyond.

There are several small points to add that are relevant to thinking about the hypothetical. First, as a general rule, a private party cannot claim adverse possession with respect to government owned property.\(^{42}\) The only way that a private party could have owned the Lucas lots in 1983—under our hypothetical facts—would be through a formal transfer by the

\(^{40}\) See supra Figure 1. Figure 1 will illustrate the following hypothetical.

\(^{41}\) The vegetation line, at the top of the beach, will rarely if ever be in same exact place as the mean high-tide line. The distance between the two lines can vary, but the vegetation line moves much less frequently than the mean high-tide line.

\(^{42}\) See United States v. California, 332 U.S. 19, 40 (1947) ("The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.").
state. Second, it would not have been necessary for all of the shoreline change between 1967 and 1983 to be avulsion for the 1967 line to be the public-private boundary. If a rapid event added just a small amount of sand, moving the mean high-tide line even a foot seaward, the 1967 line would be locked in. In that case, the state would have owned the one-foot strip, and any change—avulsion or accretion—after that time would legally attach to the state’s one-foot wide oceanfront parcel.

The most important observation to make about the hypothetical is that the scenario described—even if it did not match the actual history of change and rates of change on Wild Dunes—could have served as a powerful defense for the state in the Lucas case. The state could have denied in its answer to the complaint that Mr. Lucas owned the parcels in question and could have asserted that title to the land in question was uncertain. This would have been entirely fair and accurate. The only way to determine who owned the Lucas lots would have been through a quiet title action. Prior to the end of the quiet title case, the takings case could not have moved forward—given the takings law prerequisite that the plaintiff establish ownership of property affected by the state action in question.

What would this kind of a quiet title action entail? In essence, it would be a proceeding to determine the kinds and rates of change that had affected the specific area. The court would likely hear from expert witnesses familiar with the geomorphology of Wild Dunes over time. In the end, the court would have to decide whether the changes described by the experts constituted slow and imperceptible change or rapid change, and then use those determinations to reconstruct title to the land at issue.

One of the most difficult questions to answer in this area of law is the question of how far back in time a beach quiet title action should look for

43 Note that the state could not have deeded the land without a prior quiet title proceeding.
44 See Meliz, supra note 4, at 317.
45 Two appropriate examples of such an action come from lengthy Supreme Court of Texas opinions wherein the court had to determine the appropriate delineation between public and private property, and thus, who holds title to certain accreted lands, by using extensive historical and geological accounts of the area to determine the rate and nature of the change in the shoreline. See John G. & Marie Stella Kenedy Mem’l Found. v. Dewhurst, 90 S.W.3d 268, 278–80 (Tex. 2002); Luttes v. State, 324 S.W.2d 167, 168–70 (Tex. 1958).
46 See generally Dewhurst, 90 S.W.3d at 278–80 (discussing what is looked at to determine shoreline boundaries).
47 See id.
evidence of change. After all, a one-foot ribbon of avulsion laid down by a storm in 1820 would still be state property. And, more important, everything seaward of that ribbon would also be state property. There is no easy answer to this question.

It is also worth pointing out that the quiet title action would be of limited value moving forward. Put differently, the court’s boundary determination at the conclusion of the action would be valid only until such time as more change to the beach occurred. On a dynamic beach like the one at Wild Dunes, it is likely that changes that affect the location of the high-tide line occur on an almost-daily basis.

The constant movement (or the possibility of constant movement) creates the possibility of some very problematic outcomes. Let’s assume that a court, after a quiet title proceeding, decided that Mr. Lucas owned the two lots. The next question would be: as of when? The court would only be equipped to determine title to the land in question up to the last date on which evidence it received was gathered. In other words, the title situation could change, because the beach could change, within days or weeks after the court issues its title determination. Suppose that, notwithstanding the limited duration of the title determination, Mr. Lucas went ahead with his takings case. It is possible that, at some point during the litigation, Mr. Lucas would no longer own any of the land due to shoreline changes. The court could continue to hear the takings case, leaving open the possibility of damages for a temporary taking. However, the court would have to undertake a second quiet title action before awarding

48 See Eagle, supra note 9.
49 See id.
51 See Eagle, supra note 9.
52 See id.
damages: it would have to figure out when the property ceased to belong to Mr. Lucas!

IV. CONCLUSION

Waterfront property is very different from ordinary land with fixed boundaries on all sides. It is arguable that the Supreme Court historically applied a specialized takings test to cases alleging takings of waterfront property. In recent decades, however, most courts—including the Supreme Court, as evidenced by the Lucas decision—apply the same tests to cases involving both types of land.

Before a court gets to the stage of the regulatory takings analysis in which it applies a test, it must first determine, as Justice Scalia explained in Lucas, whether there is property at stake. In this context, cases involving waterfront property, and beachfront property in particular, will present difficult threshold issues. Such cases require a title examination, but not the kind to which property lawyers and courts are likely accustomed. Instead, courts should insist that plaintiffs provide evidence of ownership—specifically, the historical geology of the land at issue—at the start of a waterfront property takings case to determine if there is even property at issue.

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54 See generally Eagle, supra note 17.