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***Lucas v. South Carolina Coastal Council:*
Its Historic Context and Shifting
Constitutional Principles**

Cotton C. Harness, III*

In 1986, David Lucas purchased two lots on the Isle of Palms, South Carolina, a barrier island north of the port city of Charleston. The lots are located on the beachfront in a closed-gate community called Wild Dunes, a development in which Mr. Lucas was intimately involved. About eighteen months after he purchased the lots, South Carolina passed the 1988 Beachfront Management Act,¹ which had as its primary purpose the prevention of construction and reconstruction in high hazard areas on the state's beach/dune system. The Act imposed a setback scheme that prevented Mr. Lucas from building any permanent structures on his beachfront lots other than a walkway and small deck.

The Act was passed in response to a serious problem of near-shore development along the South Carolina coastline.² Due to the fact that too little statutory authority had been

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1. S.C. CODE ANN. § 48-39 (Law. Co-op. 1987 and Supp. 1991).

2. "The Blue Ribbon Committee Report on Beachfront Management," March 1987.

given under the 1977 Coastal Zone Management Act to the implementing agency, the South Carolina Coastal Council, much development had taken place very close to the shore. This ill-planned development was highly vulnerable to erosion and storms and caused a deterioration of the natural system, which in turn exacerbated the problems associated with such erosion and storms.³ Aside from concerns over life and property, the legislature recognized that this near-shore development was destroying the beaches of the state, which support a strong tourist industry, provide recreation for residents and visitors, and provide a habitat for plant and animal life. The Act sought to implement a gradual retreat from the shoreline over a forty-year period in order to protect and restore the beach/dune system and to eliminate construction in "critical" areas.⁴

Mr. Lucas filed a suit in the Court of Common Pleas of Charleston County alleging loss of "all economically viable use" of the property. Recognizing that the goals of the Act were laudable, he maintained that the loss of use and the diminution of the value of his property, without any consideration for the nature of the government action or the harms that were prevented by the Act, amounted to a taking pursuant to the Just Compensation Clause of the Fifth Amendment. The court agreed and awarded him over 1.2 million dollars.

The case was appealed to the South Carolina State Supreme Court. Relying upon an old line of cases beginning with *Mugler v. Kansas*,⁵ the Court concluded that no taking had occurred. This was based upon the Court's reading of prior U.S. Supreme Court decisions that recognized that takings, with the exception of situations in which there is a permanent invasion of property by government,⁶ require a balancing of the government interest and private loss. The Court reasoned that because Mr. Lucas never challenged the governmental purpose, and indeed conceded its importance, he had

3. *Id.*

4. S.C. CODE ANN. § 48-39-10.

5. 123 U.S. 623 (1887).

6. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

presented the Court with only one side of the takings equation. As a consequence, the Court could not *sua sponte* second-guess the legislative findings that great public harm was created by the near-shore construction proposed by Lucas. Since diminution in value has never been sufficient in and of itself to constitute a taking, Lucas failed to properly present his case for review.⁷ Lucas then filed a writ of certiorari to the U.S. Supreme Court. The purpose of this essay is not to rehash the much discussed formula for takings law or to analyze what the Court held. Instead, I want to put the *Lucas* case in a historic perspective and to point out that the economic agenda put forth by some members of the Court threatens to supplant traditional views of the individual's relationship to the community and the Court's relationship to the legislature. The philosophic shift in the Court does not bode well for regulation of the environment. As will be discussed in more detail, the shift focuses more on the property interests of the individual and less on the obligation that the individual has to the community to use his property in a way that does not harm others. Secondly, the shift attempts to use the Fifth Amendment as a constitutional tool upon which to balance public and private rights, a use which has no real basis in history or in practical application. Finally, the Court may be returning to the intrusive substantive due process analysis of the *Lochner* era, when the Court substituted its own judgment for that of the legislature in order to promote a laissez-faire economic theory in place of sound constitutional principles which were based upon deference to the legislative branch.

Until the turn of the 19th century, takings law was not in a muddle. Indeed, it was very clear. There was no application of the Fifth Amendment's Just Compensation Clause unless there had been a permanent physical invasion.⁸ The government could exercise its police power to protect the health, safety and welfare of the community subject only to the dictates of the Due Process Clause, which required simply that

7. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896-902 (S.C. 1991).

8. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

the law be rational. Equally important, however, was the principle that redress for overreaching of such a legislative exercise of police power affecting property could only be had at the polls, not in the courts.⁹

These principles were based upon a long republican tradition in this country. The republican theory of property found its most forceful spokesman in Thomas Jefferson, who represented the predominant view regarding the relationship between private and public interest in property. Recognizing that humans are socially interdependent, Jefferson believed that all property was owned subject to an implied obligation that it be used in a manner beneficial to the community. Property rights, he concluded, are derived from the state and, as a matter of principle, the property owner cannot complain when the state regulates it for the common good.¹⁰ This view of property comports with Jefferson's view that the earth is held in common stock for all men and future generations. This emphasis on the rights of the community over claims of the individual property owner was best summarized by Benjamin Franklin, who in 1785 stated:

Private property . . . is a creature of society, and subject to the calls of that society, whenever its necessities shall require it, even to its last farthing; its contributions therefore to the public exigencies are not to be considered as conferring a benefit on the public, entitling the contributors to the distinctions of honor and power, but as return of an obligation previously received for payment of a just debt.¹¹

Against this backdrop of republican thought, none of the original state constitutions contained just compensation clauses. The idea that the government should compensate for

9. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

10. William M. Treanor, Comment, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); see also Jerry L. Anderson, *Takings and Expectations: Toward A "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529 (1989).

11. BENJAMIN FRANKLIN, *THE WRITINGS OF BENJAMIN FRANKLIN* 135, 138 (A. Smyth ed. 1906).

abridgement of property rights was developed by property owners in response to military seizures during the Revolutionary War. The movement was led by Alexander Hamilton, and called for protection of private property rights, which were distilled in the Fifth Amendment's Just Compensation Clause. At that time, it was generally conceded that the Fifth Amendment applied only to physical invasions of property by the federal government.¹²

Until 1887, there were few legal challenges to the exercise of police power based upon the notion that compensation is required when government regulates property. This most certainly was due to the vastness of the country, the small population, and the lack of need for governmental regulation, but was also due in part to the continuing power of republican thought.

In 1889, the Supreme Court decided the seminal case defining the limits of the police power in *Mugler v. Kansas*.¹³ Kansas passed a constitutional amendment and supporting legislation that prohibited the manufacture and sale of intoxicating liquors. Mugler's investment in machinery was rendered virtually valueless. In an opinion reminiscent of the republican theory that private property is held in trust for the public good, Justice Harlan made his now famous statement that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."¹⁴

He went on to amplify this theme:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that

12. See *Mugler*, 123 U.S. at 623.

13. *Id.*

14. *Id.* at 665.

its use by any one, for certain forbidden purposes is prejudicial to the public interests . . . [t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.¹⁵

The *Mugler* principle, so eloquently stated by Justice Harlan, was amplified by the Court in *Munn v. Illinois*.¹⁶ Justice Waite, in holding that the state of Illinois could impose maximum rates that owners of grain warehouses could charge users, concluded that this regulation was an appropriate exercise of police power, and then went much further. He denied that the Court had the constitutional power to redress problems associated with the exercise of public power. He stated, “[w]e know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.”¹⁷

The republican ideology, which looked to the common good as determined by the body politic closest to the people, reached its zenith in *Munn*. However, the fall of the legislative prerogative was soon to come, riding the wave of great social and ideological changes, brought on by the industrialization and urbanization of America during the latter part of the 19th century. As pointed out by Professor Patrick C. McGinley in his analysis of the era, “[t]his radically changing economic base caused a rethinking of many traditional legal concepts.”¹⁸ While the public was very interested in reining in

15. *Id.* at 668-69.

16. 94 U.S. at 113.

17. *Id.* at 134.

18. Patrick C. McGinley, *Regulatory “Takings”: The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,369, 10,372 (Sept. 1987).

the excesses of economic power created during the great expansion in the 1880's and 1890's, jurists became alarmed at the breadth of cases like *Munn*, fearing that broad legislative power would impede economic growth and offend the laissez-faire theories prevalent in that day.¹⁹

While cases like *Mugler* and *Munn* rejected substantive due process restraints on legislative control of commercial enterprise, the Court, at the turn of the 19th century, began to use the Due Process Clause in reverse to augment the power it used to support commercial enterprise. In 1905, after several preliminary efforts at controlling police power, the Court turned the old republican constitutional theories on their ear and began over thirty years of intrusive second-guessing of state legislative acts by application of the substantive Due Process Clause of the Fourteenth Amendment.

In *Lochner v. New York*,²⁰ the Court struck down a New York law limiting the work hours of persons employed by bakeries. Decrying the seemingly limitless power of legislatures to control the lives and property of people, the Court held that the right of a person to make a contract, in relation to his business, is part of the liberty of the individual protected by the Fourteenth Amendment.²¹

The ascendancy of economic theory over traditionally held constitutional principles caused the Court to strike down over two hundred state police power laws until the *Lochner* era ended. Substituting its own judgement for that of state legislatures, the Court orchestrated social policy by supporting its own view of economics and diminishing the power of legislatures to act as arbiter between public and private interests. Both Harlan (who authored *Mugler*) and Holmes (the purported father of modern takings law) dissented in *Lochner*, recognizing that the Court was abandoning its fundamental constitutional role and that it was not the Court's job to promote economic theories.²²

19. *Id.* at 10,373.

20. 198 U.S. 45 (1905).

21. *Id.* at 56.

22. *Id.* at 75.

The *Lochner* era ended by the 1940's, when the Court became reluctant to continue interfering with legislative power to protect public health, safety and welfare. Indeed, the Court eventually returned to *Munn's* constitutional principles and recognized that it was not for the Court to balance the advantages or disadvantages of new legislative acts. This, it concluded, was the job of legislatures. Substantive due process of *Lochnerian* character was tossed onto the heap of outdated legal theories, and the dissenting opinions of Harlan and Holmes became mainstream once again. This, of course, implied that the Court would use great judicial restraint in reviewing legislative acts and defer to the state legislature for public policy.

Interestingly, at the same time that the Court was imposing its will upon legislatures during the *Lochner* era, takings law saw little change concerning regulation of business activities. The principles of *Mugler* remained intact and most of the takings cases, including *Pennsylvania Coal Co. v. Mahon*²³ (the cornerstone of modern takings law), were couched in due process terms that gave little hint of judicial concern for losses to private property owners where there was a valid exercise of police power.

The Fifth Amendment is a latecomer to the arena of balancing public and private rights associated with police power action, save the exception of instances where the state physically takes or occupies property. Perhaps because the Fifth Amendment does not carry the historical baggage that the Due Process Clause does, the modern Court has chosen it to chart a new constitutional course unencumbered by the due process principles of *Mugler* or the stigma that judicial use of due process acquired during the *Lochner* era. In order to apply the Fifth Amendment, however, the Court has been forced to rewrite constitutional history, pretend that precedent has established the Fifth Amendment as the appropriate arbiter for takings issues and, ironically, resurrect substantive due process review found in *Lochner* under the guise of a different

23. 260 U.S. 393 (1922).

constitutional principle. This has created significant analytical problems because by mixing *Mugler* due process considerations with the more recent private property considerations of diminution in value and reasonable investment-backed expectations, the Court has created an unworkable formula for determining when compensation is due to regulated property owners.

Part of the difficulty of modern takings law is that it is founded on a misinterpretation of *Pennsylvania Coal Co. v. Mahon*.²⁴ While Justice Rehnquist has declared this case to be the cornerstone of modern takings law, careful reading of the case clearly indicates that it is a Fourteenth Amendment due process case and has absolutely nothing to do with the Fifth Amendment. Holmes, the author of the opinion, was merely delimiting the boundaries of the Due Process Clause and not moving away from the majoritarian principles of *Mugler*. This case stands for the proposition that where the legislative branch oversteps the bounds of validity of purpose, it can still have its way if it compensates the property owners affected. In *Mahon*, Holmes concluded that there was no valid exercise of police power because the legislation in question related only to protection of private interests rather than the general public interest and as a consequence was unconstitutional. Thus, the famous "goes too far" language relates not so much to the diminution in value or loss of use by the landowners as it does to the character of the government action. Under Holmes' theory, when government action goes beyond appropriate purposes that protect general health, safety and welfare concerns, the state must pay a citizen for this unfair burden in order to avoid due process concerns.²⁵

Members of the modern Court, however, have attempted to turn this "goes too far" analysis upon the property owner's loss and have wholly discounted the true meaning of *Mahon*. However, Holmes' language in *Mahon*, linking the case philosophically to republican ideology and Supreme Court cases right up to *Keystone Bituminous Coal Ass'n v. DeBenedic-*

24. *Id.*

25. See generally McGinley, *supra* note 18, at 10,374-75.

tis,²⁶ continues to give strong weight to the insulation of police power actions from compensation requirements. These cases have confirmed over and over again that diminution in value and loss of use alone cannot overcome the central theme of republicanism that recognizes an obligation to use property in a way that is not harmful to others.²⁷ In fact, the Court has never found a taking based upon the Fifth Amendment except in instances where there has been a physical invasion.

Thus far, there has been only strong dissenting rhetoric about private property rights and there is a serious stalemate between the majoritarian forces on the Court and the newer private property advocates. This stalemate has made it singularly impossible for the Court to determine when a regulation "goes too far" so as to equate a taking, and has resulted in a doctrinal mishmash that serves only to confuse the law of takings. This gridlock is rooted in the effort to remain true to traditional principles that grant maximum power to legislatures to call in social obligations free from compensation requirements and the contrary effort to reverse the flow of obligation from the individual to the state by requiring payment for regulations that affect private property rights.

In order to escape the republican tradition and the impossible balancing of public and private interest set forth in the current test, some members of the Court have sought to obtain certainty in the test by narrowing the range of police power actions insulated from takings analysis and by subjecting legislative actions to closer scrutiny by the Court, as was done in the *Lochner* era. In doing so, these members seek to diminish the traditional police power authority of the legislature and increase the power of the Court to make decisions about which regulations cross the threshold that requires compensation under the Fifth Amendment.

Justice Rehnquist has sought for some time to narrow the range of police power actions insulated from compensation. In *Penn Central Transportation Co. v. New York City*,²⁸ the

26. 480 U.S. 470, 508 (1987).

27. *Id.* at 490.

28. 438 U.S. 104 (1978).

City of New York Landmark Preservation Law prevented construction of a twenty-four story office building over the historic Grand Central Terminal. The owners of the building contended that the New York City law had taken their property in violation of the Fifth and Fourteenth Amendments and urged that they were entitled to compensation. The majority, in upholding the constitutionality of the law, recognized that there is a broad range of police powers that are insulated from the Fifth Amendment requirement of compensation. Justice Rehnquist, in his dissenting opinion, made his now famous conclusion that "[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself. The question is whether the forbidden use is dangerous to the safety, health or welfare of others."²⁹ Under his theory, the only police power actions that are insulated are those that would prevent activity which amounts to a nuisance under common law.

Justice Rehnquist's effort to increase the range of police power activity subject to the requirement of compensation is further amplified in his dissent in *Keystone*. The majority in this case returned to *Mahon* and went to great lengths to correct the record concerning the true meaning of Justice Holmes' opinion and at the same time reemphasizing the fact that the nature of a regulation is a critical factor in determining whether a taking has occurred. The Court again specifically rejected the notion that the *Mugler* line of cases is dead and the notion that police power is somehow limited to situations where the government has attempted to prevent a nuisance as defined by common law.³⁰

Disagreeing with the majority's characterization of the state act involved in *Keystone*, Justice Rehnquist took a decidedly narrower view of what he terms the "nuisance exception." He chastised the Court for its continued deference to republican principle and stated:

[t]he ease with which the Court moves from the recogni-

29. *Id.* at 145.

30. 480 U.S. at 490.

tion of public interests to the assertion that the activity here regulated is "akin to a public nuisance" suggests an exception far wider than recognized in our previous cases. "The nuisance exception to the taking guarantee," however, "is not coterminous with the police power itself," but is a narrow exception allowing the government to prevent "a *misuse or illegal use*." . . . It is not intended to allow "the prevention of a legal and essential use, an attribute of its ownership."³¹(emphasis added).

Further clarifying the nuisance exception, Justice Rehnquist stated:

Thus, our cases applying the "nuisance" rationale have involved at least two narrowing principles. First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes . . . Second, and more significantly, our cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property.³²

Justice Rehnquist's agenda is clear. He wants to narrow the range of police power activities that are insulated from the requirement of compensation to those government actions that protect serious threats to life and property. It is equally clear that he wants to accomplish this goal by basing the takings formula upon judge-made common law nuisance theory rather than upon legislative pronouncements about what is important to society. Aside from the fact that this will freeze the legislature's ability to protect against new and different harms by only looking at common law, it does not take into account any change in social standards or concerns. Given that most of our environmental concerns of recent years have little basis in common law nuisance theory, this does not bode well for laws that attempt to develop and apply innovative ways of dealing with newly discovered land use problems.

This effort to free the Fifth Amendment balancing test

31. *Id.* at 512.

32. *Id.* at 513.

from its insurmountable analytical problems and to look for more objective standards to measure when a taking has occurred has taken the form of a direct attack upon the legislative prerogative and long held republican principles. However, while Justice Rehnquist attacks the elastic nature of police power, Justice Scalia has begun to undermine majoritarian rule in a different way by changing the manner in which courts review legislative decisions. Hints of this effort were clear in *Nollan v. California Coastal Commission*.³³ Between the demise of *Lochner* and this decision, the Court's review of the rationality of state exercise of police power was based upon a presumption of rationality.³⁴ Thus, if a state's exercise of police power is reasonably related to the purpose of the state action, the Court must defer to the legislature's wisdom. Indeed, the Court has regularly concluded that if the reasonableness of a regulation is fairly "debatable," the Court will not intervene on the behalf of private property owners to test the correctness or intelligence of a legislative decision.³⁵

Justice Scalia disregards this time-honored deference to legislative decision making and replaces it with a test that requires greater judicial scrutiny. Relying upon language from *Agins v. Tiburon*,³⁶ he claims that takings cases have never "elaborated on the standards for determining what constitutes a 'legitimate state interest.'" ³⁷ He concludes that the Court in reviewing state action must determine if the means "substantially advance" the purposes of the act. This "substantially advances" test thus invites courts to closely scrutinize laws passed to protect public health, safety and welfare.

As argued by Justice Brennan, "the Court [in *Nollan*] imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."³⁸ Justice Brennan uncovers the clear effort on the

33. 483 U.S. 825 (1987).

34. See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955).

35. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

36. 447 U.S. 255 (1980).

37. 483 U.S. at 834.

38. *Id.* at 842.

part of Justice Scalia to have the Court sit as a "super-legislature to weigh the wisdom of legislation []or to decide whether the policy which it expresses offends the public welfare."³⁹ This smacks of the intrusive substantive due process review of the first three decades of this century, repackaged under the guise of the Fifth Amendment. It also represents a dangerous effort to rein in the regulatory efforts of legislatures and limit their power to protect the public from harm.

If the Rehnquist/Scalia school of thought ultimately overtakes traditional constitutional principles recently reaffirmed in the majority opinion of *Keystone*, it is clear that environmental regulation is in for a difficult time. This is true for several reasons. First, many of the problems associated with industrialization and urbanization do not fit in traditional nuisance theory.⁴⁰ There is no strong body of nuisance law that assures that legislatures can prevent inappropriate uses of land without having to provide compensation. Take, for instance, the facts of *Lucas*. There, the state sought to prevent construction of a house upon lands which were unstable and unsuitable in their natural state for construction. However, it is questionable whether a court would determine that construction of a house along the beachfront constitutes a nuisance, given that there is existing construction in Mr. Lucas' neighborhood.⁴¹ This fact, taken together with the Rehnquist proposition that there are certain essential uses of land that in his mind are equivalent to inalienable rights, it may be that construction of a house upon a lot, despite its external effects or cumulative impacts upon the beach/dune resource, may be so important to a court that compensation will be required. Should Mr. Lucas gain a "special permit" under the recent amendments to the Beachfront Management Act to build

39. *Id.* at 843 n.1 (citing *Day Bright Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

40. On remand, the South Carolina Supreme Court must identify background principles of nuisance and property law that prohibit Mr. Lucas' intended use of his property. *Lucas*, 112 S. Ct. at 2901-02.

41. The fact that other landowners are permitted to continue using property for the use denied Mr. Lucas suggests a lack of any common law prohibition. *Lucas*, 112 S. Ct. at 2901.

upon his property, he may nevertheless be entitled to compensation for the temporary taking during the course of the litigation.⁴²

Secondly, if the Court seeks to increase its power to review the wisdom of environmental legislation through the back door by thinly disguised application of intrusive substantive due process analysis, the Justices may ultimately impose an economic theory that makes deregulation more important than protecting the environment. A narrowing of legislative discretion will chill the legislative ability to deal with evolving problems and legislatures will be less able to experiment with new means or techniques to accomplish environmental preservation. More importantly, if the Court increases its power to make policy decisions about environmental regulation, and sees such regulation through an economic filter, the traditional social obligation owed by property owners to the common good will certainly suffer. Many environmental acts are based upon the central principle of social obligation found in *Mugler* and, without recognition of this obligation, much environmental protection would be impossible to implement. The Court certainly understands that buying large tracts of regulated property is not a viable method for environmental protection. States simply do not have the resources to purchase all vital beachfront property or wetlands.

Depending on the Court's treatment of the South Carolina Supreme Court's re-formulation of the basis for its decision, the *Lucas* case is unlikely to seriously affect the test for takings. However, *Lucas* does have the potential for affording the Court an opportunity to move towards *Lochnerian* review. This will be far more serious than tinkering with a formula that, even in the best light, does not work. The Court's failure to accept the State's reliance upon the legislative findings in the 1988 Beachfront Management Act⁴³ indicates that legislative power is waning and that the Court intends to embark upon more extensive second-guessing of the efforts of the body closest to the people. Worse, it may suggest that we are

42. *Id.* at 2891-92.

43. *Lucas*, 112 S. Ct. at 2901.

returning to an era in which economic theory is more important than long held constitutional principles. If this is the case, the disruption to majoritarian democratic rule is more threatening to society than any conclusion the Court may make regarding compensation for Mr. Lucas.