Lucas v. South Carolina Coastal Commission was the high-water mark of the Supreme Court's expansion of the takings clause, which makes it unconstitutional for the government to take private property without compensation. *Lucas* epitomized the late Justice Scalia's crusade to limit government regulation of property. The decision left environmentalists and regulators quaking in their boots, especially because of its possible impact on protection for wetlands and habitat for endangered species. Ultimately, however, Scalia failed to make a compelling case for ignoring other language in earlier cases dating back decades that spoke broadly of the government's power to limit harmful uses of property, rather than imposing the limits of common law doctrines on the government. Twenty-five years later, it is striking how little impact the case has had.

Understanding the reasons requires something of a deep dive into the case and its complicated legal setting. Lucas had purchased two lots on an island in 1986. Two years later, the state had passed a beachfront management act, which prohibited new construction on the island because it was in a high erosion zone. Relying primarily on dicta in preceding cases, the Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." Thus, while an owner deprived of 95% of the property's use might sometimes recover nothing, the owner deprived of 100% would recover completely, due to the bright-line nature of the rule. In a footnote, however, Justice Scalia conceded that "[r]egrettably, the rhetorical force of our . . rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."

Defining the baseline property interest against which the taking is measured has become known as the denominator problem. There were a series of post-*Lucas* cases, which nearly all favored the government. The Supreme Court has made it clear that the baseline is full ownership of the entire parcel of land – separate property rights relating to the land or separate portions of the land can't be used as the baseline. In the recent *Murr* decision, which I discussed in a previous post, the Court said that under some circumstances the baseline could be defined to include adjacent lots, not just the lot directly subject to the regulation. Defining the baseline broadly means that it harder to show that the owner has suffered a complete wipeout, with 100% of value gone.

In any event, *Lucas* left some wiggle-room even in cases where 100% of value was destroyed. Announcing the total taking rule didn't dispose of the *Lucas* case, given that earlier cases had upheld the power of the government to severely regulate property to protect the public. Scalia needed give those prior cases a narrow interpretation in order to distinguish them from the South Carolina law. He argued that those regulations had

essentially done nothing more than mimic common law restrictions on property. Thus, a land use can be banned if it would be a public or private nuisance. Scalia gave as two examples the denial of a permit to engage in landfilling that would flood the lands of neighbors and an order to remove a nuclear plant that is discovered to sit on an earthquake fault. In a concurring opinion, Justice Kennedy argued that Scalia was wrong to limit the permissible justifications to common law doctrines rather than allowing consideration of how statutes might shape reasonable expectations.

Even under Scalia's view, long-standing restrictions on property owners can operate as carve-outs from the owner's property rights, eliminating any possibility of a taking claim. As Michael Blumm has documented, courts have recognized an expansive list of exceptions from *Lucas*. One such exception is the public trust doctrine, which traditionally limits the rights of landowners over navigable waters. Some states, however, have applied the public trust doctrine more broadly to include tributaries of navigable waters and dry beach. The federal government has its own protection from takings claims under another background principle: the navigable servitude, which gives it paramount authority over tidal and navigable waters. Courts have also invoked less familiar principles, including customary rights of beach access, native Hawaiian food gathering rights (a decision invoking the "Aloha spirit"), laws protecting in-stream water flows, state ownership of all wildlife under the common law, and Indian treaty rights predating private land ownership.

In retrospect, the *Lucas* rule had some fundamental flaws that limited its potential to restrain regulators. First, it is extremely rare to find that a regulation leaves land with literally no value. It probably wasn't even true in the *Lucas* case itself. Second, the legal foundations of the opinion were flimsy. Scalia cited only dicta in earlier cases, that is, language in those cases that wasn't really necessary and for that reason wasn't binding. And as noted above, Scalia failed to make a compelling case for ignoring other language in earlier cases dating back decades that spoke broadly of the government's power to limit harmful uses of property, rather than imposing the limits of common law doctrines on the government.

Lucas's limited influence compared to early fears has something to do with Justice Scalia's approach to opinion writing. First, he was a master of rhetoric. The result was often to make an opinion look dramatic and game changing, although on closer reading it had only limited legal import. Sometimes lower courts and future decisions chose to run with the rhetoric rather than the specific legal holding – but often they did not.

Second, Scalia never really believed in the case-by-case method of the common law. For that reason, he expected other Justices to follow the sweeping language of his opinions as if they

were legislative enactments. He didn't realize that when they joined his opinions, they were committing themselves only to the outcome and to the application of his reasoning to the specific facts of the case before them. They weren't necessarily committing to following that reasoning blindly to wherever it lead.

The Supreme Court's takings decisions aren't terribly predictable. Perhaps the resurrection of Scalia's crusade awaits only another appointment or two to the Supreme Court. But for now, *Lucas* looks more like a fluke than a bellwether.