Regulatory Takings after *Lucas*

Henry N. Butler

The Fifth Amendment to the United States Constitution concludes with the Takings Clause—"nor shall private property be taken for public use without just compensation." There are several common-sense reasons why this clause was included in the Bill of Rights. First, protection of property rights (through the public use and compensation requirements) encourages private investment and promotes economic prosperity. Second, compensation is equitable in the sense that no one individual or group is forced to bear a disproportionately large share of the costs of a government program. Third, the public use requirement could limit the scope of government activities to those that involve primarily public, rather than private (special interest), benefits. Fourth, the compensation requirement serves as an important restraint by requiring the government to pay for all the resources that it commands. Although this list of rationales is not necessarily exhaustive, it does suggest that a consideration of these rationales could provide some guidance to the application and interpretation of the Takings Clause. Unfortunately, judicial interpretation of constitutional provisions is never so straightforward.

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Like many areas of constitutional jurisprudence, judicial interpretation of the Takings Clause has created a confused and baffling body of law. For example, the Supreme Court has emasculated the "public use" requirement to the point that "public use" means whatever the taking government says is a public use. Nevertheless, when government physically invades private property, it is clear that a taking has occurred and that compensation is owed to the property holder.

What is not clear is the extent to which the Takings Clause offers property owners protection against reductions in property value caused by government regulations—so-called regulatory takings. In many instances, especially land-use regulations, the effect of regulations is to impose substantial costs on some property owners in the name of achieving what the government has determined to be a public benefit. Thus, many regulatory-induced reductions in property value are potentially characterized as takings subject to the just compensation provisions of the Takings Clause. Indeed, compensation for a typical regulatory taking would seem to fit within the primary justifications for the Takings Clause—encouraging investment, preventing inequitable treatment, and restraining government.

Nevertheless, this approach to property rights and regulatory takings offers too much—

almost every government action impacts property values, and it would be totally unworkable to require compensation every time a government action causes a diminution in value. But that does not mean that there should be no protection against regulatory takings. Proponents of greater property rights protection have long recognized the need for a principled approach to regulatory takings that is consistent with the overall purposes of the Takings Clause.

Property Rights in the Reagan-Bush Supreme Court

Prospects for greater protection for private property owners looked bright as the Reagan-Bush appointees took control of the Supreme Court. However, property rights proponents' expectations have been treated to a roller coaster ride by recent Supreme Court decisions. Beginning with three cases in 1987, the Court seemed to signal the start of a new era in which greater protection from regulatory takings would guarantee property owners compensation in the event that government actions reduced the value of their property. In fact, the 1987 decisions prompted President Reagan to issue an Executive Order calling for a "regulatory takings review" of all new federal regulations.

The prospect of greater protection of property rights appeared even brighter when the Supreme Court agreed to review the South Carolina case of *Lucas v. South Carolina Coastal Council*. Anticipation of an important decision affording greater protection against government action was reflected in numerous law review articles and the popular press. But even before *Lucas* was announced in 1992, the Court lowered expectations with its decision in *Yee v. City of Escondido*, which rejected a property owner's efforts to expand the Court's takings test to encompass regulation of mobile home parks. The Court refused to consider the petitioner's argument that although no actual physical invasion occurred, the county ordinance amounted to a regulatory taking because it deprived mobile home park owners of the economic use of their property. The Court described the regulatory takings analysis in terms of an ad hoc balancing test that "necessarily entails complex factual assessments of the purposes and economic effects of government actions." That is not the type of language that promotes and protects private property, but things got worse in *Lucas*.

The facts in *Lucas* are straightforward. David Lucas, a real estate developer, bought two beachfront lots on a South Carolina barrier island in anticipation of building vacation homes as was then permitted by all relevant regulatory bodies. The South Carolina Legislature then enacted the South Carolina Beachfront Management Act, which prevented Lucas from building on his property. A state trial court found that the state's action was a taking because it rendered the property "valueless" and ordered compensation. The South Carolina Supreme Court reversed the decision on the ground that no compensation is owed under the Takings Clause regardless of the regulation's effect on the property's value when a regulation is designed to prevent "harmful or noxious uses" of property. The notion that building a home at the beach is a "harmful or noxious" use of property would strike most people as strange or even bizarre, but the South Carolina Supreme Court accepted the legislature's determination that building additional homes would threaten existing homes and the delicate environmental system of the barrier islands. Had the South Carolina decision been upheld, Mr. Lucas would have been faced with the loss of over $1 million.

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The U.S. Supreme Court's decision to grant *certiorari* in *Lucas* created a great deal of excitement among property rights proponents as well as a great deal of concern among environmentalists. For property rights proponents, *Lucas* was a good case in the sense that the South Carolina Supreme Court's decision seemed so inequitable that the U.S. Supreme Court was bound to offer some relief. *Lucas* also presented an opportunity to develop a coherent theory of regulatory takings that would act as a real constraint on regulatory activity. On the other hand, environmentalists were concerned that the Court, in granting relief to Lucas, would rein in the regulatory demands of the environmental

lobby. As it turned out, all the glee and hand wringing were for naught.

The Distinction Between Total and Partial Takings

The Supreme Court's decision in *Lucas* was a major disappointment because the opinion unnecessarily limited its impact to unusual situations where the regulatory taking renders the property "valueless." Justice Antonin Scalia, writing for a majority of six, delineated a boundary between compensable and noncompensable land-use regulations based on the distinction between total and partial regulatory takings. Justice Scalia held that the Takings Clause reached only those land-use restrictions that deprived the owner of "all economically beneficial uses" of property. That statement was sufficient to overturn the South Carolina Supreme Court, but it failed to offer any improvement to the law of regulatory takings because most regulatory takings do not render the affected property "valueless." Thus, land-use regulations ostensibly adopted to promote some articulated state interest will not require compensation to injured landowners so long as there is not a total taking or a physical invasion of the property.

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The distinction between total and partial regulatory takings is the most troublesome aspect of Justice Scalia's opinion. The distinction is arbitrary and inconsistent with the purposes of the Takings Clause. For the typical landowner, the distinction between total and partial takings represents a difference in relative magnitude of loss for any given piece of property, but makes little sense in terms of a landowner bearing a disproportionately large share of the burden of creating some public benefit. Under the *Lucas* Court's total/partial distinction, one landowner's noncompensable partial taking may be a much larger dollar loss than another landowner's compensable total taking. In this regard, the total/partial distinction seems arbitrary and unsound.

Moreover, the total/partial distinction for regulatory takings was not necessary in light of earlier Supreme Court decisions involving partial physical takings. For example, in the 1933 case of *Jacobs v. United States,* farmers sued the federal government to recover compensation for the occasional flooding of their property that was caused by the construction of a dam by the federal government. The Supreme Court ruled that there had been a partial taking of the lands in question, for which the government was required to make compensation under the Fifth Amendment. Many years later, in *Griggs v. Allegheney County* (1962), the Court addressed the partial physical taking of air space over land. In that case, the county established an airport next to residential property, making it unsuitable for residential use. The Court required payment of compensation even though the property could be used for nonresidential or commercial purposes—that is, even though the property was not made valueless. Thus, it is clear from an analogous area of Takings jurisprudence that Supreme Court precedent did not prohibit Justice Scalia from requiring compensation for partial regulatory takings.

The most plausible explanation for why Justice Scalia adopted the total/partial distinction is that requiring compensation for partial takings would have laid the foundation for an all-out assault on other partial regulatory tak-

ings, such as zoning restrictions and rent control. *Lucas* offered a potential vehicle for such a dramatic change in property rights protection because most of the Justices did not really believe that Lucas had lost all economically beneficial use of his property. That is, *Lucas* really involved a partial taking, but Justice Scalia chose to adopt the South Carolina trial court's characterization of it as a total taking and use the total/partial distinction to limit the scope of the decision. Unfortunately, the *Lucas* opinion gives legislators and lower courts plenty of guidance about how to avoid finding a regulatory taking.

As disappointing as the *Lucas* holding might be to proponents of property rights, it is useful to keep some perspective on the decision by considering Justice Blackmun's view of Mr. Lucas's unfortunate treatment at the hands of the South Carolina Legislature. In a strong dissent to Justice Scalia's majority opinion, Justice Blackmun concluded that "even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property." Real estate developers, like Mr. Lucas, are accustomed to the financial risk involved in their business. Owners of beachfront homes, like Mr. Lucas hoped to become, are well aware of the risks of storms and hurricanes. However, just because people are willing to incur those types of risks, it does not follow that they willingly accept the risk that the legislature can take their property with no prospect of compensation. Under Blackmun's view, the biggest risk—apparently an "inherent" risk—of owning property is that the legislature will destroy its value free of any obligation to compensate the victim. This brings real meaning to the saying "When the legislature is in session, there is no such thing as an insurable interest."

Lucas not only failed to meet its potential to provide more protection for property owners, it also instructed governments how to avoid paying the full costs of regulatory takings. The tragedy of *Lucas* is that the Court has told governments, in effect, "you can take and you won't have to pay as long as you don't take it all."

Casual observation of politics at any level of government teaches us that we should never underestimate the ability of politicians and interest groups to take advantage of every opportunity to use political force to transfer wealth. But Supreme Court opinions continue to reflect a naive view of politics and the American democratic process. Nowhere is that naivete more evident than in *Lucas*. The *Lucas* decision creates a clear road map for how legislators should write legislation to avoid regulatory takings claims. As a result, we may have seen the last regulatory taking—at least according to Justice Scalia's definition—but we can expect to see even more legislative intrusions on property rights.

The Lower Courts

A more immediate concern with Justice Scalia's distinction between partial and total takings was that lower courts would seize on the negative implication—if there is not a total deprivation of economic value, then there is not a taking and compensation is not required. That is an attractive bright line rule for lower court judges because it is simple and easy to apply. Moreover, application of the *Lucas* rule is not subject to the types of second guessing that go with the application of more complicated standards like the one articulated in *Yee* which requires "complex factual assessments of the purposes and economic effects of government actions." In short, because judges generally do not like to see their decisions overturned on appeal, the simple calculus of *Lucas*—is it a total taking or not?—is very appealing.

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A review of the lower court cases—a few of which are mentioned here—suggests that the courts have been doing exactly what property rights proponents feared. Perhaps the most literal following of *Lucas* was by the Washington State Court of Appeals in *Powers v. Skagit County*, which involved land-use restrictions

prohibiting building in a flood plain where the owner previously had been granted building permits, but had allowed them to expire before beginning construction. The Washington State Court of Appeals stated "unless [the plaintiff] can demonstrate on remand that he is entitled to categorical treatment under *Lucas* (by showing that his property retains no economically viable use as a result of the regulations), then the trial court's determination that the regulations are insulated from his takings challenge must be affirmed." In *Barnardsville Quarry, Inc. v. Borough of Bernardsville*, the New Jersey Supreme Court rejected a takings challenge to a local ordinance limiting the permissible depth of a quarry that reduced the value of the plaintiff's land by over 90 percent. *Lucas* had no impact on the analysis or the ultimate decision, presumably because both parties recognized that it was not a total taking.

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In another case, *State of Delaware v. Booker*, the Superior Court of Delaware rejected a takings challenge after finding *Lucas* inapplicable to a prohibition on building in a highway "buffer zone" that was created when a new highway was built on adjacent condemned property: "Defendants incorrectly rely on *Lucas* and assume building prohibitions necessarily render land valueless. In *Lucas*, the state legislature's building restriction did render the land valueless but those facts were significantly different from the facts of the Defendants' case . . . While a building prohibition on coastal lots bought by a residential developer for the purpose of constructing houses upon them rendered the property in *Lucas* valueless, the same is not true of farmland which has been and currently is used in the same capacity. The Defendants focus too narrowly on whether a regulation does or does not prohibit building. The determinative question is whether the regulation completely deprives the owner of 'any reasonable economic use' and, thus, renders the property valueless. Defendants cannot claim their land is valueless simply because they might have developed it in the future. The possibility of future development is irrelevant because the land, as evidenced by the current use, has not been rendered completely worthless. The regulation is considered a taking only if it deprives the owner of all 'economically viable use of his property.'"

The important point illustrated by these cases is just how easy the *Lucas* total/partial takings distinction makes it for the lower courts to dismiss a regulatory taking claim. If the property has any value after the imposition of the regulation, then the game is over.

Scalia's Exception: Another Negative Implication?

Having articulated a bright-line distinction between total and partial regulatory takings, and stated that "total regulatory takings must be compensated," Justice Scalia then created an exception to the new total taking rule by providing that compensation would not be required—indeed, a "taking" would not have occurred—if the regulation prohibits uses of a property that were not "previously permissible under relevant property and nuisance principles." In other words, if the regulated activity is some form of nuisance or noxious use subject to regulation by common law, then the state is not required to compensate property owners for any resulting economic loss.

The negative implication of this position is that if the activity was previously permitted under relevant property and nuisance principles, then the prohibition of the activity would be a total regulatory taking that must be compensated. Justice Blackmun views this possibility with alarm in his dissenting opinion: "Under the Court's opinion today, . . . if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if government will be able to 'go on' effectively if it must risk compensation 'for every such change in general law.'"

Although some property rights proponents might be thrilled with such a result (one Justice's doomsday is another person's utopia), Blackmun's doomsday scenario is an extreme interpretation of Justice Scalia's analysis of the

rule and exception. For starters, the exception is relevant only if there has been a total regulatory taking. Thus, if the regulation does not destroy all economically beneficial uses, then it does not matter whether the regulated activity was previously permitted because all partial restrictions are sustained under Justice Scalia's formulation. Once again, Justice Scalia's distinction between partial and total takings makes easy work for lower court judges and it is unlikely that they will be willing to follow this potential interpretation of Scalia's exception.

Regulatory Takings and the Regulatory State

The Reagan-Bush-Rehnquist court has generated interest in the possibility of reining in the regulatory state through greater protection of property rights, but one stark fact tells the real story—that Court has not ruled that any significant state or federal regulatory program constitutes a compensable taking under the Fifth Amendment. The Takings Clause could be reinvigorated to act as a real check on regulatory excesses, but the Court has been unwilling to take the necessary steps perhaps because it views the democratic process as the best way to control governmental power. After all, the laws and regulations at issue are products of majority voting in a democratic system. However, in light of a generation of work in public choice economics and the economics of regulation, the Court gives too much deference to special-interest regulations cloaked in public-interest rhetoric.

We are left with a Court that takes property rights seriously only when granting *certiorari* (perhaps out of concern for the plight of individual plaintiffs like Mr. Lucas), but is too beholden to majoritarian institutions to use the Takings Clause to overcome the regulatory actions of federal, state, and local governments. Perhaps an inquiry into the interest group aspects of the regulations would help. For example, in making the "complex factual assessments of the purposes and economic effects of government action," courts should look beyond the public-interest rhetoric and examine the validity of the alleged public purpose. If the legislation's primary effect is to benefit interest groups and is inconsistent with the articulated public interest, the Takings Clause could require payment of just compensation to injured property owners and legislators would be forced to consider the budgetary implications of their actions. Of course, a first step in giving teeth to the concept of regulatory takings would be to abandon the total/partial regulatory takings distinction. Whether the Takings Clause is the best approach to controlling the excesses of the regulatory state is another issue. An alternative approach would be revitalization of the substantive due process review as a means of invalidating legislation. For now, unfortunately, the prospects of greater protection of property rights under either approach seem more remote than at any time in the past decade.

Postscript

On remand, the South Carolina Supreme Court ordered the state of South Carolina to purchase the Lucas property. As the new owner of a previously "worthless" piece of property, the state has decided to enter the real estate development business and has offered the property for sale as residential sites. Presumably, the state has changed its land-use restrictions to allow the development. This role reversal demonstrates that actions that may appear to be in the public interest when they are "free"—that is, when the political decisionmakers don't bear the costs—are not necessarily attractive government programs once the political decisionmakers must bear the budgetary costs of their actions. It is difficult to find a better example of how protection for owners of private property serves to restrain the growth of government.

Selected Readings

Epstein, Richard A. *Takings: Private Property and the Power of Eminent Domain.* Cambridge: Harvard University Press, 1985.

McCormick, Robert E. and Tollison, Robert D. *Politicians, Legislation, and the Economy: An Inquiry Into the Interest-Group Theory of Government:* Boston: Martinus Nijhoff, 1981.