Property Rights and Environmental Protection

Policy Forum

In December 1986 David H. Lucas purchased two undeveloped waterfront lots, which were zoned for single-family homes, on the Isle of Palms, South Carolina. Lucas's intention was to build one home to sell and a second as his own residence. In 1988, after Hurricane Hugo, South Carolina passed the Beachfront Management Act, which prohibited all new construction beyond certain setback lines and thereby rendered Lucas's property essentially useless for the purposes he had intended. The trial court found that the BMA constituted a "taking" and awarded Lucas compensation. The South Carolina Supreme Court reversed that decision, and Lucas appealed to the U.S. Supreme Court, which will soon decide whether government must compensate property owners under the Fifth Amendment's takings clause when it forbids them to develop their land.

On February 18, 1992, the Cato Institute sponsored a debate, ***"Are Property Rights Opposed to Environmental Protection?: Lucas v. South Carolina Coastal Council,"*** *between Cato adjunct scholar Richard Epstein, James Parker Hall Distinguished Professor of Law at the University of Chicago and author of* Takings: Private Property and the Power of Eminent Domain, *and John Echeverria, chief counsel to the National Audubon Society. Excerpts from the debate follow.*

Richard Epstein: If you understand exactly what a comprehensive system of property rights entails, not only do you say that there is no opposition between property rights and environmentalism, but you also say that property rights and environmental claims are mutually supportive when correctly understood.

Even though we recognize zones of autonomy, there have to be some limitations on what property owners can do with their own. It is in those limitations, I think, that one finds the effective reconciliation of property rights and environmental concerns.

The common law of nuisance, which developed over time to police disputes between property owners, is best understood as a mechanism designed to arbitrate and to reconcile disputes so as to maximize the value of each person's respective property holdings. The moment one starts to deviate from that understanding, there will be excesses in one direction or the other. If landowners, for example, are entitled to pollute more or less at will, then activities that are relatively small in value will be allowed to continue even though they cause enormous harms to other individuals. And if a system of land-use restrictions is imposed as a matter of positive law when there are no such externalities, relatively trivial gains will be exacted at the cost of enormous private losses. The system must maximize the value of inconsistent claims under general rules.

Richard Epstein: "The position of the environmentalists on [takings] is, 'We will allow you to keep the rind of the orange as long as we can suck out all of its juice.'"

The eminent domain clause of the Fifth Amendment says, "Nor shall private property be taken for public use without just compensation." It says nothing of the justifications for governments' assuming control of property without compensating the owners—an activity that goes under the heading of police power. Therefore, to understand *Lucas*, we must first ask what kinds of activities engaged in by government *do* constitute a taking, that is, do move into the sphere of protected liberties. Then we must ask whether we can find some kind of public justification for the restrictions thus imposed.

On the first issue, it is quite clear that the common law did not draw a distinction that the constitutional lawyers insist on drawing: the modern claim that there is a vast distance between physical occupation by government and a mere regulation or restriction of use. That contemporary distinction is designed to say that we don't have to look closely at anything government does if it leaves a person in bare possession of his property.

In effect, the position of the environmentalists on this issue is, "We will allow you to keep the rind of the orange as long as we can suck out all of its juice for our own particular benefit." But exclusive possession of property is not an end in itself. The reason you want exclusive possession is to make some use of your property, and if you can't make good use of it, you'd like to be able to sell or trade it to somebody else. The modern law essentially says that all those use and disposition decisions are subject to public veto.

What's wrong with that? Chiefly, it encourages a massive amount of irresponsible behavior on the part of government in its treatment of private endeavors. Essentially, a government now knows that it can attain 90 percent of its objectives and pay nothing. Why, then, would it ever bother to assume the enormous burden of occupying land for which it would then have to pay full market value? Thus, we see government regulations pushing further and further, regardless of private losses, which will never be reflected on the public ledgers—precisely the situation we find in *Lucas*.

We have in *Lucas* a change in value brought about, not because people don't want to live on the beach anymore, but because they are prohibited from using their land in the ordinary fashion. And the simplest question to ask is, what kinds of public benefits could justify that private loss?

Nobody on the Isle of Palms or anywhere else along the Carolina coast regards the restrictions in question as having been enacted for his benefit. We know that because before the regulation was imposed, land values were

very high and appreciating rapidly; after the regulation was imposed, everybody who was subject to it was wiped out. When we see such a huge wipeout, we have to look for the explanation of the statute that caused it, not in the protection of the local community, but in external third-party interests who will gain something, although far less than the landowners have lost.

In the usual case, when we take property for public use, we want to make sure that there's no disproportionate burden on the affected parties, but that consideration is rightly discarded when we can say to a particular fellow that we're concentrating losses on him because he has done something of great danger to the public at large. So we now have to think about Mr. Lucas's one-family house sitting on the beach front and find in it the kind of terror that might be associated with heavy explosives or ongoing, menacing pollution.

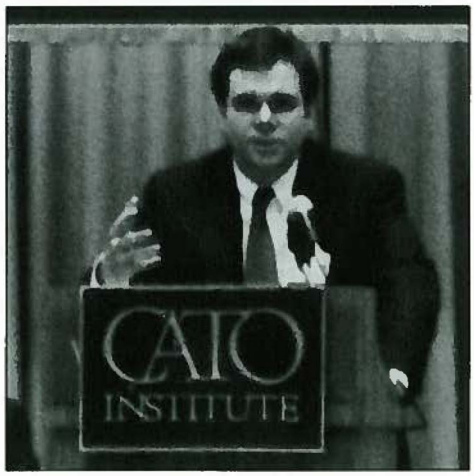
Can we do it? I think the question almost answers itself. There is no way that we can get within a thousand miles of a common law nuisance on the facts of this particular case. There is no immediate threat of erosion. We're told we're really worried about the infliction of serious external harms. Can we get an injunction on the grounds that the roof might blow off a particular building and land in the hapless fields of a neighbor? The question again more or less answers itself.

The original statute made very little if any reference whatsoever to the problem of safety. It referred instead to promoting leisure among South Carolina citizens, promoting tourism, and promoting a general form of retreat. The moment we see safety introduced during litigation, we have to wonder whether it's a pretext for some other cause.

Another difficulty involves the breadth of the restriction. If the concern is hurricane damage, the appropriate solution is, not to limit the statute in question to just beach-front owners, but to pass a general order that says: after Hurricane Hugo, nobody is entitled to rebuild in South Carolina—in Charleston or anywhere else.

There's also the question of the relationship between means and ends. If there was $10 billion worth of damage attributable to the hurricane, at least $100 of that damage must have been attributable to flying debris and falling houses. That is a trivial problem, and even if it were serious, there are surely better ways of dealing with it. We might say, for example, that anybody whose house could be found littering the beach had to remove all debris.

We hear over and over again that the government's environmental programs will shrink in size if compensation is required in *Lucas*. Those programs *should* shrink, because when government is allowed to take without compensation, it claims too much for environmental causes relative to other kinds of causes that command equal attention. Unless we introduce a system that requires the government to take and pay when it restricts private use not associated with the prevention of harms, we'll face an institutional overclaiming problem. The expansion of government will become the major issue. The just compensation clause is designed to work a perfectly sensible and moderate accommodation, to force the government to make responsible choices.



John Echeverria: "The Supreme Court has never held, and I predict will never hold, that economic injury, standing alone, is sufficient grounds for a Fifth Amendment claim."

John Echeverria: As everybody in this room knows, our national politics is driven by sound bites. The same is true in a judicial context. The hard facts of a particular case can make bad law, and the sound bite in this case is that David Lucas purchased a piece of property for about $1 million and two years later the South Carolina legislature passed a law that left him with nothing. But that's the sound bite, and the sound bite obscures the entirely genuine and legitimate goals that the South Carolina legislature had in mind—to prevent harms to the public, which are not trivial concerns.

My goal in this debate is to convince you that once you get past the sound bite of the impact on Lucas, you'll understand that the Supreme Court should and will conclude that there was no taking in this case. Before I get into it though, and I want to try to correct the sound bite by reciting to you the facts of a case the Supreme Court dealt with in 1987. That case involved a similar kind of regulation and raised the same fundamental issues of principle but leads to quite a different sound bite. I am referring to *First English Evangelical Lutheran Church v. County of Los Angeles*. The church had set up a camp for handicapped children in a flood plain, and a fire occurred in the watershed upstream from the camp. The county recognized immediately that there was enormous danger, since the vegetation had been removed, that flood waters could come down the river and wipe out the camp. In fact, a storm did occur, a flood did occur, and the camp was completely wiped out. In response, the county put in place an interim ordinance that said there could be no inhabitable structures, which could be wiped out once again, within the flood plain. When the Supreme Court got the case it did not resolve it on the merits. Instead, it used that case to reach the conclusion that a temporary taking is compensable under the Fifth Amendment. But in the dissenting opinion, several of the justices said there was no question that the ordinance was a valid public health and safety regulation and there was no taking. And Chief Justice Rehnquist said that the Court didn't have to touch that issue and would leave it to the lower courts to find out whether there had been a taking. The case was sent back to the lower courts. No taking was found, and when the case went up for review, the Supreme Court, which probably has some understanding of sound bites itself, declined to review it.

Lucas, as it was actually presented to the trial court, is actually a fairly easy case, in my view. The Supreme Court should conclude that Lucas did not establish a taking because he presented

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Property Rights (Cont. from p. 7)

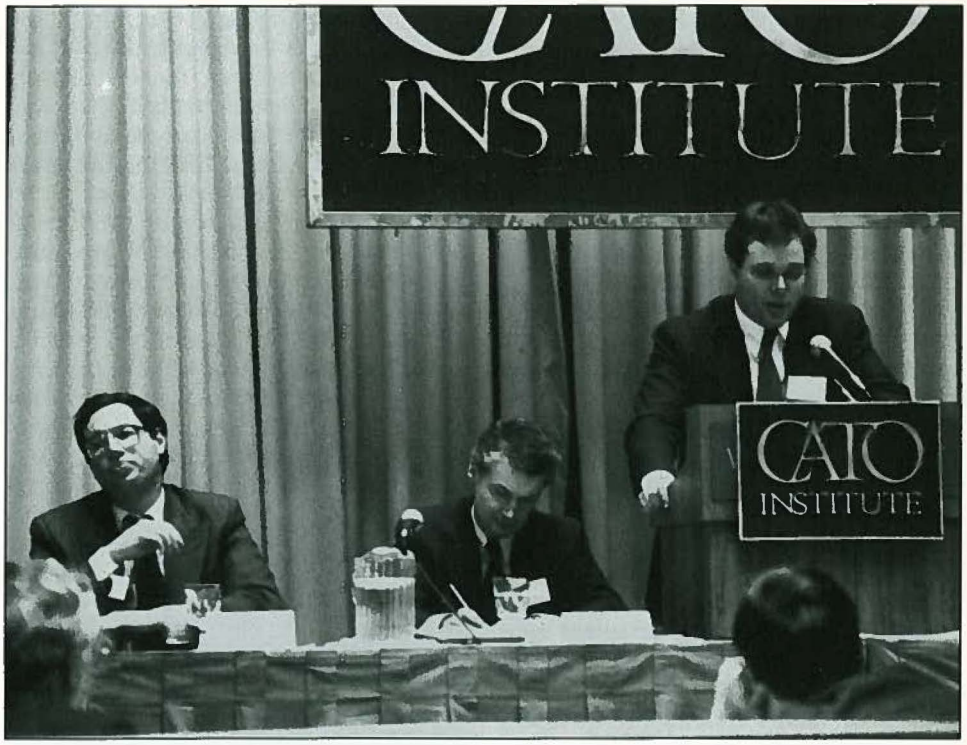
his claim based on the completely preposterous theory that if he suffered economic harm, that alone, regardless of any other consideration, entitled him to compensation under the Fifth Amendment. The fact of the matter is that the Supreme Court has never held, and I predict will never hold, that economic injury, standing alone, is sufficient grounds for a Fifth Amendment claim. The Court has consistently rejected that way of thinking for several reasons. First, the Court has recognized that every piece of property held in the United States is subject to the condition that it can't be used to harm others. That goes back to common law. Property rights are not absolute. They're conditional upon a responsibility to the community in which one resides.

The Department of Justice recommended initially that the United States in its brief take the position that economic harm, standing alone, constitutes a taking. Happily, wiser heads prevailed, and the solicitor general filed a brief that specifically repudiated that theory.

Richard Epstein, in his amicus brief, admits that a complete wipeout does not, by itself, make out a taking. We disagree about the range of activities in which the government can engage to prevent public harm without providing compensation. But we agree that within that range of activities, the government can act to prevent harm and no compensation is due regardless of the impact. I think it's on that issue that this case will basically turn.

Epstein's point, at least as I understand it from his brief, is that the burden of proof is on the government to show the legitimacy of the regulation, to show that it is in fact a public harm–prevention measure. But again, one doesn't have a property interest in harming others, and if the government is trying to prevent a landowner from harming others, then there's simply no taking.

I think that Epstein and I agree that there is a line between private property and the ability of people to impose external harms on others and to harm the general public by the use of property. The question is, where is that line drawn and on what side of the line does this particular regulation fall?



Richard Epstein expresses disdain and Cato senior fellow Roger Pilon takes notes as John Echeverria, chief counsel to the National Audubon Society, speaks at a Cato luncheon on the South Carolina takings case currently before the Supreme Court.

I submit that the harm the South Carolina legislature was trying to deal with here was both very real and very substantial. Barrier islands are not like other real estate. They literally migrate; they move. They're unconsolidated sandy sediments that migrate laterally up and down the shore and landward in response to the action of waves and winds. They are unstable areas that are very hazardous for construction. Barrier islands in the natural state provide the most important defense for coastal areas against the effects of storms, high winds, and storm surges associated with hurricanes. Building on the beach dune system, which destroys the dune, or trying to stabilize the dune fundamentally undermines the integrity of the system. Sand naturally moves from a dune down to the beach area, replenishing the beach and allowing it to serve as a barrier to storms. If the beach dune system is stabilized, its natural function is destroyed.

It is not simply a question of harm to somebody who builds on such an unstable area, although I think there are some reasons to support paternalism in some circumstances. It is also a question of harm to others. Landward properties depend on the defense provided by the beach dune system. If that system is destroyed, those properties are exposed to storm damage. Epstein belittled what the coastal geologists refer to as projectile damage, but it's a very real phenomenon. Buildings that are on the ocean shore in front of or on top of the dunes are particularly exposed to the effects of wind and storms. After Hurricane Hugo in South Carolina, the primary adverse effects on landward structures were found to be due precisely to exposed properties that were hurled landward. All of those risks also have to be considered in light of global warming and a consequent sea level rise—again, exacerbating the hazardous nature of construction on the ocean shore and the dangers to other property owners posed by such construction.

The South Carolina Beachfront Management Act is an entirely rational, thoughtful, well-tailored response to a public hazard. The first purpose of the act, and clearly the primary purpose as recited in the act itself, is to protect the public. The act recites the fact that beaches are important recreational areas and identifies other public purposes that are served by the beaches. But what is

most clear is that the regulation at issue here is specifically tailored to address a public-hazard problem.

My final point, and perhaps the most important, is that the statute specifically provided that Mr. Lucas, if he believed the line drawn pursuant to the legislative scheme was unfair, could present evidence to the coastal council and explain that the line on his property should be drawn at a different point. He never took advantage of that opportunity. He simply said, "I've been hurt and I am entitled to compensation." I believe the Supreme Court will disagree.

Epstein: According to Mr. Echeverria, it would be within the state's power to order everybody who has a home on those islands to dismantle it immediately so that there would be no flying roofs to hurt anybody else. The state could order the demolition of old construction as well as enjoin new construction.

Moreover, the beach front is not the only area peculiarly exposed to the environmental and hurricane risks that we're talking about. What about Charleston? It's also exposed to those risks. Do we say, in effect, that in the name of environmental protection we must raze the entire city without compensation because somebody's house might fall on somebody else's?

This is not a question of environmental interaction. We now have a set of restrictions that promises to cause billions in private losses, and we've heard it said that we can stop houses from being knocked down by ordering them to be razed.

There is no sense of proportion or balance in Echeverria's position. An ounce of environmental angst is sufficient to allow draconian measures that forbid the very activities that enable people to use the environment constructively. This is a classic case of overclaiming, which occurs because the environmental lobby can go to the state legislature and say, "Let us have our way. You're not going to have to pay for this." And environmentalists can prove that the benefit is greater than the political cost. But that's the wrong test. From a social point of view, the *right* test is whether the benefit is greater than the cost inflicted on the property holders. ■

Book: To Solve Health Care Crisis, Give Consumers More Clout on Costs

In today's bureaucratically dominated health care system, the patient's major role is to sign the forms that authorize one large, impersonal organization to release funds to another. A new Cato Institute book, *Patient Power: Solving America's Health Care Crisis*, by medical economists John C. Goodman and Gerald L. Musgrave, proposes that consumers be restored to their natural role in the market for medical care.

Government, through Medicare and Medicaid, buys close to half the health care provided in America today, the authors write. Most of the other half is paid for by insurance companies, through policies purchased by third parties, because the tax laws encourage people to rely on first-dollar health coverage from their employers. Goodman and Musgrave explain that when health care appears to be free or very cheap, people buy more than they would if they were paying the full cost. The resulting casual attitude toward shopping for health care drives up prices, which drives up insurance premiums, which creates hardships for business and those without insurance. That spiral eventually harms all users of health care, but the process is so circuitous that people fail to see the connection with their buying habits.

Goodman and Musgrave's solution is to restore power and responsibility to individual consumers. If individuals are allowed to deduct the cost of insurance, they will have a stake in finding the best insurance value. And insurers will compete vigorously to provide it. Most consumers will discover that high-deductible insurance is a far better buy than low-deductible policies because the cost of handling small claims exceeds the benefits. To cover routine medical expenses, Goodman and Musgrave propose that consumers be free to set up tax-free medical savings accounts. Since the money in those accounts would be the property of individuals, they would have an incentive to spend wisely on health care. The money not spent would accumulate tax-free interest and could be used for health care and other needs during retirement.

Gerald Musgrave

John Goodman

The authors also propose solutions to the problems related to cost containment, malpractice, preventive care, long-term care, mandated benefits, and organ transplants.

"Play or pay" government schemes and full-blown national health insurance would only aggravate the worst problems of the current system, the authors write. Goodman and Musgrave's message is that just as government planning failed so spectacularly in the communist world, so it will fail—indeed, already has failed—in America's health care system. They write that their proposals would result in a competitive and innovative system of private medical enterprise.

Patient Power is available from the Cato Institute for $16.95 in paperback, $29.95 in cloth. ■