

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1-1-1992

## What is Behind the "Property Rights" Debate?

John A. Humbach

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

John A. Humbach, What is Behind the "Property Rights" Debate?, 10 Pace Env'tl. L. Rev. 21 (1992), <http://digitalcommons.pace.edu/lawfaculty/93/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

## What Is Behind the "Property Rights" Debate?

John A. Humbach\*

*Lucas v. South Carolina Coastal Council*<sup>1</sup> obviously presents issues that range far more broadly than just whether people should be allowed to build on beaches and dunes. Many observers have viewed the case as a splendid opportunity for the Supreme Court to re-establish private owner autonomy in land use decisions — to cut down, perhaps drastically, on elected legislatures' traditional power to protect the environment by regulating uses of land.<sup>2</sup> Behind the "property rights" debate is the question of whether states and communities really ought to have the power that they have traditionally had to control the development and patterns of growth within their bounds.

---

\* J.D. Ohio State University. He is currently a Professor of Law at Pace University School of Law.

1. 112 S. Ct. 2886 (1992), *rev'g and remanding* 404 S.E.2d 895 (S.C. 1991). The Supreme Court's decision in *Lucas* was rendered after the remarks I made at the Center for Environmental Legal Studies Colloquium, on which this article is based. That decision did not, however, change the concerns that lie behind the larger property rights debate that are the central concern of this article.

2. "This term could be a dream come true for property owners fuming over regulations restricting the use of their land and for conservative legal strategists longing for an economic rights revival." Marcia Coyle, *Property Revival*, NAT'L L.J., Jan. 27, 1992, at 1; Tony Mauro, *Court Poised to Rewrite Property Rights Doctrine*, THE RECORDER, Feb. 25, 1992, at 7; Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992, at H1.

The contentions in *Lucas* are part of a much larger debate, a debate that will surely continue regardless of the ultimate decision in the case. The debate stems from a major difference of views about "property rights," a fundamental disagreement as to the proper role and, especially, the priority to be accorded to private property rights in decisions of public policy. There have been a number of manifestations of this sharp division of views.

We see the strength of the emerging "property rights" movement in the successful lobbying campaign that has stymied the efforts of three federal agencies to rationalize federal wetlands regulations and standardize wetlands definitions.<sup>3</sup> We see it in proposed legislation such as the Private Property Protection Act of 1991, essentially a move to curb federal regulatory power, passed by the Senate as part of the bill to raise the Environmental Protection Agency to Cabinet status.<sup>4</sup> We see it in new cases in the courts, by one recent count nearly 200 of them in the Federal Claims Court alone.<sup>5</sup> Current claims for relief against the federal government have been estimated to exceed over a billion dollars as people try to reach out and tap the Treasury because of wetlands and other environmental regulations that they do not like.<sup>6</sup>

Most importantly, however, we see the divergence of views as to the priority of property in ordinary civic discourse on issues of land use, communities' futures and protecting environmental resources. Concerned citizens enter into these discussions and find themselves met right up front with the "property rights" objection — the argument that we do not even need to talk about this or that innovative way of safeguarding our shared surroundings, the character of our com-

---

3. See, e.g., Zinn & Copeland, *Wetland Issues in the 102d Cong.*, Cong. Res. Serv. Iss. Br. 91058 (9/12/91).

4. Originally offered as S. 50, the bill would codify and harden the impact of a 1988 Executive Order (E.O. 12630), which authorizes the Department of Justice to review and rule on the effect that proposed federal regulations will have on private property rights.

5. Keith Schneider, *Environmental Laws Face a Stiff Test From Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1.

6. William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, HERITAGE FOUND. REP. ISS. BULL. 173 (1992), at 8-9.

munity, or our nation's remaining unspoiled natural beauty: Any attempt to restrict people from ruining these key components of the world around us would be an unconstitutional "taking" of private property rights. If a land-use regulation is objectionable to private owners, it should not be imposed — at least not without compensation. The property rights objection is intended as a discussion stopper, and it works as a discussion stopper, immobilizing the effort and stifling the debate.

On one side of the great divide are the defenders of private property rights. Mostly, they are people energized by a strong and understandable desire to protect their own economic interests. Typically, they are owners of non-urban land — farmers, forest owners, holders of mining interests and speculators. The basic claim of the property-rights advocates has, however, a much wider appeal. It is a claim founded on deeply rooted ideas ringing of basic fairness: "What's mine is mine." Phrased in these terms, such claims have a powerful pull on the American psyche, and even people with nothing at all to gain by enlarging the autonomy of large landowners can identify with these claims and respond to them. And when the claims come wrapped in the philosophical garb of private-market economic theory and free enterprise ideology, bonded with a healthy dose of suspicion about government generally, they can be very potent indeed.

Although the economic interests advanced on the property movement side are fairly obvious, the people aligned on the other side of the debate mostly have no such personal stake, at least no *economic* stake, in the outcome. The proponents of growth management and environmental defense are, rather, people who believe that, to have a high quality of life, Americans need to have pleasant and satisfactory surroundings in which to live. They are people who are convinced that laws such as the Clean Water Act and the Endangered Species Act address important and serious concerns. They are people who think that all Americans have a stake in the future of our one-and-only national landbase, and that, as a matter of basic patriotism, we ought to be treating this country as though we still want there to *be* a country here 50 years from now, or 100

years from now, as a decent, vital, economically viable and beautiful place for human beings, future Americans, to live.

Until *Lucas* came to the Supreme Court, the opposition of views in the "property rights" debate had been mostly skirmishes. Even so, for people merrily toiling away at environmental protection and land-use regulation, the force and conviction of the property rights counterthrust has been like a sleeping giant come awake. Industrial, agricultural and other natural resource interests that once viewed environmental and land-use regulation with grudging toleration, started to realize that the proponents of protecting our national landbase can be dangerous people — people who can influence balance sheets and affect personal wealth. To fend off the side-effects that land-use regulations can have on private wealth, these special economic interests have raised the question: "Does government have the authority to take regulatory action that diminishes the value of property?"<sup>7</sup>

Clearly, of course, government traditionally *has* had the authority to take actions that affect property values, such as regulating socially detrimental uses of land. Just as clearly, however, many people think government should not have that authority — not, at least, unless it compensates those whose "rights" to make the detrimental uses are impaired. The issue is typically raised, as it was raised by the owner in *Lucas*, in terms of "taking," with the contention that government restrictions on property use "take" away property rights. Couched in these terms, the matter seems naturally to be one calling for judicial review under the so-called Takings Clause of the United States Constitution.<sup>8</sup>

Defining the legal issue in terms of "takings" of property rights, however, tilts the inquiry and distracts attention from the central *purpose* of land-use regulations, which is something else altogether. It is just as accurate to frame the issues

---

7. *Property Rights Debate Raging Across the Nation*, 22 N.E. Agric., Mid-Atl. Ed., no. 3, p.1 (1991). See also William G. Laffer III, *The Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, HERITAGE FOUND. REP. ISS. BULL. 173 (1992).

8. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

of land-use regulation as questions of whether, and to what extent, private persons should be allowed to carry on activities (including land use) that are detrimental to the well-being of other people or of the community as a whole. After all, the only thing that restrictions on land use "take away," when you get down to it, are the "rights" that private owners previously had to use their land in ways that spill over negatively onto others, interfering with others' needs, "rights" if you will, to healthy, uplifting and livable surroundings. Compared with the "taking of property" emphasis, this way of looking at the issue at least gets the perspective more in accord with the actual priorities by putting the focus on the regulations' *purpose* instead of on their incidental side-effects (which are essentially inevitable concomitants of having any government at all).<sup>9</sup>

Proper emphasis or not, however, when a disgruntled landowner wants to challenge a legislative determination to regulate the use of his land, the Takings Clause has become the basis for obtaining judicial review of the legislative choice. The claim of "taking" has become, in short, the primary line of attack for those who want to nullify the decision of an elected legislature to add to the list of unacceptably harmful land uses. It is not, however, so obvious that the Takings Clause is a very good vehicle for this purpose. Originally, the takings clause was not intended for any such purpose at all.

The history of the matter appears to be rather clear: The purpose of the takings clause was to assure compensation for cases of physical taking.<sup>10</sup> The father of the clause, James Madison, feared that once the masses received ultimate political power under the new Constitution they might turn around and use that power to redistribute property away from the wealthy, from people like Madison himself.<sup>11</sup> As constitutional

---

9. "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

10. See, e.g., William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985).

11. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 268 (1990).

provisions go, the Takings Clause is somewhat unique in that it creates just about the only surviving constitutional right included for the deliberate purpose of promoting (or, at least, preserving) *inequality*. Even at that, however, for the first hundred years or so of our Republic, no one seriously considered the Takings Clause to have any direct bearing on behavioral regulations adopted by legislatures to preserve the public interest.<sup>12</sup>

As Mr. Harness quoted in his article from *Mugler v. Kansas*,<sup>13</sup> the prevailing 19th century view was, essentially, 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."<sup>14</sup> It was recognized, in other words, that property ownership is not just rights, but that property also entails *obligation*. There is a social obligation of property that requires owners to refrain from uses of property that could have negative side-effects on other people or on the community as a whole.<sup>15</sup> The catalogue of impermissible side-effects was not, of course, regarded as fixed. On the contrary, it was recog-

---

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

See also Scott M. Reznick, Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854 (1973). As late as 1897, the Supreme Court still regarded a "physical invasion of the real estate" as a prerequisite of a compensable "taking." *Gibson v. United States*, 166 U.S. 269, 275-76 (1897), (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878)). "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are *universally* held not to be a taking within the meaning of the constitutional provision." *Id.* (emphasis added). Writing for the Court in *Lucas*, Justice Scalia agreed that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all," but Justice Scalia regarded such details of original understanding as "entirely irrelevant." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 n.15.

13. 123 U.S. 623 (1887) (upholding a state statute prohibiting production or sale of alcoholic beverages despite the disastrous effect that it had on the use and value of a privately-owned beer brewing facility).

14. *Id.* at 665. As the Court explained in *Mugler*, a state is not required to "compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted . . . to inflict injury upon the community." *Id.* at 669.

15. I have written about this at some length in a previous article, *Law and a New Land Ethic*, 74 MINN L. REV. 339, 344-48 (1989).

nized that, as times and circumstance changed, legislatures existed for the purpose of adding new kinds of harmful activities to the list of those whose negative spillover impacts, once tolerable, had lately become socially unacceptable.<sup>16</sup>

Around the turn of the century, however, a change of outlook began to emerge, a greater judicial solicitude for private economic autonomy that became epitomized, for purposes of the Takings Clause, by the Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*.<sup>17</sup> It was in *Mahon* that the Supreme Court laid the basis for the modern regulatory takings concept with the statement: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>18</sup>

In this now famous quotation, the Supreme Court brought together and established the fundamental relationship between the two polar principles of modern regulatory takings law. First, as recognized in the *Mugler* line of cases, there is the older principle that government *can* regulate the uses of land and other kinds of property, and diminish their value by such regulation, without paying compensation. Secondly, as an offsetting anchor point, the Court established its new "too far" principle, essentially a warrant to the judiciary to strike down regulations that judges consider excessive in their impact on private owners. Poised between these two points of reference, the jurisprudence of takings was then left by the Supreme Court to the state courts, more or less exclu-

---

16. "Power to determine such questions, so as to bind all, must exist somewhere; . . . [u]nder our system that power is lodged with the legislative branch of the government." *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887). And "in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U.S. 133, 136 (1894).

In response to challenges to legislative action adding to the public nuisance list, the Supreme Court said that "it was clearly within the police powers of the State . . . 'to declare that in particular circumstances and in particular localities a [use affecting the "health and comfort of the community"] shall be deemed a nuisance in fact and in law.'" *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) (quoting *Reinman v. Little Rock*, 237 U.S. 171, 176 (1915)).

17. 260 U.S. 393 (1922) (striking down state legislation that prohibited the removal of coal from under people's homes).

18. *Id.* at 415.



sively, for the next 40 or 50 years.<sup>19</sup>

During the period between *Mahon* in 1922 and its late 1970's resumption of accepting regulatory takings cases, the Supreme Court's turn-of-the-century ideology towards economic legislation was completely reversed. The Court disclaimed any proper judicial role to review, as "super-legislature,"<sup>20</sup> the wisdom of legislative determinations in matters of economic regulation, and generally deferred to the determinations of elected legislatures to set public policy in the economic sphere. In 1980, however, the Court added another important twist to takings clause jurisprudence by seemingly approving the use of the clause as a partial surrogate for the previously repudiated "economic due process" review. Enlarging on some dicta in the 1978 case *Penn Central Transp. Co. v. New York City*,<sup>21</sup> the Court wrote in the 1980 case of *Agins v. Tiburon*<sup>22</sup> that a land-use regulation will effect a "taking" if it "does not substantially advance legitimate state interests."<sup>23</sup> Accordingly, in addition to looking at whether a regu-

---

19. With the perhaps notable exception of *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (upholding a prohibition on gravel mining), the Supreme Court decided essentially no land-use regulatory takings cases between the late 1920's and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

20. *Day-Bright Lighting v. Missouri*, 342 U.S. 421, 423 (1952) ("we do not sit as a super-legislature"). See also, e.g., *Pennell v. San Jose*, 485 U.S. 1 (1988); *Bowen v. Gilliard*, 483 U.S. 587 (1987).

21. 438 U.S. 104 (1978) (upholding city historic preservation law against challenge that it effected a "taking" of the rights to develop airspace above Grand Central Terminal). The dicta referred to stated that: "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . , or perhaps if it has an unduly harsh impact upon the owner's use of the property." *Id.* at 127.

The thrust of this dicta is practically identical with the content, albeit not the wording, of the classic formulation of economic due process in *Lawton v. Steele*, 152 U.S. 133, 137 (1894): "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." This language in *Lawton* was quoted by the Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962), which, in turn, was cited by the Court in support for its above-quoted language from *Penn Central*.

22. 447 U.S. 255 (1980) (upholding zoning for minimum lot sizes up to five acres).

23. In fuller quotation, the Court stated that a land-use regulation applied "to

lation results in a physical taking (the original mission of takings review) and at whether it goes "too far" by denying the owner "economically viable use" (from *Mahon*), the *Agins* Court added a third test. It specifically called for judges to decide, in cases of takings challenge, whether the land-use regulations under attack could indeed be considered to substantially advance any legitimate interest of government.

In summary, by the early 1980s, the Supreme Court had three distinct *per se* sounding tests for takings:

- (1) permanent physical invasion,<sup>24</sup>
- (2) insufficient relationship to a legitimate governmental purpose, and
- (3) its modern formulation of the *Mahon* "too far" test, namely: A regulation is a taking if it "denies an owner economically viable use of his land."

I describe these as only *per se* "sounding" tests because, apart from physical invasion, the Supreme Court has never actually said that it means to apply its takings tests in a strictly *per se* manner.<sup>25</sup> On the contrary, the ostensibly "*per se*" character of *Agins*' economically viable use test is considerably belied by the Court's insistence, in *Agins* and thereafter, on a need for balancing, stating that takings determinations "necessarily require[] a weighing of private and public interests."<sup>26</sup>

---

particular property effects a taking if [it] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted).

24. The permanent physical invasion test for takings was strikingly reaffirmed as applying irrespective of economic or other impact in *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (striking down a New York law requiring apartment building owners to allow cable television lines to be strung across their properties with only nominal compensation).

25. In *Lucas*, of course, the Court declared that a denial of economically viable use amounting to a "total taking" had indeed become a "categorical" test of taking — seemingly on a par with physical invasion. One way of reading this is that total takings of all value now require, just as physical invasion, that compensation be paid without any weighing of such offsetting factors as the strong public interest in or purpose behind the regulation in question. 112 S. Ct. at 2893-94. *But cf.* discussion in following footnote 26, *infra*.

26. *Agins*, 447 U.S. at 261, quoted in *Keystone Bituminous v. DeBenedictis*, 480 U.S. 470, 492 (1987). Although the Court in *Lucas* purported to accord "categorical

The comparatively rapid expansion of Supreme Court takings doctrine in the past decade or so has given rise to at least two key questions now in public debate:

First, there is the fundamental question whether government should *always* have to pay compensation whenever regulatory actions adversely affect private property values, or whether there are kinds of harms which should be prohibitable without payment?<sup>27</sup>

Second, there is the question of whether, assuming government should have *some* power to regulate property use without paying, compensation should at least be required when regulatory action removes *all* value from particular property. In other words, can there ever be a public interest strong enough to justify a total wipe out of value? This was, in essence, the legal question on which the Supreme Court granted certiorari review in the *Lucas* case.<sup>28</sup>

---

treatment" to the economic use test, *see* previous footnote, it did specify that even total takings of all value could be justified by the state if the legislation in question did no more than "duplicate" the prohibitions applicable under the common law of nuisance. *Lucas*, 112 S. Ct. at 2899-2901. The "weighing" that may occur in making such determinations of nuisance may, however, turn out to be little different from the "weighing" that would occur as prescribed in *Agins*. It is not clear, in other words, whether *Lucas* has effected much change other than a change in nomenclature and rubric while substance stays the same.

27. *See, e.g.,* William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, HERITAGE FOUND. REP. ISS. BULL. 173 (1992) at 6, making the flat statement:

"If a regulation leaves a property owner with some remaining 'economically viable use,' . . . the owner is entitled, . . . to compensation for the drop in value resulting from the regulation."

Mr. Laffer does not cite cases for this striking proposition and, of course, he could not cite any U.S. Supreme Court cases. On the contrary, the Supreme Court's cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). Indeed, as has been for many decades explicit, regulations can remove very large proportions of value and still not be compensable takings. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75%); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5%), and both modernly cited with approval, *e.g., Penn Cent.*, 438 U.S. at 125-26 and 131.

But the matter must be regarded as one of debate. *See also supra* text accompanying note 7.

28. Petitioner's Brief on Merits, at i, *Lucas*, 112 S. Ct. at 2886.

1. Should government be expected to pay compensation *whenever* use-restrictions diminish the value of private property, or should legislatures be allowed to ban at least *some* kinds of harm without compensating the property owners adversely affected?

Undoubtedly the most extreme contention to emerge from the property rights movement is the notion that government use-regulations that diminish property values should always be accompanied by compensation. Despite the grand statements that may be found along these lines, however, none of the more thoughtful property rights advocates really seems to suppose that government *always* should have to pay when its regulations reduce value. As one writer put it recently, "if a regulation merely prevents someone from engaging in activities that would violate the *rights of others* under the common law of nuisance or trespass," there is no right to compensation.<sup>29</sup> Professor Richard Epstein at the University of Chicago, widely regarded as the leading intellectual light of the property rights movement, likewise acknowledges that "the issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, this question is resolved against the claimant."<sup>30</sup> However, and here is the key point of distinction, the property rights advocates tend to define the "rights of others" fairly narrowly.

Chief Justice Rehnquist has sought to explain the constitutionality of restrictions on property use by positing the existence of a "nuisance exception" to the general requirement of just compensation.<sup>31</sup> Following this line of thought, the question boils down to what counts as a "nuisance" for purposes of the "nuisance" exception?<sup>32</sup> In other words, which harmful

---

29. William G. Laffer III, *The Private Property Rights Act: Forcing Federal Regulators to Obey the Bill of Rights*, HERITAGE FOUND. REP. ISS. BULL. 173 (1992) (emphasis added).

30. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 199 (1985).

31. See, e.g., the Chief Justice's dissenting opinion in *Keystone Bituminous v. DeBenedictis*, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting).

32. In phrasing the question in this way, I accept the "nuisance" nomenclature

uses of land should legislatures be allowed to prohibit without compensation and which harmful land uses should legislatures have to pay in order to prohibit?

The basic idea of a nuisance oriented exception to the just compensation requirement is, of course, pretty simple: Since nobody "has a right to use his property so as to create a nuisance or *otherwise* harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."<sup>33</sup> Certainly, insofar as the exception applies to conduct that clearly would be adjudicated to be a common-law nuisance anyway (should the case so arise), the nuisance exception is not merely logical, it is a tautology: No question of "taking" can arise when a legislature prohibits that which is already prohibited.<sup>34</sup> But what about nuisance-like activity? What about the italicized portion of the quotation above — to the effect that no one has a right to use property in ways that "otherwise" harm others?

The question of whether the proper scope of the nuisance exception is narrow, limited essentially in scope to common-law nuisances, or is broader, and (if so) by how much, represented a key point of difference between the five-justice majority and the Chief Justice's dissenting opinion in *Lucas*' main precedent, the 1987 case of *Keystone Bituminous v. DeBenedictis*.<sup>35</sup> The distinct difference in philosophical approach to property rights was not buried by *Keystone*'s 5-4

---

for rhetorical convenience, but not for purposes of conceptual limitation. That is to say, by using the term "nuisance" I do *not* mean to imply that the class of constitutionally prohibitable uses should necessarily be restricted to some exogenously defined common-law category.

33. *Keystone*, 480 U.S. at 491 n.20 (emphasis added).

34. The Supreme Court explicitly embraced this position in *Lucas*. Even when the effect of a regulation is to deprive a private owner of all economic value and use, it will be valid if what it prohibits was already prohibited in the courts under "background principles" of state nuisance or property law. *Lucas*, 112 S. Ct. at 2901. Depending on how state courts interpret their powers under the state's own common law of nuisance, this nuisance analysis presents a potentially gaping exception to the ostensibly "categorical treatment" that it declared for such "total takings." *Lucas*, 112 S. Ct. at 2899-2901. The nuisance principle should, therefore, continue to apply *a fortiori* with equal force to regulations that deprive the owner of less than all value and use.

35. 480 U.S. 470 (1987).

vote, and the *Lucas* case was seen as an opportunity for the narrow approach of the *Keystone* dissent to become the majority view.

[As it has turned out, the Supreme Court in *Lucas* rejected the idea that a narrowly scoped “nuisance exception” (as advanced by the *Keystone* dissent) is the general explanation for why land-use regulations can diminish values without compensation. Instead, it recognized that there is a “broad realm within which government may regulate without compensation,”<sup>36</sup> and stated that earlier “harmful or noxious use” analysis<sup>37</sup> was “simply the progenitor of our more contemporary statements that ‘land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ . . .”<sup>38</sup>

At the same time, however, the *Lucas* Court adapted and applied the *Keystone* dissent’s narrowly scoped “nuisance exception” to a new task, namely, that of defining the extent of legislatures’ power to cause “total takings” (regulations that deprive some land parcels of “all economically beneficial use”).<sup>39</sup> The original remarks that followed at this point have been truncated to reflect the new but more confined role for the “nuisance exception.”]

There is a fundamental conceptual difficulty in constructing any sort of common-law based “nuisance exception” to define the general grant of legislative power. The difficulty is that legislatures basically exist in order to improve, remediate and expand on the common law as deficiencies are discovered.<sup>40</sup> To the extent, therefore, that the legislative power is

---

36. *Lucas*, 112 S. Ct. at 2897.

37. That is, the theory that justifies valid police-power regulations on the ground that they merely implement the governmental power to ban uses that are akin to public nuisances. *Id.* at 2890, 2897.

38. *Id.* at 2897. The Court described the government’s power to “affect property values by regulation without incurring an obligation to compensate” as “a reality we nowadays acknowledge explicitly with respect to the *full scope* of the State’s police power.” *Id.* (emphasis added).

39. *Id.* at 2899-2901.

40. As the Supreme Court once observed, it is “the great office of statutes . . . to

itself confined by developments in the common law of nuisance, an essential legislative function, "to remedy defects in the common law,"<sup>41</sup> is incapacitated. The effect is to reverse the relative roles of elected legislatures and courts.

Courts, bound to an extent by *stare decisis*, are not always in the best position to meet the needs for change and improvement in the common law.<sup>42</sup> The common law of nuisance is no exception, and there is ample support in the Supreme Court's cases for allowing legislatures to restrict virtually any use of property, common-law nuisance or not, once the use has been legislatively deemed to have harmful external impacts.<sup>43</sup> We can speculate how even the justices who favor narrowing the exceptions to the just-compensation mandate would respond to a local law banning, for example, marijuana crops on private land. This can be a "valuable" use of land and was certainly no nuisance at common law. But not even the dissenters in *Keystone* (it is my guess) would insist that state bans on marijuana production must compensate growers for the loss of business opportunity.<sup>44</sup>

Beyond this, however, the common law of nuisance is just not logically or doctrinally suited at all to serve as the delimit-

---

remedy defects in the common law," adapting to the "changes of times and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

41. *Id.*

42. *See, e.g., Boomer v. Atlantic Cement Co.* 26 N.Y.2d 219, 223, 309 N.Y.S.2d 312, 314, 257 N.E.2d 870, 871-72 (1970) (maintaining that courts are not equipped "as a by-product of private litigation" to institute major changes in air pollution (nuisance) policy, a task far better left to the legislature).

43. *See, e.g., Andrus v. Allard*, 444 U.S. 51 (1979) (trading in eagle feathers); *Agins v. Tiburon*, 447 U.S. 255 (1980) (lots smaller than 1-5 acres); *Belle Terre v. Boraas*, 416 U.S. 1 (1974) (six students in a house); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (mining gravel); *Perley v. North Carolina*, 249 U.S. 510 (1919) (timber scraps left on ground); *Welch v. Swasey*, 214 U.S. 91 (1909) (tall buildings); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (selling water interstate); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (margarine); *Mugler v. Kansas*, 123 U.S. 623 (1887) (alcoholic beverages).

44. Indeed, Chief Justice Rehnquist wrote at one point in his *Keystone* dissent that the State has: "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Keystone*, 480 U.S. at 511. In the recent case of *Renton v. Playtime Theaters*, 475 U.S. 41 (1986), the Chief Justice described a ban on using certain land for showing adult films as "the essence of zoning." *Id.* at 54.

iter of the harms that legislatures can prohibit without compensation. Anyone who thinks that the constitutional law of "takings" is an unruly chaos should take a look at the law of nuisance. Indeed, the historic range of "public" nuisance law, the common-law precursor of most modern legislative land-use regulations, was essentially co-extensive with the police power generally. In fact, cases define public nuisance as any act or omission that "injuriously affects the safety, health or morals of the public,"<sup>45</sup> practically the same words typically used to describe the police power.<sup>46</sup>

Compared with the modern statutory body of public nuisance law, the law of *private* nuisance impinges but little on private owner autonomy — a factor that no doubt commends it as a delimiter of government regulation to those who would like to see less of such regulation. The lesser impingement of private nuisance law is, however, mainly due to its essential nature as a private property protection: Being a matter of private right, the conduct standards of private nuisance can be imposed only in cases where there are specific aggrieved parties with specific measurable injuries to their *property*. Nevertheless, some writers, perhaps attracted by this important "standing" limitation, seem to have the law of private nuisance primarily in mind when they speak of common-law nuisance as a logical delimiter of legislatures' power to affect property rights.<sup>47</sup> But the law of private nuisance is, if any-

---

45. *Commonwealth v. South Covington & Cincinnati St. Ry.*, 205 S.W. 581, 583 (Ky. Ct. App. 1918). *See also* *Copart Indus. v. Consol. Edison*, 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971 (1977) (acts that "endanger or injure the property, health, safety or comfort of a considerable number of persons"); *RESTATEMENT (SECOND) OF TORTS*, § 821B(2)(a) (1977) (public health, safety, peace, comfort or convenience).

46. *E.g.*, "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power . . ." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

47. *See, e.g.*, Professor Epstein's account of the nuisance basis for uncompensated use restrictions, in which the stress is laid on private actions that invade others' property rights as the "wrongs" that justify the government's non-compensated intervention. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 108-25 (1985). "The intellectual source of the police power," he writes, "lies in the marriage of precise private law analogues to a general theory of representative government . . . . The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on his own behalf. The individual



thing, even more useless than the law of public nuisance to cabin legislative powers to affect property rights without compensation. The point is that the law of nuisance simply does not define a class of reprehensible or tortious behavior whose nature justifies something (governmental "taking") that would otherwise be wrongful.

In sum, while nearly everybody may agree that there are some situations in which government should be able to regulate without paying compensation, there is real underlying disagreement as to how such situations should be defined. While government obviously should not have to pay criminals and other wrongdoers not to commit their wrongs, who defines "wrong?" Traditionally, both courts and legislatures have been able to redefine "wrong" by adding new items to the list of prohibited conduct, and the Supreme Court has been very clear that the police power of state legislatures includes the power to declare new kinds of nuisances, beyond those known at common law.<sup>48</sup> Whether legislatures, as elected representatives of the people, should continue to have such authority is one of the issues underlying the property rights debate.

2. Can public policy considerations ever be sufficiently compelling to justify use-restrictions that deprive owners of all use entirely?

This second question in the continuing property-rights debate implies a more modest version of the basic contention that governments should not diminish property values with-

---

... loses that protection [from takings] when he himself takes or threatens to take property." *Id.* at 111 (emphasis added).

The problem is that Professor Epstein does not appear to acknowledge adequately the possibility that human beings may enter into society and form governments for the purpose of securing, in addition to property, a decent and pleasant surrounding world in which to live — very much a concern of the law of public nuisance and the police power, though only an incidental concern of private nuisance law.

48. It has been held to be "clearly within the police power of the State . . . 'to declare that in particular circumstances and in particular localities a [use affecting the "health and comfort of the community"] shall be *deemed* a nuisance in fact and in law.'" *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915), (quoting *Reinman v. Little Rock*, 237 U.S. 171 (1915) (emphasis added)).

out compensation. In this more modest version, the argument goes: Compensation should be paid, at least when government regulations reduce a property's value all the way to zero. Put a different way, the public interest can never be so weighty as to justify wiping out an individual owner totally without paying. Indeed, it can be said that if a public interest in prohibiting a particular use is so overwhelmingly compelling, there certainly will be a willingness on the part of the public to pay, and unwillingness to pay simply proves that the supposed public benefit is not worth the opportunity cost.<sup>49</sup>

Of all their claims, the contention that wipe-outs (at least total wipe-outs) are never constitutionally justified has the greatest real potential for being a winner for the property rights movement — and, hence, the greatest potential to endanger our nation's natural land and resource base. It is a potential winner for the property rights side because, for one thing, a deprivation of all value raises most pointedly the feeling that inequity is involved. There is, even more importantly, significant supporting *obiter dictum* in the two-part takings test of *Agins v. Tiburon*<sup>50</sup> — namely, that a land use regulation will effect a taking if it (under the second of the two prongs) “denies an owner economically viable use of his land.”

The potential success of the contention presents a danger to our natural landbase because many important landforms — wetlands, beaches and dunes, watersheds for drinking water supplies, endangered species habitats, and other ecologically sensitive areas — have essentially no economically viable use

---

49. In a variety of circumstances, of course, government operates to secure public advantages without paying the opportunity cost borne by those to whom burdens are consequently shifted. A few examples that come quickly to mind are the military draft, control of the interest rates by central banking authorities, prohibition of certain lines of business (such as trading with the enemy, or manufacture of narcotic drugs), and the recognition of unequally distributed private property rights (by ratifying the pre-existing unequal patterns of possession) in the first place.

Correspondingly, governments normally also do not assess for the benefits that they provide (such as security from foreign invaders, relatively stable money markets, and the multitudinous public services and infrastructure that account for most of the current market value of most parcels of privately owned land).

50. See *supra* note 23 and accompanying text for discussion of the two-part takings test.

in terms of current commercial values. As a consequence, land-use regulations that go far enough to be effective in retaining the important natural character of these lands may leave the lands' owner with no value.

Apart from the dicta in *Agins*, however, the Supreme Court's cases have recognized many instances in which a public purpose to prevent harmful uses of property has justified legislative measures that take all market value from private owners. Actually, the law is so clear on this subject that it is rather amazing (*Agins* dicta aside) that the constitutionality of such measures is still a matter of debate. Historically, there has simply been no doubt that public welfare concerns can suffice to justify total destruction of the value of private property.

One classic example is measures to protect public health, such as when government agents confiscate spoiled food, rotten meat, adulterated baby formula and the like.<sup>51</sup> Public emergency situations present another kind of classic case, for example, blowing up a house to prevent the spread of a fire, destroying petroleum facilities to keep them out of enemy hands, or wrecking a bridge to keep it from falling to hostile forces.<sup>52</sup>

There is, to be sure, a wide distance between the public concerns represented in land-use legislation and those implicated when it comes to winning a war. But the warfare cases provide, nevertheless, an instructive beginning point for understanding the question of whether the public interest can "ever" justify a total taking of all value. The answer they provide is clearly "yes."

A far more important class of constitutionally permissible *in toto* takings is the now popular statutory forfeiture of lands

---

51. *E.g.*, *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (confiscation of spoiled food); *see, e.g.*, 21 U.S.C. § 673 (1988 & Supp. II 1991) (authorizing seizure of adulterated meat, etc.).

52. *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (blowing up a house to stop spread of fire). *See also* *United States v. Caltex*, 344 U.S. 149, 154 (1952) (destroying terminal facilities in path of hostile forces), quoting *United States v. Pacific R.R.*, 120 U.S. 227, 234 (1887) ("The safety of the state in such cases overrides all considerations of private loss").

or chattels in order to prevent their use in ways that are deemed “undesirable.”<sup>53</sup> Who determines what is “undesirable” for purposes of statutory forfeiture? Such determinations are, of course, left to legislatures, which are given very ample latitude in deciding that “legitimate governmental interests” or “legitimate purposes”<sup>54</sup> justify total expropriations of innocent owners’ property. To prevent the use of narcotic drugs, for example, the legislature can authorize not only confiscation of the drug, but also confiscation of a yacht in which the drugs were transported — even if the yacht owner had nothing to do with the transportation, had no knowledge of it, and had basically no realistic ability to stop it.<sup>55</sup>

Despite the “difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment,”<sup>56</sup> the Supreme Court always manages to reconcile the two. In short, statutory forfeiture is a clear modern example of how the public interest alone can justify *in toto* takings of innocent owners’ property quite apart from the guilt or the innocence of the owner.

This brings us, then, to the crux of the issue. What if, instead of confiscating property in its entirety to prevent “undesirable” use, the legislature decides on less drastic measures — taking merely the owner’s right to make the “undesirable” use. Even though less drastic, the result can still sometimes be to deprive the owner of all value. If the only market value that a piece of land has is attributable to uses that are deemed too socially harmful to allow, the use restriction will take all value.

Are governmental actions that merely forbid a detrimental use somehow more constitutionally suspect than ones that address “undesirable” uses by taking away the property entirely? I would not think so, and there is indeed precedent.

---

53. *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926) (transporting liquor). *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

54. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 688, 690. *See also United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983) (“important governmental purposes”).

55. *United States v. \$8,850*, 461 U.S. 555, 562 n.12 (1983).

56. *United States v. United States Coin & Currency*, 401 U.S. 715, 721 (1971).

Consider, for example, the case of an unsanitary tenement house, one that has no plumbing and is located in a residential district of a large and densely populated city. Suppose that the cost of installing plumbing would exceed the value of the house. If the city council decides that pit toilets in tenement backyards have become socially intolerable, and it bans them, the result will be a total loss to the tenement owner. These are the facts of *Tenement House Department v. Moesch*,<sup>57</sup> in which the New York Court of Appeals upheld the ban on outdoor toilets and the Supreme Court affirmed, despite the total loss borne by the tenement owner. The government does not have to buy an unsanitary tenement house in order to prevent its use in socially deleterious ways.

What, then, is the meaning and the future of the "economically viable use" test from *Agins*? Although frequently repeated, the economically viable use test was *obiter* in *Agins* and has been *obiter* since.<sup>58</sup> The law of statutory forfeiture seems completely incompatible with any such flat constitutional guarantee of economically viable use.<sup>59</sup> The *Lucas* case is focused directly, however, on whether current market conditions should play a key role in the legislative power to regulate land uses.<sup>60</sup>

---

57. 179 N.Y. 325, 72 N.E. 231 (1904), *aff'g without opinion* 203 U.S. 583 (1906) (tenement owner ordered to replace outdoor privy with expensive indoor toilets).

58. The speech, on which this article is based, was given before the decision in *Lucas* and, on this point, has been contradicted by the *Lucas* holding. See *supra* note 1 and accompanying text. As noted earlier, *Lucas* held that a land-use regulation effecting a "total taking" of "all economically beneficial use" *ipso facto* requires compensation unless it forbids nothing more than was already forbidden under the state's background principles of property and nuisance law.

59. In *Lucas*, the Court may have succeeded in achieving at least a partial reconciliation between its "categorical treatment" of total takings and legislative power to adopt statutory forfeitures. It did so by indicating that the rule for "total takings" was applicable only to real estate interests and not to personal property. While statutory forfeiture may more typically be applied to chattels, it can also be applied against innocent owners' real estate. Unless the Court is prepared to limit such real estate forfeitures to cases of "common law nuisances," there is some new law — or specious distinction — that remains to be made.

60. Petitioner's Brief on the Merits, at i; *Lucas*, 112 S. Ct. at 2886.

### Conclusion

Nobody can, of course, predict the impact of *Lucas*. Prior to the decision, it was the guess of many (including myself) that the Court would not pioneer a new expansion of the "fundamental rights" concept into the property area. There was substantial ground to think that the more conservative members of the Supreme Court would recall their aversion to judicial activists who substitute their own predilections for the decisions of elected legislatures, and that they would remember their commitment to federalism and their mistrust of federal intrusions that limit the states' abilities to find the right solutions to meet their own local needs. There was reason to think, as well, that the Court would also remember the original intention of the takings clause, and resist expanding upon the plain judicial activism of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, the activism that created the whole "regulatory taking" concept in the first place.

However the courts approach these issues post-*Lucas*, I hope that they keep in mind that the issue here is not a rarified 18th century philosophical debate about *Lockean* private property rights or the "natural" relationship between human beings and their government. Rather, what is ultimately at stake is our nation's ability to protect the natural resources on which its vitality and economic strength depend. As important as the historic sanctity of private property may be, Americans can simply no longer afford the luxury of leaving our vital natural resources, our national landbase, vulnerable to the poorly planned development or badly executed utilization that can occur when all land-use decisions are dominated by short-term market pressures. We cannot afford the luxury of leaving the future of our country to the self-oriented decisions of a relative few who happen to be temporary owners in our generation.

This debate is simply not destined to peter out very soon. Neither side of the property rights debate will let it. The land-use autonomy of private owners will continue to be an important policy end for those whose own economic interests benefit from it. And, against their contentions, other Ameri-

cans will continue to urge that our nation cannot give up its right to protect its own natural resources, that no nation can ever rightly bind itself to pay off those who say: "Pay me or I might destroy my bit of the national land." Private property rights are important, but they are not the *only* thing that is important. They sometimes must yield to a cause greater still: The defense of the American land.