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The classical Lockean picture and its difficulties

These lectures are about private property and the Rule of Law. But, instead of starting with abstract definitions of these terms, I want to begin with a case.

It's a 1992 decision of the Supreme Court of the United States, *Lucas v. South Carolina Coastal Council*.¹ Like many American property cases, it concerns the application of what we call the "Takings Clause" of the Fifth Amendment. These lectures are not about American constitutional law and I won't ask you to venture very far into the morass that constitutes American Takings Clause jurisprudence. It is a mess and, if only you knew how much of a mess, you would thank me for steering us away from this aspect of litigation. But the facts in *Lucas v. South Carolina Coastal Council* are going to be very helpful for our discussion of ownership and its relation to the Rule of Law.²

In 1986, a property developer named David Lucas paid US\$975,000 for some ocean-front real estate on the Isle of Palms, which is a barrier island off the coast of South

¹ 505 US 1003 (1992).

² My statement of the facts is taken from Justice Scalia's opinion for the Court in *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), and also from the opinions given by judges in the South Carolina Supreme Court in *Lucas v. South Carolina Coastal Council*, 404 SE 2d 895 (1991).

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Carolina, intending to develop it as residential property for resale. But his plans were thwarted by new environmental regulations established by state law intended to protect the coastline from erosion. Mr. Lucas knew at the time he bought the property that the general area was subject to some regulation under a 1972 federal statute and a 1977 statute of the South Carolina legislature. But his lots were not in what was defined as a “critical area” when he bought them, and so he did not need to apply for any special consent from the newly created South Carolina Coastal Council before beginning construction. However, things changed before he actually began construction. In 1988, responding to heightened concern about the state of the beaches expressed in the report of a blue-ribbon commission investigating the matter, South Carolina enacted legislation that empowered the Council to draw a new set-back line, a new line in the sand, as it were, a line that was on the landward side of Mr. Lucas’s property. They did just that, and the effect was to establish a more or less complete ban on the construction of any habitable improvements on Mr. Lucas’s land beyond a small deck or walkway.

So far as Mr. Lucas’s plans for development were concerned, this rendered his property worthless. So he sued under the Fifth and Fourteenth Amendments of the US Constitution, which prohibit the taking of private property for public use without fair compensation. The case went all the way to the Supreme Court of the United States, and, in 1992, the Supreme Court held in Mr. Lucas’s favor. The case was then remanded to the South Carolina courts which required South Carolina to pay Mr. Lucas US\$850,000 for the two lots, just slightly less

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than he had bought them for. (I am told that now, twenty years later, large homes sit on both lots.)³

As I said, I do not intend to say very much more than this about the American Takings Clause. Suffice to say that the *Lucas* decision represented something of a revival of the Supreme Court's willingness to condemn state regulations as takings.⁴ The questions I am going to consider are about a political ideal, not about constitutional provisions. The political ideal of the Rule of Law is something we valued in the United Kingdom, even though the UK has nothing like the Takings Clause in its constitution.⁵ Even without anything like the American Fifth Amendment, prohibiting the taking of private property for public use without just compensation, we can still ask whether it detracts from the Rule of Law to subject property rights to restriction in the way regulations restricted the use Mr. Lucas could make of his property. For, suppose that a legal system generated a large number of

³ See William A. Fischel, "A Photographic Update on *Lucas v. South Carolina Coastal Council*: A Photographic Essay," available at www.dartmouth.edu/~wfischel/lucasupdate.html.

⁴ See e.g. Hope Babcock, "Has the US Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of *Lucas v. South Carolina Coastal Council* on Wetlands and Coastal Barrier Beaches," *Harvard Environmental Law Review* 19 (1995), 1; and James Sanderson and Ann Mesmer, "A Review of Regulatory Takings after *Lucas*," *Denver University Law Review* 70 (1993), 497.

⁵ The closest the UK gets to it is in Article 1 of the First Protocol to the European Convention on Human Rights, which is binding on the UK. But, as far as I understand, that provision has not been used much to constrain the regulation of property.

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confrontations like this one – confrontations between private property rights on the one hand and environmental regulations on the other. Suppose that, up and down the coastline, and in inland wetland areas as well, and on mountains whose tops could be removed to find lucrative seams of coal, property owners found themselves limited in what they could do with their land by statutes and regulations, aimed at securing important public goods such as the preservation of beaches, an hospitable environment for birdlife, or the conservation of the aesthetic beauty of forests and mountains in an inland area. Such confrontations might be characterized in all sorts of ways. But here is the question that I want to ask: what is the situation regarding these property rights and environmental regulations so far as the Rule of Law is concerned? Does the Rule of Law condemn these restrictions? Does it require that the owner's lawful property rights be upheld? Or does it recognize the environmental regulations as law also, and command that they too should be respected, upheld and complied with as part of our general respect for the law of the land?

Let me get one distraction out of the way. In using *Lucas* as a sort of archetype, I am assuming for the sake of the argument I am going to pursue that the property-owner opposed and was offended by the restrictions on his property.⁶ It is possible,

⁶ According to Justice Scalia in *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992), p. 1009, "Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives."

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though, that, in the *Lucas* litigation, the real estate developer didn't actually oppose the legislation. One way of understanding Mr. Lucas's complaint might be as follows:

If my private property is to be affected by conservation schemes, then I am entitled to compensation. For if it is true that the public interest requires conservation of the beaches, then the costs of that conservation should be spread across the whole community; it should not be visited particularly on me.

That sounds like a reasonable claim. Mr. Lucas doesn't mean that he is having to pay for the bulldozing, the fencing, and the grass planting that is required to preserve the beaches. But he *is* having to bear the *opportunity cost* of having this land preserved as a beach – the opportunity cost of residential development, which the community is now insisting must be forgone. That's the cost that is unfairly incumbent on him, he will say, to the tune of almost a million wasted dollars. And what he is trying to do in his litigation against the Coastal Council is to secure a more equitable spread of costs across the community.

I have no quarrel with that argument (though others may). I mention it here, just to remove a distraction. Mr. Lucas may have been interested solely in compensation, but many people in a similar position do care about and do oppose the legislative restrictions as such. And some of them complain that such restrictions are at odds with the Rule of Law. *That* is the complaint I wish to discuss. Is it the role of the Rule of Law – considered as one of our most cherished political ideals – to protect people's property from these sorts of regulative

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incursions? Or should we reckon that the Rule of Law is as invested in the enforcement of environmental legislation as it is in the upholding of traditional property rights?

My question is about the Rule of Law, a phrase I always write using an upper-case “R” and an upper-case “L” to distinguish it from a phrase that sounds the same, but is all in lower case: “a rule of law,” like the rule against perpetuities, the rule that prohibits drunk driving, or the rule that says I have to file my taxes in the United States by midnight on April 15. Those are all rules of law, but *the* Rule of Law is one of the great values or principles of our political system.

The idea of the Rule of Law is that the law should stand above every powerful person and agency in the land. The authority of government should be exercised within a constraining framework of public norms. Political power should be controlled by law – as the great Victorian relic, Albert Venn Dicey, put it, in contrast “with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers.”⁷ Moreover, the Rule of Law requires that ordinary people should have access to law, in two senses. The first requires that law should be accessible, that is, promulgated prospectively as public knowledge so that people can take it on board and calculate its impact in advance on their actions and transactions. The second part of the Rule of Law’s access requirement is that legal procedures should be

⁷ A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, 1915) (Indianapolis, IN: Liberty Classics, 1982), p. 110 (emphasis added).

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available to ordinary people to protect them against abuses of public and private power. All this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of legal procedures.

The Rule of Law is a hugely important ideal in our tradition and has been for millennia. It is sometimes said that Dicey in 1885 was the first jurist to use the phrase “the Rule of Law.”⁸ I don’t think that is true, except in the most pedantic sense of exact grammatical construction. John Adams and other American revolutionaries explicitly contrasted the government of laws with the rule of men in 1780,⁹ and Aristotle used almost exactly those terms (only in Greek) in Book III of the *Politics* more than 2,300 years ago.¹⁰ I am not going to get hung up on the exact phraseology; the point is that, whether it is in the form of a slogan, a paragraph, or a treatise, and whether it’s in English, Greek, or German, the ideals and concerns that this phrase connotes have resonated in our tradition for centuries – beginning with Aristotle, proceeding with medieval theorists like Sir John Fortescue, who sought to distinguish lawful from despotic forms of kingship, through the early modern period in the work of John Locke, James

⁸ The claim that Dicey coined the phrase “the rule of law” has been traced to *Stephen’s Commentaries on the Laws of England* (21st edn, London: Butterworths, 1895), vol. 3, p. 337.

⁹ John Adams, who drafted the Constitution of Massachusetts, wrote in Article 30 of that document that the commonwealth aspired to be “a government of laws and not of men.”

¹⁰ Aristotle, *Politics*, trans. T. A. Sinclair (Harmondsworth: Penguin Books, 1962), pp. 122 ff. (Book III, Chapters 10 ff.).

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Harrington, and (oddly enough) Niccolo Machiavelli, in the Enlightenment in the writings of Montesquieu, Beccaria, and others, in the American tradition in *The Federalist* and even more forcefully in *The Anti-Federalist Papers*, and, in the modern era, in Britain in the writings of Dicey, Hayek, Oakeshott, Raz, and Finnis, and in America in the writings of Fuller, Dworkin, and Rawls.¹¹

There is a tremendous amount here, and quite a lot of detailed controversy about what the Rule of Law actually

¹¹ See Sir John Fortescue, *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge University Press, 1997), pp. 85 ff.; John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988); James Harrington, *The Commonwealth of Oceana and a System of Politics*, ed. J. G. A. Pocock (Cambridge: Cambridge University Press, 1992), pp. 9 ff.; Niccolò Machiavelli, *Discourses on Livy*, trans. Harvey Mansfield and Nathan Tarcov (Chicago: University of Chicago Press, 1996), pp. 73–76 and 93–95 (Book I, Chapters 34 and 45); Charles de Montesquieu, *The Spirit of the Laws*, ed. Anne Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), pp. 156 ff. (Book II, Chapter 6); Cesare Beccaria, *On Crimes and Punishments and Other Writings*, ed. Richard Bellamy (Cambridge: Cambridge University Press, 1995); Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Signet Classics, 2003), pp. 297–304 and 463–470 (Numbers 47 and 78); Ralph Ketcham (ed.), *The Anti-Federalist Papers* (New York: Signet Classics, 2003), pp. 256–308; Dicey, *Introduction to the Study of the Law of the Constitution*; F. A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960); Michael Oakeshott, “The Rule of Law” (1983), in *On History, and Other Essays* (Indianapolis, IN: Liberty Fund, 1999), p. 129; Joseph Raz, “The Rule of Law and Its Virtue,” in his collection, *The Authority of Law* (Oxford: Clarendon Press, 1979), p. 224; John Finnis, *Natural Law and Natural Rights* (1980), pp. 270–276; Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964); Ronald Dworkin, “Political Judges and the

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requires, and what aspects of law it privileges.¹² Law is many things, after all: for some the Common Law is the epitome of legality; for others, the Rule of Law connotes the impartial application of a clearly drafted public statute; for others still, the Rule of Law is epitomized by a stable constitution that has been embedded for centuries in the politics of a country and the consciousness of its people. And people's estimation of the importance of the Rule of Law sometimes depends on which paradigm of law is being spoken about. When Aristotle contrasted the Rule of Law with the rule of men, he ventured the opinion that "a man may be a safer ruler than the written law, but not safer than the customary law."¹³ Centuries later, in our own era, F. A. Hayek was at pains to distinguish the rule of law from the rule of legislation, identifying the former with something more like the evolutionary development of the Common Law, less constructive, less susceptible to human control, less *positivist* than the enactment of statutes.¹⁴

Plainly, these positions are going to be relevant to what we are considering in these lectures. Look at *Lucas v. South Carolina Coastal Council*. On the one hand, you have a property right developed presumably in accordance with the Common Law that South Carolina shares with many other

Rule of Law," in his collection, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), p. 9; and John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 235–243.

¹² See Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" *Law and Philosophy* 21 (2002), 137.

¹³ Aristotle, *Politics*, p. 144 (Book III, Chapter 16).

¹⁴ F. A. Hayek, *Rules and Order*, vol. 1 of *Law, Legislation and Liberty* (Chicago: University of Chicago Press, 1973), pp. 72 ff.

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jurisdictions – a property right defined by Common Law and circulating according to market principles. On the other hand, you have an environmental determination, made by an administrative body, pursuant to a piece of state legislation: a rule that exists as law because it occurred to some legislators in Columbia, South Carolina, that it might be a good idea to protect the beaches of the barrier islands from erosion. These are two different kinds of law – Common Law versus statutory regulation – and we may want to ask whether our ideal of the Rule of Law privileges one kind of law rather than the other. I am not going to try to settle any of this with an *a priori* definition. I want to leave it contestable, and I shall present everything I say in these lectures as a contribution to that contestation.

The fact that the Rule of Law is a controversial idea does not stop various agencies around the world from trying to measure it in different societies. The World Bank maintains a “Rule of Law” index for the nations of the earth, alongside other governance indicators such as control of corruption, absence of violence and so on. So for example, for 2008, a ranking was produced which placed countries like Canada, Norway, and New Zealand at the top of the Rule-of-Law League and Zimbabwe and Afghanistan at the bottom.¹⁵ So here is another

¹⁵ Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, “Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996–2008,” available at <http://ssrn.com/abstract=1424591>. The organization, Political Risk Services, also produces Rule-of-Law assessments for every country which may be purchased from its website at <http://www.prsgroup.com>. See also the discussion of the work of Political Risk