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Ruminations on Lucas v. South Carolina Coastal Council: An Introduction to an Amicus Curiae Brief

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RUMINATIONS ON *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL:* AN INTRODUCTION TO AMICUS CURIAE BRIEF

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In most circumstances I think that it is a useful convention to keep academic work separate from the controversies of the day. One consequence of this attitude is *not* to publish in law reviews briefs and other documents written to persuade courts to adopt certain positions. I have written such an amicus curiae brief for the Institute for Justice in one of the most important takings cases to come before the United States Supreme Court, *Lucas v. South Carolina Coastal Council*.[1] For a variety of reasons, I think that this brief should be published as an exception to the general rule set out above. This short introduction is designed to explain why.

The most obvious explanation is the importance of the *Lucas* case, which has been reflected in the large number of requests for copies of the brief. Since the Supreme Court has been involved in deciding takings claims, it has insisted on a line, not dictated by the text of the Takings Clause, between physical occupation and regulatory takings. Cases that fall into the former class are judged by fairly strict standards, so that the government usually loses and is required to pay compensation, unless it can offer a compelling justification for its decision to occupy the landowner's property. The Court's attitude on regulatory takings—including a wide range of restrictions on the use of land—has been precisely the opposite. The rational basis test imposes a standard of scrutiny so low that the Supreme Court has rebuffed virtually every effort made by property owners to require the State to pay compensation to offset the losses imposed by the regulation. *Lucas* is, in one sense at least, the ultimate test of this approach to regulatory takings. It involves a near—or total—wipeout of the value of the land, without effecting a physical occupation of the property. The very fact that the Supreme Court has granted certiorari in this case suggests that it may now be prepared to pull back from its well nigh categorical distinction between physical occupation

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1. 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

and regulatory taking, and require the State to pay compensation in some regulatory settings.[2]

There is a second reason as well. The most notable feature of the brief is that it takes an intermediate position between that claimed by Lucas himself and that taken by the environmental groups that have filed briefs in support of the South Carolina Coastal Council. It is always risky business to write an amicus brief attacking the theory upon which the party in interest on your side of the case has rested its entire case. Yet that is what I chose to do in this brief.

Lucas has taken the position that as long as the government regulation effects a total wipeout of the use value of the property, compensation is always required, no matter what justification the State puts forward for its action. To see how extreme this position is, consider the following illustration. Suppose that the only use for a parcel of land is as a dump site for waste materials, which leach into the soil and poison underground waters. According to Lucas's theory, the State would be required to pay full value to the owner of the dump site in order to shut it down. The more intense the use of the property in this way, the greater the external threat of harm, and the more the State has to pay in order to quell it. It is only when the wipeout of the landowner's use is partial, that the State may impose its restrictions on use without having to pay compensation. Lucas's position thus reflects a preoccupation with the individual case without regard to the overall structure of takings law. Lucas's categorical rule requiring compensation applies only to the narrow class of cases into which the South Carolina Beachfront Management Act (BMA)[3] falls.

I do not believe that any Justice of the Supreme Court will adopt Lucas's theory with respect to total wipeouts; nor do I think that any Supreme Court Justice *should* adopt a theory which has such extreme consequences that it leaves the State powerless to impose restrictions against conduct so obviously wrongful in both intention and consequence. But the position offered on the environmental side is every bit as extreme in the opposite direction. As developed, it takes the view that any occurrence of "serious public harm" is sufficient to impose any restriction on land use, however severe and complete. In practice this position allows for far more extensive regulation than might be apparent at

2. This possibility seems somewhat less likely in light of the Supreme Court's strong adherence to this distinction in Yee v. City of Escondido, 60 U.S.L.W. 4301 (Apr. 1, 1992).

3. The Beachfront Management Act (BMA) is codified beginning at S.C. CODE ANN. § 48-39-270 (Law. Co-op. Supp. 1991). The BMA was amended in 1990. 1990 S.C. Acts 607. The amendment added §§ 48-39-250, -260.

first blush because of the very broad definition given to the phrase "serious public harm."

In this regard the modern environmental movement has replicated the degeneration of the "harm principle" originally developed in John Stuart Mill's *On Liberty*.[4] There Mill first announced that the only possible warrant for the restriction of the liberty of another human being was that he inflicted or threatened to inflict harm upon others. The great weakness of that principle is that, without qualification and by ceaseless extension, the harm exception swallows up virtually all exercises of individual liberty. So long as any person takes offense at what I do, then there is some external harm that can be said to justify the State restriction on my behavior. Speech critical of public officials can be suppressed; competition can be outlawed; and use of property that others find aesthetically displeasing can be banned. Every action has its own externality if we are prepared to look hard enough to find it.

The brief submitted on behalf of the Institute for Justice left me in the unaccustomed position of being a moderate, even though it followed the general lines of my *Takings* book,[5] which has often been attacked as being anything but moderate.[6] The purpose of the brief was to develop an account of harm to others that is broad enough to allow the State to regulate in the pollution case but narrow enough to prevent it from manufacturing some form of public harm in every other situation. In developing that argument I took the position that the State could impose regulations that were reasonably suited to stopping the commission of a common-law nuisance.

The law of nuisance is often quite complicated, for it not only in-

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4. JOHN STUART MILL, ON LIBERTY 119-20 (Henry Regnery Co. ed., 1949) (1859). Mill states:

> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interest of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interest of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.

Id.

5. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN chs. 8-9 (1985).

6. For some of the criticism, see *Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986). For a flavor of some of the attacks, see Joseph L. Sax, Book Review, 53 U. CHI. L. REV. 279 (1986) (reviewing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)), and Mark Kelman, *Taking* Takings *Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829 (1986) (same).

volves limitations on various forms of physical invasions, but also on various forms of non-invasive conduct, as with reciprocal negative easements of support for neighboring land.[7] Looking at *Lucas* only as a nuisance case, it seems clear that the State must lose. The closest that one can come to any form of a common-law nuisance is the faint possibility that construction of a house somewhere on the sand dune will reduce the support for other portions of the dune so that it will be more exposed to destruction by wind and water. But because these structures are so fragile, and have been violently distended by natural forces even when there has been absolutely no construction on private lands, it is doubtful that private construction poses a serious threat of this sort to public lands, or even to the lands of the builder. The effects of human intervention are swamped by natural forces. A total injunction against land use (as opposed to some far more tailored restraint) thus seems wholly inappropriate for the circumstances.

As drafted, the brief limits the police power to the prevention of actions that amount to the commission of a nuisance. I wrote the brief in this fashion in response to the sparse record of the case below—itself attributable to the very spartan nature of the plaintiff's theory that rested the claim for compensation on the single fact of a total wipeout by the government regulation. One of the difficulties of writing first before the Supreme Court is that sometimes it is not possible to anticipate all the arguments that will be arrayed against you. In this case, the first hint that I received that the case had taken an unsuspected turn came when I was interviewed by various members of the media, all of whom asked me to explain why it was permissible to build a house when it could be lifted up by a hurricane and cause damage to other persons and structures in the vicinity. As the briefs were filed on South Carolina's side of the case,[8] it became clear that this theme had vaulted into prominence as the centerpiece of the case. As I did not have an opportunity to respond to the challenge in the brief, I shall devote a few paragraphs to answer it here, if only for the public record.

First, it should be clear that the ends of the police power include the

7. For a development of the nuisance theory that underlies this major proposition, see Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUDIES 49 (1979).

8. *See, e.g.*, Brief of Nueces County, Texas et al. as Amici Curiae in Support of Respondent, Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991) (No. 91-453) (written chiefly by John Echeverria, General Counsel of the National Audubon Society). The brief was joined by two municipal conservation commissions in Massachusetts, six national conservation groups, two regional conservation groups and six leading coastal scientists.

prevention not only of common-law nuisances, but of other forms of threatened harm that are tortious in themselves. The most obvious is where the government forbids the storage of explosives in residential neighborhoods. The possible sudden blast is inconsistent with the gradual releases associated with ordinary nuisances, but the low probability of a massive harm deserves the same response as a high probability of a lesser harm. Similarly, during his comments in our debate, Professor Sax noted that it was appropriate for the State to order, without compensation, a private owner to pull down his own house when it threatened to topple over and cause harm to other people or other property. I could not agree more. Indeed an action by public officials ordering the destruction of the house is no new-fangled invention, but was well-established in classical Roman Law, with the so-called action for *damnum infactum*, or threatened injury. As emphasized in the brief the older conceptions have considerable staying power, even in the most modern of environmental settings.

Second, it is highly doubtful that Lucas's case falls within the expanded definition of the legitimate scope of the police power. One obvious point is that South Carolina's claim in this regard should be viewed with suspicion if any attention is paid to the statement of purposes that is contained in the BMA.[9] There are many purposes listed, including the preservation of open spaces for South Carolina citizens and out-of-state tourists. While these ends may be legitimate for the State to pursue upon payment of compensation, their conspicuous presence in several places in the statute undercuts the proposition that the BMA was passed in order to control the risk of hurricane damage. To be sure, the statement of statutory purposes is not conclusive on whether the statute advances legitimate ends. The Supreme Court has allowed land use restrictions to be salvaged in courts based on justifications that were not advanced by the legislature itself. At the very least, the constant reiteration of purposes that have nothing to do with harm prevention should place a heavy burden on South Carolina to show that this statute falls within the traditional conception of the police power.

Third, examining the incidence of the restriction provides additional ammunition against the BMA. The risk of hurricane damage is one that runs up and down the Carolina coast. Charleston itself was devastated by Hurricane Hugo not long ago. Yet people were allowed to rebuild in

9. *See* S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1991); Richard A. Epstein, *Lucas v. South Carolina Coastal Commission*: Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner, 25 LOY. L.A. L. REV. 1233 app. at 1254 (reprinting S.C. CODE ANN. §§ 48-39-250, -260 (Law. Co-op. Supp. 1991)).

Charleston but not on the Isle of Palm. Why? It surely cannot be because there is no hurricane risk. That risk is greatest where the population is most dense, that is, in Charleston itself. If the State allows thousands of homeowners to rebuild in Charleston, then it should allow homeowners to rebuild on the Isle of Palm. The selective nature of the building restriction speaks volumes about the actual purpose behind the BMA. It is not possible to return Charleston to its pristine condition, but it is possible to do that on the Isle of Palm. The reason the greater risk of hurricane damage was allowed while the smaller one was prohibited is that hurricane prevention is not part of the overall design of the BMA, which is aimed at entirely other ends.

Fourth, the scope of the restriction is far broader than necessary to achieve its end. The State, if concerned about the risk of hurricane damage, could have specified certain restrictions on the size and shape of the building, or the materials that it contained. The State could have required that storm cellars be included in the buildings to protect occupants. Or it could have ordered homeowners to pay clean-up costs if debris from their houses littered public beaches. These far more moderate restrictions would do relatively little to the private value from the use of the land, but would answer virtually all the concerns with hurricane damage. But none of these moderate restrictions were chosen because the purpose of the BMA was to hasten an environmental retreat. There is an abundance of overbreadth if the logic behind the statute is damage prevention. The concerns that led to its passage are conveniently downplayed or ignored.

Fifth, the transparent nature of the anti-hurricane rationale is made still clearer by considering the interest group politics that lay behind the passage of the BMA. The BMA was not a local ordinance passed by the people on the Isle of Palm for their own protection. It was passed at the state level and worked a total devastation of local interests. People whose lots were un-built had to keep them that way. People who had built on their lots were told, in effect, that they would be denied the right to rebuild if their houses were more than half destroyed by hurricanes. Everyone in the local community was made worse off by the regulation, even if some landowners were made worse off than others. No local ordinance could have passed if it had produced so grotesque a result. Yet passage at the state level was possible because the winners, members of the environmental groups who supported passage of the statute, did not have to bear any of the local losses. The people on the Isle of Palm were prepared to run the small risk of hurricane damage in order to reap the greater gains of home ownership. The negative shifts in real estate values

throughout the island are consistent with that story, and not with the story that the BMA was passed for the protection of the homeowners.

In sum, the ex-post rationale of hurricane prevention is belied by a closer examination of the structure of the BMA, the scope of its coverage, and the politics used to secure its passage. In principle, it might be appropriate for the Supreme Court to remand the case to the trial court to see whether the hurricane prevention rationale was the dominant motive behind the passage, or whether it was a last-minute pretext thrown together to justify a statute that could not be sustained by reference to its own state purposes. If such a remand is ordered, then it should place a heavy burden on the State. The strongest argument supporting this remand is that the peculiar posture of Lucas's argument made it impossible for the State to develop its anti-hurricane rationale. However, there is a strong sense that the remand is unnecessary because the information contained in the record before the Supreme Court makes quite clear the reasons that motivated the passage of the BMA. Here is a taking for public use, for which just compensation is required.[10]

10. Even the original act, the South Carolina Coastal Zone Act of 1977—amended by the BMA—grants this. *See* S.C. CODE ANN. § 48-39-30(C) (Law. Co-op. 1987).