University of Baltimore Law Forum

Volume 23
Number 1 *Summer, 1992*

Article 7

1992

Recent Developments: Lucas v. South Carolina Coastal Council: Landowner Compensation Required Where Property Regulations Deprive All Economically Beneficial Use of Land Unless Regulations Are Inherent in Title

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to protect against the victimization of people who were particularly vulnerable to discrimination. *R.A.V.*, 112 S. Ct. at 2549. The Court, reasoning that the "emotive impact of speech on its audience is not a secondary effect, found that the St. Paul ordinance was not directed to secondary effects because it handicapped "specific categories" of speech. *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

In a concurring opinion, Justice White argued that the case should have been decided by finding the ordinance fatally overbroad. *Id.* at 2550. As written, the ordinance could prevent modes of expression that had offensive content but were not themselves threatening or harmful. For this reason, Justice White charged the majority with renouncing the traditional use of strict scrutiny review as a tool of First Amendment analysis. Under a strict scrutiny analysis, restrictions on speech are justified where the statute is narrowly tailored and necessary for the achievement of a compelling interest. The St. Paul ordinance, according to Justice White, could have survived a strict scrutiny review if it was more narrowly drafted. He faulted the majority for effecting an underinclusive standard which suggested that the statute should have banned a wider category of speech than was necessary to achieve the city's interest. This perceived departure from strict scrutiny analysis was criticized in light of the recent Supreme Court decision *Burson v. Freeman*, 112 S. Ct. 1846 (1992), in which the participating members of the present Court agreed that a strict scrutiny standard is applicable to a case involving a First Amendment challenge to a content-based statute. *R.A.V.*, 112 S. Ct. at 2551.

The concurrence also argued that the majority violated Court precedent by not categorically including fighting words among constitutionally prohibited speech. *Id.* at 2552-53. Justice White recognized that fighting words made up no "essential part of any exposition of ideas" and were wholly unprotected by the First Amendment because they were "directed at individuals to provoke violence or to inflict injury." *Id.* at 2553 (quoting *Chaplinsky*, 315 U.S. at 572).

In a separate concurring opinion, Justice Stevens noted his frustration with the majority's attitude towards the dangers of hate speech. *R.A.V.*, 112 S. Ct. at 2570. In a footnote referring to the Los Angeles riots, he wrote, "one need look no further than the recent social unrest in the nation's cities to see that race-based threats may cause more harm to society . . . than other threats." *Id.* at 2570 n.9.

The Supreme Court's ruling that banning cross burnings and swastika displays on the basis of content violates the First Amendment is significant because most states have enacted some form of hate speech legislation that will be invalidated by this decision. *R.A.V. v. St. Paul* will probably stand as one of the most far-reaching interpretations of the First Amendment. Although the bottom line was balanced, the analysis was insensitive. The majority's seeming perception of hate speech as no more than a societal nuisance is offensive to the many Americans whose lives were threatened by the very actions which the majority characterizes as merely "obnoxious." To many, the sight of a burning cross on the front lawn or a swastika display on the temple wall exceeds mere speech and proposes a direct threat of physical violence. Moreover, the Court's fractured consensus on First Amendment analysis, as applied to hate speech, will likely leave many lawyers bewildered over how to litigate hate crimes, and will leave many legislators perplexed about how to formulate a hate crime statute.

- Kim Germaine Judd

Lucas v. South Carolina Coastal Council: LANDOWNER COMPENSATION REQUIRED WHERE PROPERTY REGULATIONS DEPRIVE ALL ECONOMICALLY BENEFICIAL USE OF LAND UNLESS REGULATIONS ARE INHERENT IN TITLE.

The United States Supreme Court's most recent inverse condemnation decision, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), introduced a new approach to determine whether a property owner has suffered a regulatory taking requiring the payment of just compensation. The Court developed a test which inquires into the underlying principles of the state's property and nuisance law. The new test considers whether the challenged regulations merely make explicit restrictions on the property's use that were inherent in the title to the property itself. If so, then no compensation is required under the Fifth and Fourteenth Amendments, even if the regulation deprives the owner of all economically beneficial use of the land.

In 1986, David Lucas purchased two residential lots on the Isle of Palms, a barrier island located east of Charleston, South Carolina. Just as neighboring landowners had done on their land, Lucas intended to build single-family homes on his $975,000 parcels. His plans, however, were thwarted by the South Carolina Legislature in 1988 with the passage of the Beachfront Management Act. S.C. Code Ann. §§ 48-39-250 to -360 (Law. Co-op. Supp. 1991) ("the Act"). The Act established a baseline connecting the furthest-inland points of erosion during the last forty years and prohibited the construction of "occupiable improvements" seaward of the baseline. Because the baseline fell inland of Lucas's lots and his proposed homes constituted "occupiable improvements." Lucas was prohibited from building on his land.

Lucas challenged the Act in the South Carolina Court of Common Pleas, arguing that the law's effect on

his property constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. *Lucas*, 112 S. Ct. at 2890. The trial court agreed and reasoned that Lucas must be compensated because there were virtually no restrictions on the use of the land when Lucas purchased it. *Id.* The court thus found that the Act deprived Lucas of any reasonable economic use of the lots, interfered with the unrestricted right of use, and rendered the lots valueless. *Id.* The South Carolina Supreme Court reversed, finding itself bound by the legislature's conclusion that coastal zone construction threatened South Carolina's beaches, a valuable public resource. Regulations designed to prevent such public harms, the court ruled, do not require compensation despite their effect upon property value.

The United States Supreme Court began its analysis by addressing a ripeness issue raised by the South Carolina Coastal Council. After argument but before the South Carolina Supreme Court had rendered its opinion, the Act was amended to allow the Council to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. *Id.* at 2891. Because the South Carolina Supreme Court declined to base its decision on ripeness grounds, the Supreme Court found it appropriate to address the case on its merits, rather than ordering that Lucas pursue relief by obtaining special permits. *Id.*

The Court then traced a brief history of its takings cases, noting that this rubric had fostered few clear rules and numerous exceptions. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), had acknowledged that a "'regulation [that] goes too far . . . will be recognized as a taking.'" *Lucas*, 112 S. Ct. at 2893 (quoting *Mahon*, 260 U.S. at 415). The problem with this recognition, the Court explained, was that the phrase "too far" had never been adequately defined, necessitating a case-by-case factual analysis that produced inconsistent decisions. *Id.* Two categories of regulatory action did not require this fact-specific inquiry, however, but instead warranted compensation regardless of the public interest advanced. *Id.* The first category involved those regulations that compelled the owner to suffer a physical invasion of his land, and the second involved regulations that denied the landowner all economically beneficial or productive use of the land. *Id.* The Court concluded that a regulation which requires an owner to "leave his property economically idle" effects a compensable taking. *Id.* at 2895.

The Court noted that because Lucas had not challenged either the Act's purposes or its means, the South Carolina Supreme Court had considered his claim governed by the United States Supreme Court's long history of Due Process and Takings Clause challenges. *Id.* at 2896-97. This line of cases indicated that the state's police power to enjoin landowners from activities akin to public nuisances was constitutionally permissible. *Id.* at 2897. While acknowledging that many of these cases suggested that "harmful or noxious uses" of property could be prevented by government regulation without requiring compensation, the Court stated that the South Carolina Supreme Court erred in mechanically applying that principle to Lucas's case. *Id.*

The Court explained that its "harmful or noxious use" analysis was simply the predecessor to its later recognition that regulations which substantially advance legitimate state interests are not takings. *Id.* However, the Court elaborated that "noxious-use logic" could not serve as the basis by which to distinguish regulatory takings requiring compensation from those which do not. *Id.* at 2899. The Court explained that the prevention of a noxious use was simply the early manifestation of the police power justification necessary to sustain, without compensation, any regulatory reduction in value. *Id.* at 2898-99. Additionally, the Court noted that drawing the distinction between regulations which prevent harmful uses and those which confer benefits is a "difficult, if not impossible" task. *Id.* at 2899.

After detailing the inadequacy of noxious-use analysis, the Court introduced a new takings test that looks to the "nature of the owner's estate" to see if "the proscribed use interests were not part of his title to begin with." *Id.* If the proscribed use was not inherent in the landowner's title, compensation is not required even if the regulation deprives the landowner of all economically beneficial use of his land. *Id.* The test therefore asks whether government regulation simply makes manifest limitations on the landowner's rights that were included in the title to the land. *Id.*

This new approach was buttressed as being a derivative of the "bundle of rights" concept, because landowners would naturally expect their land to be subject to some level of regulation. *Id.* at 2899-2900. The new test, the Court explained, recognizes that an uncompensated regulatory taking could not be newly asserted by the government unless it was an outgrowth of a pre-existing limitation on the owner's title. *Id.* at 2900. The Court explained that such a regulation would merely mimic the result that adjacent landowners could achieve in court based on the State's nuisance law. *Id.* The Court illustrated this principle through the example of a lakebed owner who was denied a permit to fill in the lake and thereby flood others' land. *Id.* The lakebed owner would not be entitled to compensation because this limitation on his use is inherent in the title he holds. *Id.*

The Court further explained that the "total taking" inquiry required by the new test ordinarily would entail examination of several factors relative to the landowner claiming a taking. *Id.* at 2901. Among these are the degree of harm posed by the claimant's activities, the social value of the activities, their suitability to the location, and the feasibility of avoiding any alleged harm. *Id.*

Applying this test to Lucas's case, the Court found it unlikely that common-law principles would have prevented Lucas from building on his land, but left judgment on the issue to the South Carolina Supreme Court on remand. *Id.* The South Carolina Coastal Council's burden on remand, the Court noted, is to "identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 2901-02. Only by sustaining this burden could the State contend that the Beachfront Management Act's proscription of all such beneficial uses did not amount to a taking. *Id.* at 2902.

With the development of a new test for regulatory takings in *Lucas*, the Supreme Court did not wholly reject its earlier analyses of public nuisances, legitimate state interests, or economically viable uses of private land. Rather, the *Lucas* test mandates an antecedent examination of state property and nuisance law to determine whether regulations on land use effect a taking requiring compensation of the landowner. Lower courts may have difficulty implementing the *Lucas* test, however, because the Court outlined the test in broad terms and did not provide specific guidelines. Consequently, potential land purchasers must exercise caution and determine if property is subject to implied limitations on its use.

- Joshua D. Bruch

Franklin v. Gwinnett County Public Schools: **DAMAGES ARE AVAILABLE FOR AN ACTION BROUGHT TO ENFORCE TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.**

In a recent unanimous decision, the United States Supreme Court held that federal courts have the authority to award appropriate remedies in actions brought pursuant to Title IX of the Education Amendments of 1972 (Title IX). *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992). In so holding, the Court maintained the general principle that absent a clear indication by Congress to the contrary, federal courts have the power to award appropriate relief in cases brought under a federal statute.

Petitioner, Christine Franklin, was a student at North Gwinnett High School in Georgia. Respondent, Gwinnett County School District, operated the school with federal funds. On December 29, 1988, Franklin filed a complaint in the United States District Court for the Northern District of Georgia, alleging that she had been a victim of sexual harassment and abuse by a teacher, Andrew Hill. She sought damages pursuant to Title IX, which provides in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* at 1031 n.1 (*quoting* 20 U.S.C. § 1681(a) (1988)). Subsequent to Franklin filing the complaint, Hill resigned from his position at North Gwinnett High School on the condition that all pending matters and investigations be dropped. The school closed its investigation.

The district court dismissed Franklin's complaint, holding that Title IX does not provide for an award of damages. The United States Court of Appeals for the Eleventh Circuit affirmed. Noting that Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964 have been interpreted similarly, the appellate court relied on *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129 (5th Cir. 1981), which held that the Civil Rights Act of 1964 did not provide for an award of damages, as its authority for not granting damages under Title IX. The court further reasoned that damages were limited under statutes that were enacted pursuant to Congress's Spending Clause power. Because Title IX was enacted under the spending clause without an express provision for damages, the court held that damages were unavailable. The United States Supreme Court granted certiorari to settle the conflicting decisions among the circuit courts on the issue of whether the implied right of action under Title IX authorizes a claim for damages.

In an opinion delivered by Justice White, the Supreme Court first acknowledged the general rule that "where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Franklin*, 112 S. Ct. at 1033 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). The Court also recognized that affording a remedy for wrongs was deeply rooted in American history and in support thereof quoted Chief Justice Marshall's declaration that our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Franklin*, 112 S. Ct. at 1033 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1908)).

In arguing that damages should not be provided under Title IX, Respondents and the United States as amicus curiae insisted that the presumption in favor of damages no longer existed and emphasized that both the statute and the legislative intent behind the statute were silent as to damages. *Franklin*, 112 S. Ct. at 1034. Respondents contended that regardless of the presumption that existed traditionally or at the time *Bell* was decided, *Davis v. Passman*, 442 U.S. 228 (1979) nullified the presumption by holding that "the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Franklin*, 112 S. Ct. at 1034 (quoting *Davis*, 442 U.S. at 241). In rejecting this contention, the Court held that *Davis* dealt with whether one had a cause of action, not with whether one was entitled to any relief under a particular cause of action. *Franklin*,