

On this date in 1992, the property rights movement achieved its greatest victory in the form of the Supreme Court's [\*Lucas\*](#) ruling. The campaign to protect property rights seemed to have huge momentum. But things didn't work out that way. For property rights advocates, *Lucas* turned out to be a false dawn.

Mr. Lucas owned land on a barrier island off the South Carolina coast. Alarmed by the risks of building on such vulnerable areas, the South Carolina passed a law limiting new construction in risky locations. As a result, Lucas couldn't build anything on the land, which allegedly reduced the value of the land to zero. In a sweeping opinion by Justice Scalia, the Supreme Court held that the law violated Lucas's property rights. The heart of Justice Scalia's opinion is that a regulation that eliminates the economic value of property is a "taking" of private property.

The state government argued that the regulation was justified because it would prevent serious public harm. Building on undeveloped land would harm the environment and could cause erosion, endangering nearby houses. Justice Blackmun's dissent argued that the state was entitled to prevent landowners from harming the public. He saw a commonsense distinction between preventing someone to harm the public and forcing them to benefit the public.

Justice Scalia, however, viewed this difference as illusory. For him, withholding a benefit and imposing a harm were just two sides of the same coin. I realize this seems weird — it seems to mean that you could equally well say that someone harms me by punching me in the nose or that they just withheld the benefit of leaving my nose alone. But I'm just a simple country lawyer, not a Supreme Court Justice.

Justice Scalia did recognize one circumstance where a state regulation could validly deprive land of all value. That exception is when the regulation merely duplicates what a court would have ruled without the law. For example, under some circumstances, a court would issue an injunction against using the land in a way that harms others under the common law doctrine of nuisance. A state law that had the same effect would be valid. But a state law could not expand on the long-standing rules of the common law.

Justice Scalia's opinion seemed to create a nearly absolute rule against state regulations requiring land to be kept in its natural state, except in the rare circumstance where the old-fashioned nuisance doctrine applied. No new-fangled environmental restrictions allowed!

Property rights advocates were jubilant. But the thirty-eight years since *Lucas* was decided turned out to be one long retreat from Justice Scalia's vision.

Justice Scalia's opinion itself recognized one of the problems. His rule required that a regulation destroy 100% of the value of the property. The difficult was knowing how to define the "property" in question. For instance, suppose that a law prohibited any use of property, but only for a limited time. During that limited time, the property could not be used, but it could be used later. In a later opinion written by Justice Stevens, the Court held that the Scalia rule did not apply. Or what if a law prohibited any use of part of the land but allowed use of other parts? In another written opinion by Justice Stevens, the Court ruled that Justice Scalia's rule didn't apply. The upshot of all this is that it became harder and harder to find a "100% taking."

Justice Scalia's rule ran into another problem, too. It turns out that there are other common law doctrines, besides nuisance, that can prevent development of land. One of those is the public trust doctrine, which protects the public's interest in land that is regularly submerged. States like California give a broad interpretation to this doctrine, which takes a chunk out of Scalia's rule.

The nadir of the *Lucas* rule is a case called *Murr*. Justice Kennedy had joined Justice Scalia's opinion in *Lucas*, but he had never fully bought into Scalia's reasoning. In *Murr*, he went a long way toward gutting *Lucas*. Kennedy's opinion in *Murr* further broadened Justice Stevens's approach, at the expense of Scalia's hard-and-fast rule. Kennedy also indicated that environmental laws, not just old common law doctrines, could provide limits on property rights.

*Lucas* has not been overruled. It continues to operate in a small number of land use cases every year. But Justice Scalia's rule is now a battered remnant of its former self. Of course, all this could change, with new conservative Supreme Court appointments. For now, however, Scalia's 1992 opinion remains the high water mark of the property rights movement, and the tide has turned since them.