

WHY THE NUISANCE KNOT CAN'T UNDO THE TAKINGS MUDDLE

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INTRODUCTION

In this paper, I examine the Supreme Court's 1992 decision on takings in *Lucas v. South Carolina Coastal Council*¹ and argue, *inter alia*, that the majority's historical use of nuisance law as a tool to resolve the takings muddle is incoherent. That is not because nuisance law is itself necessarily confused, as the dissent argues.² Rather it is because the majority reads the legislature out of nuisance law, although it has historically played a role there—a role relevant to the takings inquiry. I use nineteenth-century nuisance cases from South Carolina, where *Lucas* originated, to demonstrate that this omission violates the historical record.

In *Lucas*, the Supreme Court said the legislature cannot be relied upon when it claims that the purpose of a statute is to prevent harm to the public, rather than obtain a free public benefit.³ According to Justice Scalia, the opinion's author, the legislature is always subject to the temptation to obtain a benefit for the public at the expense of private property, claiming that the purpose of the statute is to prevent harm.⁴ Hence its bona fides are always questionable and declared legislative purpose unreliable.⁵

Is *Lucas* then no more than another go-round on the Lochnerian⁶ carousel, a sign that Justice Scalia seeks to restore judicial oversight of legislation that places limitations on profit-seeking enterprise? That is how the case is read by Justice Blackmun, who asks in dissent why the majority assumes courts can do what the legislature cannot.⁷ This is a good question, but one to which Justice Scalia has an answer. He is too clever to fall for *Lochner* without a safety net: he does a backflip from its deathgrip, lands briefly in the enemy territory of the crits, then springs home into the arms of formalism, with a little boost from fellow acrobat, Richard Epstein.

To ground this aerial metaphor, let me say straight out that Justice Scalia's answer is that the judiciary need not, as it did in the period of substantive due process, develop rules distinct from legislative findings or statements of purpose, to distinguish what burdens the public interest from what benefits it in respect to land-use controls. His claim

* Assistant Professor of Law, Washington & Lee University School of Law. First, my apologies to Carol Rose for having appropriated a piece of her useful metaphor for my title. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). Thanks to my colleagues David Caudill, Gwen Handelman and Doug Rendleman for their comments on an earlier draft and to the Frances Lewis Law Center for its financial support. I am particularly grateful to Tom Yoder, W&L '95, for his very able and patient research assistance. Thanks also to my students in the Fall 1993 takings seminar at W&L; this piece is dedicated to the memory of one of them, Jack Litz.

1. 112 S. Ct. 2886 (1992).

2. *Id.* at 2914 (Blackmun, J., dissenting) (“[O]ne searches in vain . . . for anything resembling a principle in the law of nuisance.”).

3. *Id.* at 2899.

4. *Id.* at 2894-95.

5. *Id.* at 2898 n.12.

6. *Lochner v. New York*, 198 U.S. 45 (1905).

7. *Lucas*, 112 S. Ct. at 2913.

is a larger one, a meta-challenge to the Lochnerian dilemma: he says there is no public interest, merely a congeries of many private interests. Thus, he says, the common law regulating land use among private landowners is an appropriate and sufficient measure of the constitutionality of public land-use legislation.

Eliminating the public interest as a qualitatively distinct legal entity, Scalia can avoid the pitfalls of Lochnerism by adhering to the common law, which Justice Scalia identifies with private law. Yet it is my claim that his recourse to the common law is possible only by a determined evasion of the history of the common law as it applied to land use. In turning to the common law of private nuisance, Justice Scalia ignores the historical role of legislatures in nuisance decision-making, and thus distorts the common law, despite his attempt to find solid footing in its history. Scalia does this, it appears to me, through a construction of the common law attributable to Richard Epstein, though the latter is neither cited in the opinion nor acknowledged as its intellectual godfather.

I begin with a discussion of the majority opinion in *Lucas*, and its peculiar mix of formalism, modernism and post-modernism. In the second part of the Article, I then examine its view of nuisance, which I claim is shaped by aversion to the opposing poles of Lochnerism and deference to legislative decision-making. I make the claim that the roots of this view lay in the thinking of Epstein, as well as Ronald Coase, uneasy bedfellows whom the opinion does not manage to soothe; I point out the deficiencies in both those accounts and thus in the majority's. In the third section, I also question the adequacy of the opinion's claim to foundation in history and precedent. I examine the appropriateness of the majority's use of the *Restatement (Second) of Torts* as a guide to takings law. I examine some common law nuisance precedents of South Carolina and demonstrate how they differ from the account of private nuisance given by the majority. In addition, I look at whether the majority's claim of a historic compact locating land-use decision-making in the judiciary holds up in South Carolina precedent. Finally, I conclude that the *Lucas* opinion, while claiming the authority of history, is not in fact true to the common law doctrine that ostensibly bottoms its holding.

I. LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

A. *The Opinion*

In *Lucas*, the Supreme Court attempted yet again to bring some order to the "muddle" of regulatory takings.⁸ Seventy years before, the Court, led by Justice Holmes, had for the first time held that a regulation which left an owner its land, but at a much-diminished value, could "be recognized as a taking" if the loss of value went "too far."⁹ In the next seven decades, the Court had never found a taking in any land-use regulation unaccompanied by physical invasion. In *Lucas*, it did.

I begin by briefly describing the *Lucas* facts and holdings. In 1986, real estate developer David Lucas paid almost a million dollars for two non-contiguous oceanfront lots on the Isle of Palms, near Charleston, South Carolina. At the time of purchase, both lots were zoned for single-family residential construction. After Lucas' purchase, but before he undertook construction, the South Carolina legislature passed the Beachfront

8. See Rose, *supra* note *.

9. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Management Act of 1988 (BMA), which directed the state agency responsible for coastal zone management, the Coastal Council, to enforce new baselines regulating coastal construction.¹⁰ The new regulations barred construction seaward of the baselines;¹¹ Lucas's lots were stranded between the new lines and the sea. Lucas could now build no occupiable structure on those lots.¹²

Lucas sued, alleging that the BMA worked a permanent and total taking of the value of the lots without just compensation. At trial, he prevailed; the court found a permanent, total taking of private property without just compensation in contravention of the Fifth Amendment of the Constitution of the United States.¹³ The Coastal Council appealed. On appeal, the Supreme Court of South Carolina reversed, holding that the BMA was passed to prevent serious public harm consequent on beachfront erosion, a point Lucas conceded; thus, under the nuisance exception to the Fifth Amendment, the BMA worked a permissible restriction of Lucas' use of the property, despite its elimination of the lots' entire value.¹⁴ Accordingly, there was no "regulatory taking" entitling Lucas to compensation. Lucas appealed this ruling to the United States Supreme Court, and the Court granted certiorari.¹⁵

Agreeing with the plaintiff and the trial court, the Supreme Court finally found another regulation that went "too far," in that it took from plaintiff *all* the value of his land, though leaving him both land and title. In an opinion written by Justice Scalia, the Court ruled that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."¹⁶ The Court remanded this inquiry to the court below, to give the Coastal Council an opportunity to identify "background principles of nuisance and property law" underlying the BMA that might justify restraining Lucas from building houses on his land.¹⁷ On remand, the South Carolina Supreme Court held that no "common law basis exists by which [the Coastal Council] could restrain Lucas's desired use of his land."¹⁸

While the findings of the lower court regarding total loss of value are unlikely to recur,¹⁹ the more problematic element of the decision is how it dealt with what has been

10. 1988 Beachfront Management Act (BMA), S.C. CODE ANN. §§ 48-39-10, 48-39-280(C) (Law. Co-op 1987 & Supp. 1993).

11. *Id.* § 48-39-290.

12. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890 (1992).

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

14. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

15. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 436 (1991).

16. *Lucas*, 112 S. Ct. at 2899.

17. *Id.* at 2901-02.

18. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

19. As a commentator points out, legislators "will be able to circumvent easily the constraints enunciated in *Lucas*. When imposing severe restrictions on land use, they will simply enumerate the activities in which the affected owners are still permitted to engage." William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1409 (1993).

known as the “nuisance exception” to takings law. Until *Lucas*, it had been thought that some regulations, though they might indeed deprive a landowner of all viable use of real property, were nonetheless immune to Fifth Amendment challenge because promulgated pursuant to the state’s police power. That power is the state’s to protect public health and safety by abating or preventing a noxious use amounting to a public nuisance.

The *Lucas* opinion eliminated that rationale for the “nuisance exception” where its application takes all value, holding that it is not possible to give a defensible or generalizable account of the difference between, on the one hand, a regulation that seeks to prevent harm to the public and whose effect on value is noncompensable, and a regulation that seeks a public benefit and requires eminent domain compensation, on the other. While regulation may take *some* value where a legitimate state interest (including the interest in protecting the public from harm) is advanced, “noxious use,” or harm-prevention analysis cannot, on account of its indeterminacy, create an exception to the categorical rule that “total regulatory takings must be compensated.”²⁰ Some value may be taken from a landowner on the basis of non-operationalizable evaluations like harm prevention, but not all.

Regulation that bars a *particular* use of real property does not implicate this categorical rule for it does not work a complete loss of value. Landowners expect such regulation, “which has traditionally been guided by the understandings of our citizens.”²¹ That is, given the bundle of rights that make up ownership, landowners have traditionally understood that they will occasionally be called upon to give up a stick or two.²² And, in terms of personal property, given “the State’s traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”²³ But there is traditionally no such realization with respect to real property, nor is there any “implied limitation”²⁴ on land ownership that would allow the state to eliminate all its value.

As the majority recognizes, the problem with the formulation that total regulatory takings must be compensated is that it is not supported by precedent.²⁵ There is indeed a very long history of halting uses without compensation, even if they are the only profitable uses of land, when the legislature judges such use poses a threat of harm to the public health or safety.²⁶ But that, says the majority, is a tradition of a different color. It concedes there are cases in which even a total loss of value will not be compensated²⁷ and

20. *Lucas*, 112 S. Ct. at 2899. Here the majority echoes Professor Frank Michelman who, in an influential article, argued that the distinction between benefit and burden in land use was indeterminate. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1196-1201 (1967).

21. *Lucas*, 112 S. Ct. at 2899.

22. *Id.*

23. *Id.*

24. *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

25. *Id.* at 2900 n.15.

26. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

27. Although Justice Scalia seeks to distinguish away those cases in which profitable use has been lost, claiming that *some* profitable use remained to the owners in those cases, the distinction is unconvincing. *Lucas*,

gives the example of the nuclear power plant built on an earthquake fault.²⁸ That use may be halted without compensation even if it is the only use to which the land can be put and its owner thereby suffers a total extinction of its value. But such cases are *not* based on the public interest, whether harm-preventing or benefit-conferring. Rather what is now statutorily barred was in fact never permissible: “[T]he proscribed use interests were not part of [the owner’s] title to begin with,”²⁹ so the bar on the use, even if the loss of value is total, takes nothing from the owner that she legitimately possessed. The landowner never possessed the right to endanger her neighbor’s property by siting a dangerous use on an earthquake fault and the bar against her act takes nothing she had.

So when regulation deprives land of *all* value, it may do so without compensation only if the barred use is one that would be forbidden as between neighbors, without reference to larger concerns, like public harm or benefit. Any total loss of value is a taking, unless the lost value is attributable to a use that was not an inherent part of the plaintiff’s property rights. Says the majority, “Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”³⁰

The state’s power to abate threats to public health and safety is “complementary”³¹ to, and apparently derived from, private landowners’ power to enjoin, or get court-ordered damages due to, the depredations of a harmful neighboring use.³² There can be no nuisance abatement on behalf of public interests any broader than the interests of abutters. Where private parties can restrain each other’s uses, the state may do so; where private parties can extinguish each other’s uses only by purchase, the state too must expend funds if it wishes to put an end to a use. A public nuisance is simply a private nuisance writ

112 S. Ct. at 2899 n.13. It rests upon the trial court’s finding, unreviewed by the appellate court, *id.* at 2908 n.6 (Blackmun, J., dissenting), that Lucas, who still owned the beachfront properties, retaining the right to exclude and dispose, retained no value whatsoever, following the revision of baselines for construction. That finding was recently disproved when a neighbor offered \$350,000 for one of the lots in order to preserve his view. *State’s Plan to Sell Lots Criticized*, COLUMBIA STATE-RECORD, Sept. 1, 1993, Metro-Region Section, at 4B.

28. *Lucas*, 112 S. Ct. at 2900.

29. *Id.* at 2899.

30. *Id.* at 2900.

31. *Id.*

32. It is difficult to tell on what theoretical grounds the supposed bar on injury to a neighbor rests. It cannot be that the lost value is dependent upon a use that is dangerous to others and no owner is entitled to such value. If the rights of property include profitable use but not at the expense of others, we would not allow owners to compete, since competition is precisely the process of injuring others. But, of course, injuries from competition are privileged in our legal system. See generally Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

The alternative theory is that the rights of property include profitable use, even competitive injury, but not at the expense of the public. This is problematic too, for it destabilizes the proposition, central to the reasoning of the *Lucas* opinion, that the guide to the acceptability of injury to property is located in private rights, *i.e.*, in the common law of private nuisance, rather than in public rights and public nuisance. See *infra* text accompanying notes 91-106.

large. In effect, the formal line between police power nuisance abatement and eminent domain is erased and both are collapsed into the equivalent of the private landowner's response to a neighbor's offending use.³³

B. Formalism, Modernism, Post-Modernism

Lucas seems an example of an attempt general in the Reagan-Bush era to resuscitate the nineteenth-century formalist proposition that law and the legal system may be derived entirely from the principles of private law.³⁴ This is the recognizable negative of the realist project a half-century before to show that private law was in fact public law. The opinion is representative of this Court's odd admixture of realism and formalism.³⁵ It takes the police power and nuisance seriously as bounded, discrete and stable entities. It purports to create a bright line test, derived from formal categories, in reaction to the contingent, particularist *ad hocery* of previous realist-derived tests of regulatory takings.³⁶ But the opinion rests quite fundamentally on the *ur-realist* conclusion that it is impossible to draw a coherent line between obtaining a benefit and avoiding a burden.

Here a modernist, even a post-modernist,³⁷ move provides the basis for a retreat to formalism. There was a traditional formal distinction, perhaps not a bright line, but nonetheless discernable, between the state's uncompensable exercise of its police power to prevent harm and its compensable taking of property for a desirable public use. But, says Scalia in his realist mode, there is no coherent distinction in public law between state action to prevent public harm, such action requiring no compensation, and state action to secure a public benefit by taking private property, such action requiring compensation. What looks like the prevention of harm to a member of the public may look like the

33. This reverses the mid-nineteenth century process by which the police power emerged conceptually from the notion of eminent domain. "The eminent domain doctrine . . . implied a 'public use' of private enterprises that in turn implied the vulnerability of those enterprises to state regulation under the police powers. The concept of police power entered American jurisprudence during the years coincident with [articulation of eminent domain doctrine]." G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 59 (1988).

34. For discussion of the formalist proposition, see generally MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 9-31 (1992) [hereinafter *TRANSFORMATION II*].

35. There is no better example of that mix than the *Lucas* conclusion: takings cases should be decided by traditional principles, but actual historical cases are "out of accord with *any* plausible interpretation" of the Takings Clause. *Lucas*, 112 S. Ct. at 2900 n.15 (emphasis in original). Moreover, those cases lack weight because they precede the incorporation of the Takings Clause in 1897. *Id.* This disposes not only of state cases but also a great many Supreme Court cases, with differing outcomes, examining regulation and the police power, e.g., *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (holding that an unreviewable rate regulation was a taking); *Munn v. Illinois*, 94 U.S. 113 (1877) (holding that rate regulation was not a taking).

36. See, e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

37. For example, Justice Scalia dismisses Justice Stevens' well-founded objection to the logic of a particular line of reasoning in the majority opinion, *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting), with a kind of deconstructionist recognition of the fruitlessness of seeking coherence in legal reasoning. *Id.* at 2895 n.8 ("[T]akings law is full of these all-or-nothing situations.").

securing of a benefit to the affected landowner; there is no easy way to tell who is "right."³⁸

By eliminating the possibility of a coherent "noxious use" exception to the "categorical rule" that a total taking must be compensated, Scalia can conclude, categorically and unexceptionably, that government regulation cannot work a total deprivation of the value of real property. There is no "nuisance exception" to the categorical Fifth Amendment rule forbidding extinction of use without compensation; rather, there is an entirely different rule, another entity, itself categorical and untainted by exception, forbidding harmful land use. That category sorts the acceptable uses of property from the unacceptable and allows—indeed, requires—the statutory extinction of the unacceptable use even if that causes a total deprivation of value. "The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."³⁹ There was never a right to engage in an unacceptable use and therefore, when that use is barred, no property right is lost. By multiplying entities, that is, by separating from the bar on takings a separate, ostensibly distinct rule delineating acceptable land use, the majority has managed to retain the purity of its categories. The law of takings is stabilized by eliminating its unstable components and transferring them to another category.

Scalia's is a neat, a very neat, solution, at least at first glance.⁴⁰ But the means the majority chooses to operationalize this solution are not quite so neat: the distinctly separate category into which the majority intends to place the non-compensable total deprivation of value is nuisance, a doctrine "intractable to definition"⁴¹ and variously described by its own expounders as a mongrel,⁴² a mystery,⁴³ a garbage can,⁴⁴ a

38. Of course, the initial assumption of realists offering such an indeterminacy critique was that, were the justification for a legislative determination ambiguous, the appropriate judicial response would be deference to the majoritarian judgment. See, e.g., *Commonwealth v. Perry*, 28 N.E. 1126 (Mass. 1891) (Holmes, J., dissenting).

39. *Lucas*, 112 S. Ct. at 2901 (emphasis added). To return to the post-modernism of the opinion, it is hard to resist pointing out this sentence's no-doubt accidental echo of the Derridean "dangerous supplement," the repressed opposition that is, as Derrideans are wont to say, "always already" embedded at the inception of presence and that undermines the purity of every category. See, e.g., JACQUES DERRIDA, *Plato's Pharmacy*, in *DISSEMINATION* 61, 109 (Barbara Johnson trans., 1981) ("[The] dangerous supplement . . . breaks into the very thing that would have liked to do without it.").

In this case, I would argue, what Justice Scalia's heroic categorizations of presence attempt to suppress is the role of the public interest in defining land use, but it is "always already" present within the category. As Jonathan Culler, an interpreter of Derrida, says, it is precisely the characteristics of the dangerous supplement that are the "defining qualities of the central object of consideration." *ON DECONSTRUCTION* 168 (1982). There is a separate article to be written deconstructing *Lucas* and this is the last the reader will see of deconstruction in this one.

40. A clever commentator calls it "legerdemain." Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 642 (1993).

41. F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949).

42. *Id.*

43. Warren A. Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV.

quagmire,⁴⁵ and an impenetrable jungle.⁴⁶ It seems improbable that nuisance law, characterized, says Dean Prosser, by “vagueness, uncertainty and confusion,”⁴⁷ can bring clarity to the “muddle” of takings law, can sort the uses inherent in the title to real property, hence categorically acceptable, from those extrinsic to title, hence categorically barred. It is my claim that, while nuisance doctrine is not, in fact, as incoherent as this litany might suggest, it is at least two-fold; that is, it includes both private and public nuisance. But, in *Lucas*, the majority ignores the latter. The task that Justice Scalia assigns to private nuisance doctrine, guidance as to the constitutionality of legislative control of land use, is not within its sphere. In effect, he has constitutionalized the wrong bit of doctrine.

II. THE NUISANCE KNOT

A. *In Lucas*

The *Lucas* account of the place of nuisance law in judicial review of legislative decision-making implicitly goes like this: If Bob, a landowner, could obtain injunctive relief to end his neighbor Alice's use, then the legislature, too, can halt Alice's use. If a court would not enjoin Alice, and thus Bob would have to purchase Alice's use to put an end to it, then the legislature must also buy out Alice if it wishes to end her use. The legislature can order Alice to abate what a court would, on Bob's prayer for relief, order Alice to abate; the legislature must pay for what Bob must buy. Unlike Bob who must pay Alice's price, the legislature can force a sale at market price through its power of eminent domain. Nonetheless, Alice has no duty to the public different in kind from her obligations to her neighbor Bob, and the legislature has no power in respect to Alice's use greater than Bob's. The legislature cannot, without offering compensation, end Alice's use if the common law would not allow the same to Bob. Noncompensable elimination of value by legislative act is valid only when a statute codifies the common law bar against the valuable use; the state can, for example, legislate to bar the construction of a nuclear power plant on an earthquake fault because the common law would bar it.⁴⁸

Thus, at least where a bar on use is total, the power to define what is acceptable land use, in effect, to regulate competition among land uses, is in the judiciary, subject only to the limitation that its decisions appear correct by “*objectively reasonable application* of relevant precedents.”⁴⁹ Land use regulation is not to be seen as addressing the well-being of the public, but rather choosing between incompatible, in effect, competing, uses.

984, 984 (1952).

44. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942).

45. John E. Bryson & Angus MacBeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 241 (1972).

46. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS §71, at 550 (1941).

47. *Id.*

48. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992).

49. *Id.* at 2902 n.18 (emphasis in original). It is not clear why application of precedent may be subjected to a test of “objective reasonableness,” when uses may not be subjected to a test of “objective noxiousness.” Presumably, the reasonableness of judicial action is more accessible to observation than that of legislatures.

That choice is the province of the law of private nuisance;⁵⁰ regulating the competition between private uses *is* a traditional task of the judiciary (though one much curtailed since the advent of zoning some seventy years ago). Where incompatible uses of private property exist side-by-side, it has been the role of common-law courts to sort out which neighbor is to prevail.

Contrary to Justice Blackmun's claim in his dissent,⁵¹ this account does not fall into the Lochnerian trap of shifting to the judiciary the assessment of whether a measure provides public benefit or prevents public harm; that is, whether it should be viewed as a compensable exercise of eminent domain or an uncompensable exercise of the police power. Rather, the majority marks out a new path, eliminating the police power from the legislature's land-use repertoire, at least where the consequence is the total extinction of the value of some piece of real property. Judicial inquiry into legislative acts will not examine ends; instead, the court is to inquire into an act's congruence with common law rules regulating the land use of neighbors.

The majority does not weaken legislative authority by subserving it to the judiciary—that was discredited by *Lochner*. Instead, it strips the legislature of the police power, an attribute of sovereignty,⁵² by claiming that the public interest which the police power doctrinally protects does not exist as a formal entity. By giving the judiciary the power to adjudicate between legislature and landowner, *Lucas* reduces the police power to no more than the extension to the commons of the rule of *sic utere*.⁵³ The legislature's role in land use is limited to codifying the common law of private disputes.⁵⁴

Although the opinion does not revive *Lochner*, it does have another flaw, a serious one considering its claim to be bottomed in common-law doctrine: as between legislature and landowner, what Justice Scalia calls the "background principles of nuisance and property law"⁵⁵ have traditionally allowed the legislature to choose between uses, according some privilege and disabling others, all in the name of the public interest.⁵⁶ Those background principles do not provide formal support for allowing the judiciary to

50. Joel Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 406 (1974) ("Nuisance is the common law of competing land use.").

51. *Lucas*, 112 S. Ct. at 2914.

52. A typical statement of the police power is from the New York Court of Appeals: "[T]he police power is the least limitable of the powers of government and . . . extends to all the great public needs." *People v. Nebbia*, 186 N.E. 694, 699 (N.Y. 1933), *aff'd*, 291 U.S. 502 (1934).

53. *Sic utere tuo ut alienum non laedas* (So use your own property as not to harm another's). BLACK'S LAW DICTIONARY 1380 (6th ed. 1990). I have previously given an account of a similar and unsuccessful attempt by a conservative treatise writer of the last century to trace the police power to the rule of *sic utere*. Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1361-63 (1990).

54. John Humbach notes that Justice Scalia, the author of *Lucas*, on the same day declared disapprovingly in *Planned Parenthood v. Casey*, that the "Imperial Judiciary lives." See 112 S. Ct. 2791, 2828 (1992) (Scalia, J., dissenting). "Alas," says Humbach, "Justice Scalia's remarks were not in *Lucas*." "Taking" the Imperial Judiciary Seriously: *Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. L. REV. 771, 772 (1993).

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

56. See *infra* text accompanying notes 102-21.

treat the interaction between legislature and landowner as a competition whose winner the courts determine.⁵⁷ The weight of common-law precedent, even in South Carolina where the *Lucas* dispute arose,⁵⁸ does not rest with the conclusion that the legislature has no role in land use disputes, or that the police power the legislature wields is the equivalent of judicial power to resolve private disputes. Rather the legislature has historically wielded the police power to choose between private uses on the basis of its judgment of their respective contributions to the public interest.

B. In Epstein

I believe that the conclusion the *Lucas* majority reaches that it is possible, using private law, to provide a non-Lochnerian means to limit the legislative role in land use, is attributable to the thinking of Richard Epstein. Indeed, the disappearance of the public interest as an independent entity was urged in his brief *amicus curiae* filed in *Lucas* by the Institute for Justice.⁵⁹ In that brief, a condensation of positions set forth at greater length in an earlier book and several articles, Epstein argued that the common law doctrine regulating the interaction of private landowners, *i.e.*, private nuisance, is expressive of the extent to which the Fifth Amendment will allow state action to limit property uses without compensation. What follows is a summary of the Epstein argument and a critique of its coherence.

Epstein's conclusion that the Fifth Amendment mirrors private law is in accord with his general "corrective justice" model. The model posits that dealings among individuals are the correct basis to judge dealings among institutions, both public and private.⁶⁰ An apparent corollary is that the state should act only to accomplish those limited ends that individuals cannot—for reasons of hold-out, free riding and high transaction costs—accomplish for themselves through the medium of the market.⁶¹ Only market failure justifies state action; nothing good is to be accomplished by the government acting to do what the market can. This is the meaning of the Fifth Amendment's limitation of forced transfers to those with public purpose. Anything else is a taking and should be prohibited even if compensated.

Reading the Fifth Amendment in this way effectuates the intention of the Framers for it protects the polity against the danger of Leviathan, of majoritarian redistribution:

Any broader conception of the police power allows the state, as agent of its citizens, to take without compensation property that the citizens themselves would have to purchase from the landowner . . . [T]he same individuals who

57. See, e.g., *People v. Lim*, 118 P.2d 472, 476 (Cal. 1941).

58. See *infra* subpart III.B.

59. Richard A. Epstein, *Ruminations on Lucas v. South Carolina Coastal Council: An Introduction to Amicus Curiae Brief*, 25 LOY. L.A. L. REV. 1225 (1992) [hereinafter *Brief*].

60. Richard A. Epstein, *The Principles of Environmental Protection: The Case of Superfund*, 2 CATO J. 9, 11 (1982) [hereinafter *Superfund*].

61. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 164-65 (1985) [hereinafter *TAKINGS*].

in their private capacity are required to purchase [an] interest in land are [not] in their public capacity allowed to take it by majority vote *for nothing*.⁶²

Epstein's police power is the aggregate sum of the powers of individual citizens to respond to wrongful acts.⁶³ Where "harm threatens a large portion of the population, the state has the sum of the individual rights."⁶⁴ One neighbor can usually bar injury or threat of injury by another; the police power is derived from that ability and bounded by it. "Private parties can enjoin a nuisance without compensation; the state as their representative has the same power."⁶⁵ The whole is the police power, the parts are individual rights. "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf."⁶⁶

Individual rights are aggregated into the police power because otherwise there would be too many small cases. Hence, the difference between the private action on behalf of a single landowner and state action on behalf of the public is merely quantitative. The public interest is just a large-number case of the principles governing private interests.⁶⁷ "Large cases simply decompose into smaller ones."⁶⁸ The state's "only unique power is to force exchanges upon provision of just compensation."⁶⁹

62. *Brief, supra* note 59, at 1239-42. Epstein's justification of this reading is both normative and circular: "The police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the [Takings] clause." *TAKINGS, supra* note 61, at 109. It is right that it is thus, for otherwise it would be other.

63. For Epstein, the police power is not what government begins with, but what is left over: it is described as "those grants of power to the federal and state government that survive the explicit limitations found in the Constitution." *TAKINGS, supra* note 61, at 107.

But of course the Constitution makes no grants to state government; rather, it grants to the federal government powers that are delegated by the states. Any power in the states exists prior to constitutional grant, and any police power possessed by the federal government is taken from the states and thus existed prior to the Constitution. Indeed, the earliest conceptualizations of the police power stress its pre-constitutional existence. *See, e.g., Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851) (Shaw, J.). To the extent that formal doctrinal discourse conceives of the police power as arising from grant, it is not from constitutional grant, but from an even earlier pre-constitutional Lockean compact to be governed.

This is a difficult point for Epstein to concede because it gives state power historic pre-eminence over its limitation. Hence, he does not concede: rather than acknowledge its extra-constitutional origin, Epstein wiggles it into the Constitution by implication, calling the police power "a universal part of constitutional discourse that qualifies the explicit text." *TAKINGS, supra* note 61, at 107.

64. *TAKINGS, supra* note 61, at 111.

65. *Brief, supra* note 59, at 1248.

66. *TAKINGS, supra* note 61, at 111.

67. "[T]he question of large numbers is vital only where there are actual or threatened violations of individual rights, whether or not defined as rights in the person or in private property." *Superfund, supra* note 60, at 16.

68. *Superfund, supra* note 60, at 17. Thus, when Epstein urges the proposition that, in respect to land use, state action under the police power is limited "to the prevention of actions that amount to the commission of a nuisance," he means, of course, a private nuisance. *Brief, supra* note 59, at 1228.

69. *TAKINGS, supra* note 61, at 218.

The outlines of the majority opinion in *Lucas* take shape in Epstein's call for "a specific examination of private liability rules and government regulation as direct substitutes for each other."⁷⁰ Police power actions, like environmental protection, should be understood as the "claims of individuals protecting person and property against the wrongful acts of other individuals."⁷¹ The legitimacy of state environmental regulation is based on the widespread protection it affords to private rights that can be invaded: "Air and water pollution [sic] and the discharge of toxic substances all give rise to the violation of private rights, which the state is empowered to prevent."⁷²

However, Epstein's formulation does not explain *what* private rights open to violation by pollution the state's environmental oversight protects. This is a difficult question for Epstein,⁷³ but a crucial one. It is crucial because failure to discover that there are distinctly private, as opposed to public, rights protected by the police power would mean the police power protects something other, or at the very least more, than the aggregate rights of private owners. It would mean the police power is protective of a public interest that is *qualitatively* distinct from private interests. Thus, he must come up with a satisfactory answer to the question of what private rights are invaded by a public nuisance, particularly given the fact that a public plaintiff may sue on a public nuisance.

A relatively easy solution is to say that the state, when it acts as public nuisance plaintiff or environmental regulator, is acting to protect its private property rights; that the state is, in other words, the owner of unowned things, like fresh air or clean water. Epstein has in fact argued that, with respect to some environmental goods, the state should be considered as being "in the position of an owner" because "a system of common law rights and remedies fails most completely in the protection of unowned things."⁷⁴ Hence,

70. *Superfund*, *supra* note 60, at 21-22.

71. *Superfund*, *supra* note 60, at 19.

72. TAKINGS, *supra* note 61, at 121. Epstein separates environmental regulation into two categories, one concerning "the development and exploitation of public lands," and what he calls the "very different" category "involving the rights and duties between private individuals, where the state acts only as umpire and not as owner." *Superfund*, *supra* note 60, at 9. It is into the latter category that he puts Superfund, a statute designed to obtain cleanup of hazardous waste sites. One can obviously make a strong argument, stronger than Epstein's, one would think, that Superfund is designed to protect public health and safety, rather than private individuals.

73. See Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 467-68 (1979), for a critique of Epstein's discussion of private rights in unowned goods, in Richard A. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979) [hereinafter *Nuisance Law*]. For Epstein's response to Posner's critique, see *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 501-02 (1979) [hereinafter *Causation*].

74. *Superfund*, *supra* note 60, at 24. If one equates "a system of common law rights and remedies" entirely and only with a set of market rules, including first capture as the root of title, then he is correct. However, I go on to argue, *infra*, that Epstein is wrong because the common law has always protected public rights by considering the state their guarantor, rather than their owner. Regardless of that disagreement, the important point is that the position set out in the Superfund essay is not the same as that Epstein took in respect to *Lucas*. If the state were considered in the position of an owner in respect to the coastal ecosystem, it seems hard to imagine that it would not have prevailed in *Lucas*, where the Beachfront Management Act was designed, whether to prevent harm or to obtain benefit, to preserve the coastal ecosystem.

let us assume that, for the purpose of protecting those things not yet reduced to the ownership of individuals, the state may act as its owner. This provides some solution to the “unfortunate situation [that occurs] whenever potentially valuable resources are not the subject of exclusive rights.”⁷⁵ The state is in the position of an owner as “representative of all individuals” in order to prevent the “premature exhaustion of the common pool.”⁷⁶

This formulation is, however, troublesome for Epstein: although it allows the state to prevent premature exhaustion of resources by capture, it can also ratify unnecessary regulation and hence limitation of otherwise desirable capture. After all, the state owns the resource in question and may set such rules as it wishes with respect to harvesting the resource.⁷⁷ For this reason, Epstein needs to avoid the proposition that the justification for state oversight of goods in the common pool is state ownership. But, on the other hand, hewing to the “hard line that finds vested rights only in [goods] captured”⁷⁸ from the common pool would deny protection to the environment, or at least to that part of it, like air, water, and the ecosystem, that is not owned by individuals. The puzzle is how to protect what is not privately owned without conceding that it is publicly owned.

In *Takings*, Epstein posits a more sophisticated answer to this problem: environmental regulation protects neither that which is unowned nor that which is state-owned, but rather the individual’s right to *acquire* in the future what is as yet unowned.⁷⁹ Each of us has those rights in the common pool. My right in the common pool is a right of acquisition that “is itself a property right, good against the world.”⁸⁰ And while “there is no private wrong to control when private parties take unowned things,”⁸¹ making it impossible for others to capture unowned things is either a nuisance or a taking, depending upon who is acting.⁸² A polluter violates rights of acquisition by unregulated pollution, the government takes the same property rights by overregulating polluters.

Although this move is, for Epstein, an improvement on either of the alternative propositions—that environmental regulation protects either what is unowned or what is state-owned—it is not really a solution. Three things remain problematic. One is that the proposition that the state protects private rights of acquisition does not explain how the state can act to prevent a polluting use that does not interfere with the current exercise of those rights. The second is that Epstein’s formulation requires us to assume that air, water, species diversity, wilderness, and whatever else is unowned, are indeed *capable* of being acquired, that is, reduced to individual possession, at some future point. The third is that it requires compensation of every existing expectation.

In considering the first problem, it may help to ask whether fisherpersons whose catch is reduced by pollution or by new regulation and law professors who never fish are in the same status in regard to a challenge to the limiting event. The answer is shrouded

75. *Causation*, *supra* note 73, at 502.

76. *Superfund*, *supra* note 60, at 25.

77. *TAKINGS*, *supra* note 61, at 223.

78. *TAKINGS*, *supra* note 61, at 224.

79. *TAKINGS*, *supra* note 61, at 224.

80. *TAKINGS*, *supra* note 61, at 219.

81. *TAKINGS*, *supra* note 61, at 219.

82. *TAKINGS*, *supra* note 61, at 219.

in the ambiguity of what right is potentially infringed either by government regulation or by pollution. Is it a right to acquire or is it a right in goods not yet acquired? If the former, it is not clear in what respect the fisherperson differs from the rest of the world; hence, when the state sets fishing rules, either both fisherperson and professor have good claims against polluters or neither does. If neither does, the state does not either. If both do, the right to be vindicated does not rest on private ownership and we are back to the question of whether the public interest is different from individual private rights.

If, on the other hand, the right infringed by polluters is a right in those goods that fisherpersons have an expectation of acquiring, but law professors do not, the calculus of expectation divides the world into two classes. Only those in the first category have a nuisance claim in respect to the pollution. This seems workable as a means of separating legitimate claimants from those with no claim, but it does not explain the basis of the state's claim against pollution. If there are no commercial fishing enterprises and the first category is empty, is the state unable to abate pollution threatening the fish? Suppose for example that no commercial fishing enterprise exists because the population does not eat fish, but birds; and suppose as well that the birds eat fish, so there is a general interest in protecting the fish. Does the absence of a group with a commercial expectation of acquiring the fish mean that the state cannot protect the common pool of fish? Epstein does not answer this question.

The second, and related, problem is whether species diversity, for example, can be considered capable of private acquisition in the future. If it is not possible for us to conceive of individual rights in species diversity, or in anything not reduced to individual possession, Epstein's theoretical posture is in danger of decomposing because the rights that are vindicated when the state acts to protect these goods are not only not in private hands now, *but never will be*. There can be no private right in that which is not yet acquired, if it is impossible of acquisition at any time in the future. Epstein's move to transmogrify rights of possession into rights of acquisition is thus insufficient. What is protected by the police power may be something *incapable* of individual possession, a right not of possession, but of continuing non-possession, a right held by non-possessors, that is to say, by the public at large, a right that may be vindicated against any who would violate it by possession, a right to prevent propertization, a right *against* property.

Finally, although Epstein's solution may divide those with no expectation from those with some expectation, it makes any and all expectation compensable. Anyone with an erased expectation, large or small, total or partial, must be compensated, leaving open the door to the concern Justice Holmes expressed in *Mahon* that compensating expectation will bring government to a halt.⁸³ This problem does not much trouble Epstein, who has suggested in commentary on *Lucas*, that the Court should simply have cut the Gordian knot.⁸⁴ Rather than ask what percentage of loss below 100% may be compensable, the court should protect *all* expectations of profit with respect to land, thereby taking on land-use planning, zoning and the congeries of environmental regulation that has made up the landscape of land use over the past fifty or so years. However, Justice Scalia apparently could not command a majority in *Lucas* willing to compensate all expectations. Instead,

83. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

84. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1388-89 (1993) [hereinafter *Tangled Web*].

the court retreated to the categorical definition that a total loss of value is a taking when that loss is not attributable to abating a private nuisance. But, as Justice Scalia admits,⁸⁵ it has no sound reason for that limitation. The logic of the opinion, as opposed to its actual holding, thus tracks Epstein's reasoning and leaves unanswered the question of where compensation ought to begin.

C. *In Coase*

Perhaps recognizing the dilemma within Epstein's theory, his inability to explain what the state protects when it either regulates or acts against public nuisance, the *Lucas* opinion does not explicitly adopt his claim that private property rights are the basis of the police power. While it adopts his outcome, in that private nuisance doctrine becomes the guide to the constitutionality of public law, the explicit reason for the turn to private nuisance is harm/benefit indeterminacy.

This reason, too, suffers from some incoherence, for harm/benefit indeterminacy also famously exists in respect to private nuisance, that is, the disputes of neighbors over land use. It is more than thirty years since Ronald Coase pointed out the absence of a coherent distinction between courts abating a nuisance on behalf of a neighbor's use and providing an unpaid benefit to that neighbor.⁸⁶ Rather than asking a court to make unjustifiable distinctions among uses, Coase concluded that, given perfect information and no transaction costs, neighbors' disputes ought to be left to the market to assess the worth of benefits and burdens. Let the party who values her own use most highly prevail. Illogically, the problem Coase identified with judicial resolution of private disputes, that is, harm/benefit indeterminacy, is precisely the reason the majority gives for using the law of private dispute resolution to judge the constitutionality of public-regarding legislation.

Epstein has rejected the Coase theorem as "causal nihilism,"⁸⁷ claiming that it is not in fact difficult to distinguish between the creator of a nuisance and its victim.⁸⁸ Such distinctions he believes are possible both on the private and the public level; courts can judge fairly between competing private uses and also between public burden and public benefit.⁸⁹ But Epstein's solution to the Coasean puzzle calls for courts to look at the natural rights of property and decide whether they are invaded by the action of another, whether neighbor or state. This would be to resuscitate *Lochner*, and indeed, Epstein claims that case was not wrongly decided.⁹⁰ But even if Epstein would welcome the revival of substantive due process in land use law, the logic of majority-making will not allow it.

85. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 n.8 (1992).

86. Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

87. *Nuisance Law*, *supra* note 73, at 58.

88. TAKINGS, *supra* note 61, at 117-19. More recently Epstein has seemed to accept Coase's notion that there is no moral basis for assigning entitlements. See *Tangled Web*, *supra* note 84, at 1388-89. Rather, we can at best "[p]ick the path which reduces the transaction costs necessary to reach the optimal allocation of resources." *Tangled Web*, *supra* note 84, at 1389.

89. TAKINGS, *supra* note 61, at 121-25.

90. Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 734 (1984).

So the *Lucas* opinion takes an unprincipled course, adopting Epstein's premise that the public interest is merely private interest writ large, but rejecting the necessarily-implied Lochnerian judicial means of resolving any apparent conflict between the two. This unprincipled course is the mirror image of the majority's acceptance of the Coase principle that burdens and benefits are indistinguishable when the antagonists are government on one hand and a private landowner on the other, while rejecting the same principle when the antagonists are private landowners. In sum, then, the theoretical underpinnings of the claim that private nuisance law holds the key to assessing the rightness of legislative land use decisions is unsustainable. In the next section, I go on to claim that the historical underpinnings of that claim are equally shaky.

III. THE ROLE OF LEGISLATURES IN NUISANCE LAW: THE SOUTH CAROLINA EXAMPLE

As I have noted, the *Lucas* opinion, while it draws heavily on Epstein, does not cite him. Instead, its citations are to treatise and history—the *Restatement of Torts*, the tradition of judicial oversight of private land use conflicts, and a special compact concerning real property allegedly embedded in the Takings Clause. I propose now to work backward through the historical support for the majority's reading of nuisance law as private law, how it is derived, and whether it is sustainable.

A. Nuisance Doctrine and The Restatement

The guide the *Lucas* majority recommends to courts making decisions under the rule that legislation must track the common law of private nuisance is the *Restatement (Second) of Torts*.⁹¹ According to the majority, the inquiry a court should make in respect to a claim that legislation works a taking requires examination of

the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.⁹²

This mirrors the six factors of the nuisance test set out in the *Restatement*: the extent and degree of harm attributable to a use, its social value, its suitability to the locale, the relative ease with which harm can be avoided, whether the offending use was initiated by the current owner's predecessor, and whether the offending use is carried on by others elsewhere.⁹³

91. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

92. *Id.*

93. RESTATEMENT (SECOND) OF TORTS §§ 826-31 (1979) [hereinafter RESTATEMENT]. No single factor is dispositive and each is to be balanced against the other. Generally speaking, the factors, when balanced, tend to favor large-scale use over small-scale, and intense use over less intense. Thus, the *Restatement (Second)* test

However, the *Restatement* is not relevant to anything other than the conflicts of neighbors. This is not a failing in the *Restatement*, which is, after all, a guide to the law of torts. Historically, common law public nuisance has not been treated as part of the common law of tort or of property; indeed it found no place in *either* the *Restatement of Property* or the first *Restatement of Torts*. The *Restatement of Property* defined the law of nuisance as a branch of tort and made “no attempt at all . . . to deal with public control of land use or the law of natural resources.”⁹⁴ The first *Restatement of Torts* entirely ignored public nuisance.⁹⁵ The nuisance topic was assigned to a drafting group made up of property experts; they examined private nuisance, that is, injury to privately-owned real property, and ignored public nuisance, injury to public rights.⁹⁶ Although the drafters of the *Restatement (Second) of Torts* sought to rectify that omission, the first draft of the *Restatement (Second)* to deal with public nuisance defined it only in terms of criminal conduct, and thus excluded it from the range of topics relevant to the treatise’s purpose.⁹⁷ In the final version, the public nuisance section was expanded to include the private plaintiff’s tort action for particular damages due to public nuisance, but the sovereign’s executive exercise of the police power in an equitable, rather than criminal, proceeding was still *hors de texte*.

The public plaintiff’s public nuisance action is not ignored because it is simply private nuisance writ large, the *Lucas* approach. Rather, there is the beginning of a recognition that the sovereign’s public nuisance action is something other than a tort case.⁹⁸ Dean Prosser, the reporter for the *Restatement (Second)*, explained in his own treatise on torts that public nuisance was the term used for “criminal offenses, consisting of an interference with the rights of the community at large.”⁹⁹ On the other hand, he denominated private nuisance “a civil wrong, based on a disturbance of rights in land.”¹⁰⁰ He considered the two separate entities as having “almost nothing in common, except that each causes inconvenience to someone.”¹⁰¹

is in fact an extreme form of the balancing tests that are otherwise anathema to members of the majority in respect to takings decisions.

94. John Donahue, *The Future of the Concept of Property Predicted from its Past*, in XXII NOMOS, PROPERTY 28, 43 (1980).

95. See RESTATEMENT, *supra* note 93, §§ 822-40 (1934). See also SEAVEY, *supra* note 43, at 985 n.4 (“It is to be noted that there are no sections in the *Restatement* which consider public nuisances.”).

96. Bryson & MacBeth, *supra* note 45, at 242 n.1.

97. Bryson & MacBeth, *supra* note 45, at 242-43. The explanation for treating public nuisance as a criminal offense was that the violation of rights common to all did not originally give rise to a right of action in each affected party, but were to be dealt with by means of indictment as a violation of public peace and order.

98. See, e.g., RESTATEMENT, *supra* note 93, §821C cmt. j. (“[T]here may be a distinction between an individual suit for damages and a suit in behalf of the public or a class action.”). See also, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §90, at 643 (5th ed. 1984) (recognizing that a torts treatise “is not the place to discuss in any detail the remedies available to the state and other governmental units to protect the general welfare from conduct regarded as so inimical to many people as to constitute a public nuisance.”). This volume is, of course, the successor to Prosser’s HANDBOOK, *supra* note 46.

99. PROSSER, *supra* note 46, §71, at 552 (1941).

100. PROSSER, *supra* note 46, §71, at 552 (1941).

101. PROSSER, *supra* note 46, §71, at 552 (1941).

Reduction of all nuisance law to private nuisance is formally incorrect; private nuisance is a smaller category than nuisance generally, as Dean Prosser recognized. When the state abates a public nuisance, it is not in all, or perhaps not even in most, cases acting like a private landowner to protect what it owns. Rather, it acts to protect unowned resources, e.g., silence, clean air, pure water, animals *ferae naturae*, species diversity, wilderness, the ecosphere. As I have noted above,¹⁰² calling this interest a right of ownership, as Epstein sometimes does, is problematic. It appears to be more doctrinally correct to say that there is a public interest in protecting what may never be owned.

The public interest is also the basis for legislative distinctions between the rights afforded property uses in respect to nuisance. Thus, historically, there was not only power in the legislature to protect the public against offensive uses by legislating against nuisances, but also a correlative power to extend immunity from nuisance liability to offending uses, when such protection was deemed in the public interest. Injury to property was originally governed by a form of strict liability: it was actionable without reference to the care taken by the defendant to avoid it.¹⁰³ When, in the early nineteenth century, the privilege to do harm was carefully extended to personal injury generally,¹⁰⁴ it was not extended to injury to property. In fact, nuisance retained its strict liability character well into the twentieth century.¹⁰⁵ Clearly, across-the-board application of such a doctrine would have greatly limited enterprise, making every large-scale use liable to its smaller neighbors for the undoubted disruptions it would cause them. Instead, legislatures granted the privilege of a negligence standard to certain uses on a case-by-case basis; uses authorized by the legislature were held to have the privilege to harm their neighbors so long as the harm was not done negligently. The doctrine of legislative authorization as the sole basis for application of a negligence standard to the injuries

102. See *supra* text accompanying notes 73-85 for a discussion of Epstein.

103. 3 WILLIAM BLACKSTONE, COMMENTARIES *217-18 (“[I]f one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another’s property, it is a nuisance [sic]: for it is incumbent on him to find some other place to do that act, where it will be less offensive.”). See, e.g., *Yonkers Bd. of Health v. Copcutt*, 35 N.E. 443, 445 (N.Y. 1893) (“[H]owever innocent [the owner] may be in creating the condition or maintaining it, he is bound to abate it upon the proper official request, and, if he refuses, becomes at once responsible for the existing condition, as continuing a nuisance which it was his right and his duty to remove and suppress.”). See also Daniel Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 778 (1979) (Historically, nuisance did not “involve[] questions of fault in the modern sense.”).

104. There is a good deal of controversy over whether personal injury ever had the benefit of a strict liability standard in English law, with *Brown v. Kendall* marking a decided shift, or whether strict liability in tort was more apparent than real. Compare, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 89-91 (1978), and Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1722-30 (1981). However, there seems no doubt that nuisance, known as trespass on the case, was historically treated like trespass in respect to strict liability.

105. It was not until 1928 that then-Judge Cardozo definitively extended negligence principles to nuisance cases: “The primary meaning [of nuisance] does not involve the element of negligence [W]e hold now that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance.” *McFarlane v. City of Niagara Falls*, 160 N.E. 391, 391-92 (N.Y. 1928).

caused to property by another use retained its vitality until about the time that land use became bureaucratized through zoning and planning.¹⁰⁶

B. Courts and Legislature in South Carolina Nuisance Law

This doctrine also applied in South Carolina, where *Lucas* originated. That is to say, South Carolina courts, like the courts of other states, traditionally recognized and honored a distinction between uses authorized by the legislature that afforded the privilege to do harm to their neighbors under a standard of due care, and unauthorized uses that were subject to a strict liability standard.

A continuing theme in the South Carolina cases is that courts, though willing to adjudicate property rights of private parties, did not consider as within the judicial sphere decisions as to what kind of private land use was in the public interest.¹⁰⁷ If a use was legislatively-chartered, as virtually all large-scale enterprise was in the period before general incorporation statutes, the consequences of its proper undertaking were not actionable. Thus, where, in 1858, a Charleston cotton press had been licensed by municipal action, the court would not quickly find it a nuisance to complaining neighbors. In considering whether the cotton press belonged in the neighborhood and whether the plaintiff was unreasonably endangered, in sum, whether defendant's business was a private nuisance, the court decided that

the action of the council is, as evidence, entitled to higher estimation than the opinions of private individuals. The mayor and aldermen are the representatives of the City, and a citizen who has made an investment under their authority, after consulting them in a matter entrusted to their judgement, should not be readily found guilty of doing wrong by creating danger which they do not apprehend, or producing annoyances which they do not perceive.¹⁰⁸

Similarly, in 1850, the court held that if an authorized use led to a decline in a neighbor's property value, the decline was not compensable.¹⁰⁹ In *McLauchlin*, the legislature had approved defendant's obstruction of a public way, otherwise the classic

106. I have discussed the traditional strict liability character of nuisance, legislative extension of a negligence standard to particular uses, and subsequent judicial adoption of an overall negligence standard, at greater length in Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850-1915*, 54 ALB. L. REV. 301 (1991). I argue that across-the-board extension of a negligence standard to all injuries done to property by other uses would have destabilized property rights; hence, the law of nuisance did not attain a coherent set of liability rules, as tort law did, but remained a jumble of contradictory principles, a doctrine "too valuable to abandon, yet too contested to rationalize." *Id.* at 303.

107. A discussion of the interaction between the post-Civil War economy of South Carolina and its judicial precedent in the area of land use is beyond the scope of this paper. Suffice it to say, however, that Southern legal regionalism does not seem to have affected nuisance law. See LAWRENCE FRIEDMAN, *The Law Between the States: Some Thoughts on Southern Legal History*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 30, 33 (Bodenhamer & Ely eds., 1984). As the cases cited *infra* demonstrate, South Carolina afforded assistance to large-scale infrastructural undertakings, like dams and railroads, just as northern states did.

108. *Ryan v. Copes*, 45 S.C.L. (11 Rich.) 217, 238 (1858).

109. *McLauchlin v. Charlotte and S.C. R.R.*, 39 S.C.L. (5 Rich.) 583 (1850).

public nuisance. But, said the court, “[i]f the streets are ordinary highways, and their obstruction has been authorized by law, no right remains for an individual to complain, by action at law, of peculiar damage done to him by an act detrimental to the public, which public authority has sanctioned.”¹¹⁰ That the plaintiff had lost the power to develop his property in the future gave rise to no claim. So long as the owner retained the current use, an effect on developmental values did not warrant court action. “A mere temporary diminution of marketable value, whilst the property is out of market, and the owner’s enjoyment of it is uninterrupted, is no actual loss, but only matter of speculation which ceases when the cause of diminution is removed.”¹¹¹

Without legislative authorization, the traditional strict liability character of nuisance retained its historical vitality. The character of the act creating the nuisance was irrelevant and the plea of no negligence was not a defense:

[T]o allow the owner of a tract of land to so use his own land in the prosecution of any lawful business as would necessarily or probably injure his neighbor, provided he takes all reasonable care to prevent such injury . . . we do not understand to be the law. On the contrary, we think, if one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business.¹¹²

Injuries to property carried the burden of strict liability, unless the legislature chose to lighten that burden. A claim of injury against defendant’s authorized use could succeed only through “some allegations of facts showing that the defendant, in doing the act which it was authorized to do, has, either wantonly or through negligence, done the act in such a manner as unnecessarily impaired or injured the rights of the plaintiff.”¹¹³ Absent defendant’s negligence in operating an authorized use, the plaintiff would be considered damaged without injury.¹¹⁴ In such a case, plaintiff’s nuisance claim would succeed only on a showing that the offending use was undertaken negligently. The reasoning was that the “law will not declare that to be a nuisance . . . which it has authorized . . . [but] the law does not authorize negligence.”¹¹⁵

Two dam and pond cases, cases typical of the improvements undertaken for the purposes of enterprise in low-lying South Carolina, make the point well. Where a dam and pond were authorized by the legislature, only negligence could make the owner liable for nuisance when the pond became a breeding ground for malarial mosquitoes.¹¹⁶ But authorization had to be explicit and would not be inferred from long usage. So, in another dam and pond case where defendant claimed the prescriptive right to continue the damage done by his dam’s flooding, the court said:

110. *Id.* at 593.

111. *Id.* at 592.

112. *Frost v. Berkeley Phosphate Co.*, 20 S.E. 280, 283 (S.C. 1894).

113. *Wallace v. Columbia & G. R.*, 12 S.E. 815, 815 (S.C. 1891).

114. *McLauchlin*, 39 S.C.L. (5 Rich.) at 599.

115. *Johnson v. Charleston & W.C. Ry.*, 50 S.E. 775, 776 (S.C. 1905).

116. *Belton v. Wateree Power Co.*, 115 S.E. 587, 588-89 (S.C. 1922).

While the long possession may confer a right to the land flowed, and all the proprietary incidents which follow the title to property, it can not be set up as a bar to the abatement of a nuisance on behalf of the public. A right to violate the law is not to be presumed as allowed by the State itself, for this would be inconsistent with the very purpose for which it was created, and would involve an absurdity too violent to be entertained even for a moment.¹¹⁷

The legislature was free to decide not only that the public benefit of an offending use outweighed its harm to a private party, but also what land use to privilege with a grant of immunity from the strict liability standard. South Carolina courts declined to take a role in deciding what land uses were to be considered as useful to the public. They carefully distinguished between the function of the judiciary and that of the legislature, refusing to undertake to balance private harm against public utility. They viewed balancing as political, and the power to balance as the legislature's.

In a case where pollution of a stream was an issue between private litigants, a defendant, whose mining activity was obviously far more extensive than plaintiff's small farming operation, asked the court to take that fact into account in deciding whether a nuisance existed. Defendant was told that it was not for the court to consider

the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream. That question would be pertinent only in an application addressed to the Legislature to give such corporations the power of condemnation.¹¹⁸

Similarly, in a 1909 case, the Attorney General of South Carolina claimed that the bridge a power company wanted to build over a canal would threaten navigation and sought to enjoin its construction.¹¹⁹ The company claimed that the court should weigh the good to be done by the building of the bridge, part of a larger project to create a reservoir, against the harm done by the obstruction of the canal. The court denied it had the power to refuse an injunction on the ground that the

right of navigation of the Columbia Canal may be of small value in comparison with the great value to the city of Columbia of the obstruction it proposes to erect. The court's discretion is not broad enough to permit it to refuse to protect either private or public property or rights because the invasion of such property or the violation of such right would be of benefit to an individual or to a portion of the public.¹²⁰

It was well-settled that a political decision could be made to authorize the existence of a nuisance; active uses should be encouraged. Even if such uses did some harm to their

117. *State v. Rankin*, 3 S.C. 438, 449 (1872). "The right to property from long possession . . . cannot be applied to sanction or uphold its use or devotion to purposes not permitted by the State, either as affecting its own sovereignty or the rights of third persons." *Id.* at 448-49.

118. *Williams v. Haile Gold Mining Co.*, 66 S.E. 117, 118 (S.C. 1910).

119. *State v. Columbia Water Power Co.*, 63 S.E. 884 (S.C. 1909).

120. *Id.* at 890.

neighbors, their contribution to economic growth justified the extension to them of a form of eminent domain allowing their depredations, so long as carefully done. But that decision was solely political and not for the courts. South Carolina courts characterized as a legislative enterprise the balancing of public good against private right in the determination of whether a use was allowable; the balancing endeavor, authorizing harm to private property for the public good, was considered outside the judicial sphere.¹²¹

C. The "Historical Compact" in South Carolina

To sum up the state of nineteenth-century South Carolina nuisance law, what would otherwise be a nuisance could be authorized by the legislature, if it judged that the public benefit of the offending use outweighed its harm to a private party. Such a use would get the privilege of a negligence standard when a neighbor complained of harm. *Sans* such authorization, the harm to a neighbor, however carefully created, would not be tolerated. This doctrine, accepting a tort standard of liability for the legislatively-authorized use, but retaining strict liability for the harms done to property by the unauthorized use, is clear evidence that state courts did not believe that they alone made the law of land use. This evidence contradicts the *Lucas* claim that judicial review of land use under common law private nuisance principles and without regard to political decision-making is part of a "historical compact"¹²² between government and citizen represented in the Fifth Amendment, at least as that compact was interpreted in South Carolina.

Further traversing the *Lucas* opinion, it appears that judicial review of legislative land use decisions was part of that compact neither before the Takings Clause was nationalized nor afterwards. According to Justice Scalia, pre-1897 judicial opinions allowing legislatures to limit and even extinguish rights of real property in the public interest are "irrelevant" to an understanding of the "historical compact" regarding government interference with real property that is embodied in the Takings Clause.¹²³ Those early cases were decided in a context in which the Supreme Court had not yet incorporated the Constitution's guarantee against takings and made it applicable to state action;¹²⁴ hence, they do not reflect a "plausible"¹²⁵ account of the compact.

But, to take only one example, the outcomes of two South Carolina nuisance cases pre- and post-1897, *McLauchlin* in 1850 and *Johnson* in 1905, were virtually identical. In each case, the court refused to grant relief to a plaintiff claiming property injury due to a neighbor's use, on the ground that the legislature's charter of the use immunized it from liability for any non-negligent injury to plaintiff's property. Neither before nor after 1897, did the court believe itself obliged to offer a plaintiff the redress that would have been available had defendant not been armed with the legislature's conclusion that its use was in the public interest. The incorporation of the Takings Clause does not seem to have

121. For a general discussion of formalist resistance to judicial use of modern balancing tests on the grounds that it involved courts in political decision-making, see TRANSFORMATION II, *supra* note 34, at 28.

122. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992).

123. *Id.* at 2900 n.15.

124. In *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897), the Court incorporated the Fifth Amendment's guarantee against takings to govern state action.

125. *Lucas*, 112 S. Ct. at 2900 n.15.

affected the judicial premise that the legislature had the power to weigh the public interest in private land uses, at least not in South Carolina.

The much harder question for South Carolina courts, as for other state and federal courts,¹²⁶ was whether to review the legislative determination that a use could be barred as a nuisance. That decision could destroy ongoing businesses, eliminating their value entirely. South Carolina courts rejected the idea that the legislature, which could make a nuisance no nuisance by immunizing from liability its careful operation, could conversely make no nuisance a nuisance. A body "empowered by law to declare what shall constitute a nuisance, may not declare that to be [a nuisance] which in fact is not," said the South Carolina Supreme Court.¹²⁷ The idea at work was that the legislature could indeed bar categories of use, but singling out a particular use as a nuisance was subject to judicial review. In *Law v. City of Spartanburg*, the challenged ordinance, which appeared on its face a bar against a whole category of uses, on closer examination revealed itself as limited to barring one particular use, the only one in the city that met all the aspects of the categorical definition. A legislature could act generally in the public interest, but its work could be challenged if its effect was to single out a particular use.¹²⁸

The mention of this limitation South Carolina courts recognized in respect to legislative power should make clear that I am not attempting to force closure on the nuisance/takings problem with the claim that state common law nuisance doctrine mandated strict judicial deference to legislatures. Nuisance doctrine has never provided a clearcut guide to how far a legislature could go in limiting the use of property under the rubric of the police power.¹²⁹ And demonstrating that state judiciaries deferred to a legislative role in land-use decisions is a long way from establishing the degree of deference courts owe to legislative action limiting property use. All we can say is that historically, the "background principles of nuisance and property law"¹³⁰ have seemed to include the notion of a police power that can both limit and expand the rights of property in the interests of the community, a police power that courts have agreed is confided to the legislature, not the judiciary.

CONCLUSION

Although I cannot undo the takings muddle with nuisance doctrine, neither can the *Lucas* majority. What this look at South Carolina nuisance cases reveals is the lack of precedential support for the application of private nuisance doctrine, such as that

126. See, e.g., *Lawton v. Steele*, 23 N.E. 878 (N.Y. 1890), *aff'd*, 152 U.S. 133 (1894).

127. *Law v. City of Spartanburg*, 146 S.E. 12, 14 (S.C. 1928).

128. Indeed, Carol Rose, an acute commentator on the takings issue, argues that in *Mahon*, Justice Holmes's stricture against legislative trespass on private rights, against regulation that "goes too far," is aimed, not at the extent of value lost, but at "singling out," and the related problem of forced wealth transfers between private individuals. Rose, *supra* note *, at 566, 581-87.

129. Indeed, South Carolina has a state constitutional tradition, in the form of a theory of inverse condemnation, that takes a very restrictive, indeed suspicious, view of legislative line-drawing when it comes to preventing a public harm or attaining a public benefit. Bradford W. Wyche, *A Guide to the Common Law of Nuisance in South Carolina*, 45 S.C. L. REV. 337, 368-70 (1994).

130. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992).

enunciated in the *Restatement (Second) of Torts*, to cases involving a legislative evaluation of harm and benefit. Precisely the same balancing inquiry enjoined on state courts by the majority's adoption of the *Restatement's* nuisance factors has been rejected by the courts of South Carolina as infringing upon a legislative task, the decision as to what forms of land use are in the public interest. The majority's claim of a clear, unequivocal and single-minded common-law doctrinal tradition arising out of private law and denominating the appropriate conditions of land use is revealed as historically inaccurate. To the contrary, the "background principles of nuisance and property law" in state common law are embedded in the self-same dilemma that has plagued the Supreme Court of the United States in interpreting the constitutional mandates of the Fifth Amendment—how far is too far?

Justice Scalia is determined to limit the power of legislatures to regulate property. But the practical considerations of majority-making require him to reject the Lochnerian path that would allow wholesale judicial review of legislative acts. He thus makes two moves: first, he says, the Lochnerian path is closed due to burden/benefit indeterminacy; neither legislative nor judicial pronouncements as to the nature of a legislative act are reliable. Second, he adopts Richard Epstein's position that the police power solely protects and is bounded by private power, *i.e.*, private rights. Hence, he concludes, the only means left by which to judge the constitutionality of a legislative act under the police power are the common-law precedents that have historically governed the competition between private rights.

This conclusion must fail not only because the application of private nuisance law in the public sphere is incoherent, but also because, as a matter of historical fact, the law of private nuisance is not what common-law courts have applied when land use and the public interest were at issue. Looking at the South Carolina record, it is clear that the judiciary made an explicit distinction between legislative decision-making regarding the public interest and judicial resolution of competition among private land uses. Erasing the public-private distinction and applying the law of private nuisance to the determination of public rights is an appealing alternative to *Lochner*, but it is not true to the record of history.