

# Hundredth Anniversary of Pennsylvania Coal vs. Mahon

**11:00AM – 12:20PM      Breakout Sessions**

*Session 2 – JI-Lecture Hall*

## **Hundredth Anniversary of Pennsylvania Coal vs. Mahon: How the Takings Clause Became the Primary Check on Government Power When SCOTUS Abandoned Review Under the Due Process and Contracts Clauses During the New Deal**

Moderator: **Carolynne C. White, Esq.**, LEED AP, *Brownstein Hyatt Farber Schreck, LLP*

**Robert H. Thomas, Esq.**,

*Joseph T. Waldo Visiting Chair in Property Rights Law, William & Mary Law School and Director, Property Rights Litigation, Pacific Legal Foundation*

**Carol N. Brown, Esq.**,

*Professor of Law, University of Richmond School of Law*

**Dwight H. Merriam, Esq.**, FAICP

*Attorney at Law*

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Syllabus.

PENNSYLVANIA COAL COMPANY v. MAHON  
ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 549. Argued November 14, 1922.—Decided December 11, 1922.

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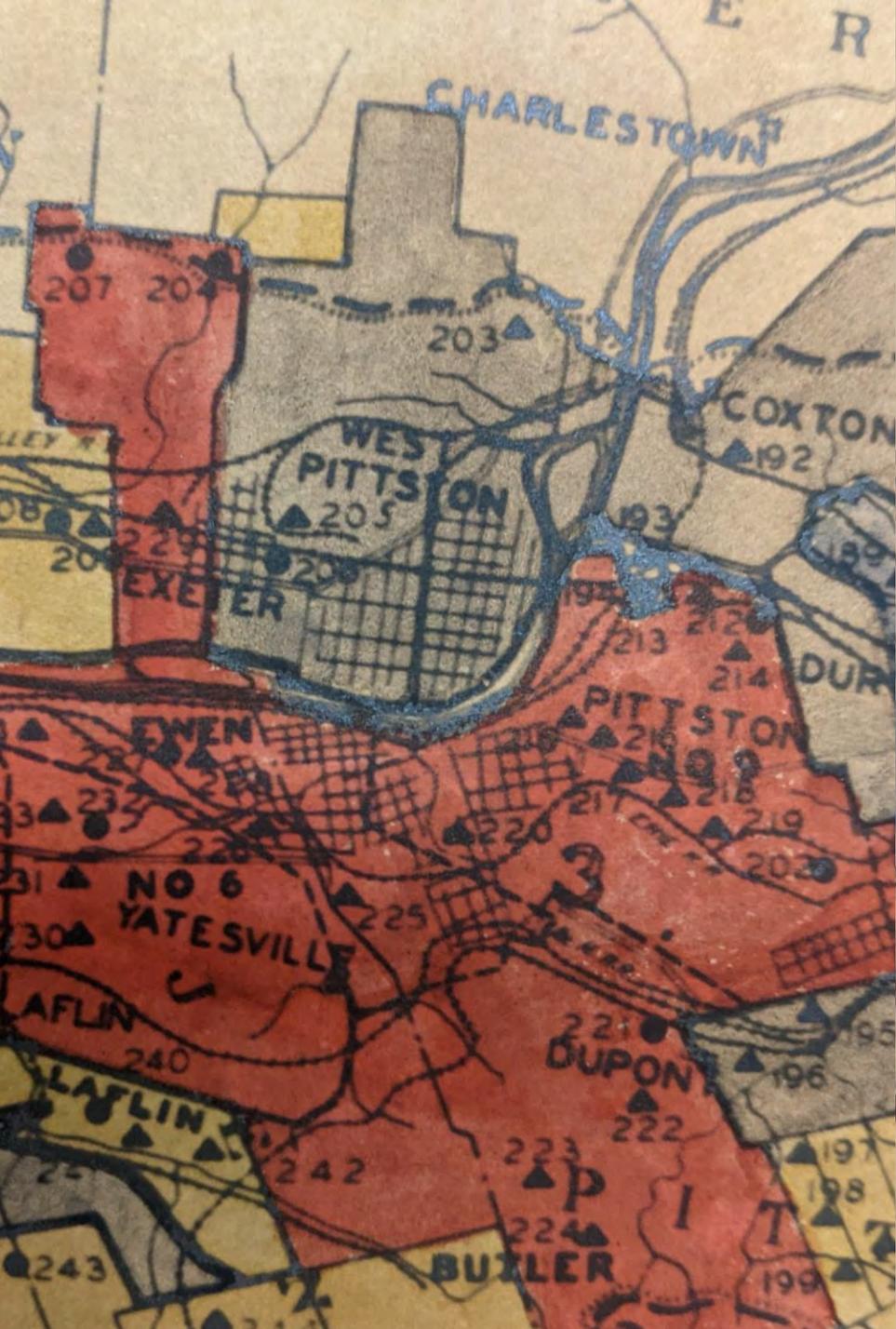
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compensation must be paid.

purchased or laid out by  
paid for. P. 415.

coal deposits had deeded the  
the right to remove all the coal  
the risk and waiving all claim to  
such mining, and the property  
contracts made, were valid under the  
enacted later, forbade mining in such way  
of any human habitation, or public street  
thereby made commercially impractical  
valuable coal deposits.







L'UZERNE CO.

MAP

OF THE

ANTHRACITE COAL

OF

PENNSYLVANIA

S. HARRIES DADDOW

Practical Miner etc.

Published by BENJAMIN BANNAN Pottsville

ON CO.

EXPLANATIONS	NAMES & LOCATIONS
The Location of each Colliery is denoted	MIDDLE COAL FIELD.

Excepting and reserving to the said Pennsylvania Coal Company their successors and assigns all the coal and other minerals under in or upon said lot of land, and also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company their successors and assigns remained the owners in fee of said surface or right of soil - the said Pennsylvania Coal Company not to transport the coal and other minerals thereby reserved upon the surface of said lot but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels passages and ways under said surface of said lot without objection or hindrance and not to be liable to the said Alexander Craig his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels passages or ways.





MERRY  
Christmas



“subsidence”

STOCK EXTRA

# The Scranton Times

40TH YEAR—NO. 206

12 PAGES—SCRANTON, PA., MONDAY AFTERNOON, AUGUST 20, 1900.—12 PAGES

## PILLAR ROBBING CAUSED BIG CAVE-IN; \$100,000 DAMAGE

Fourteenth Ward Hillside  
Shaken and Scared By  
Mine Settling That  
Cameged Homes,  
School and Church  
Property.

SEVERAL HOUSES  
MAY TIP OVER

BIRDSEYE VIEW OF CAVE-IN TERRITORY



The Kohler Act

THE KOHLER ACT.

(Act of May 27, 1921, P. L. 1198)

No. 445.

AN ACT.

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

SECTION 1. Be it enacted, &c., That it shall be unlawful <sup>Mining of anthracite coal.</sup> for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations. <sup>Must not cause subsidence of certain lands and structures.</sup>

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

SECTION 2. Every owner, operator, lessor, lessee, or general contractor, engaged in the mining anthracite coal within this Commonwealth, shall make, or cause to be made, a true and accurate map or plan of the workings or excavations of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently <sup>Maps and plans of proposed operations.</sup>

Scranton, Pa., Sept. 1, 1921.

To H. J. Mahon and Mrs. Margaret Craig Mahon,  
7 Prospect Place,  
Pittston, Pa.

DEAR SIR AND MADAM:

You are hereby notified that the mining operations of the Pennsylvania Coal Company, beneath your premises will by September 15th, have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take proper steps for the protection of your dwelling and for the safety of yourselves and the members of your household during the period when the disturbance will continue.

Yours very truly,

PENNSYLVANIA COAL COMPANY,  
By W. A. MAY,  
*President.*



MASTRANO  
GOVERNOR

BOGNET  
GOVERNOR

OZ  
GOVERNOR



7

# U.S. Constitution, amend. V

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*”

## Syllabus.

CHICAGO, BURLINGTON AND QUINCY RAILROAD  
COMPANY *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 129. Argued November 6, 9, 1896. — Decided March 1, 1897.

This court has authority to reëxamine the final judgment of the highest court of a State, rendered in a proceeding to condemn private property for public use, in which after verdict a defendant assigned as a ground for new trial that the statute under which the case was instituted and the proceedings under it were in violation of the clause of the Fourteenth Amendment, forbidding a State to deprive any person of property without due process of law, and which ground of objection was repeated in the highest court of the State; provided the judgment of the court by its necessary operation was adverse to the claim of Federal right and could not rest upon any independent ground of local law.

The prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

The contention that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence. The judicial authorities of a State may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with that amendment.



Syllabus.

PENNSYLVANIA COAL COMPANY *v.* MAHON  
ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 549. Argued November 14, 1922.—Decided December 11, 1922.

1. One consideration in deciding whether limitations on private property, to be implied in favor of the police power, are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question; and this is to be determined from the facts of the particular case. P. 413.
2. The general rule, at least, is that if regulation goes too far it will be recognized as a taking for which compensation must be paid. P. 415.
3. The rights of the public in a street, purchased or laid out by eminent domain, are those that it has paid for. P. 415.
4. Where the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, etc., and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined, *held*, that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal-owner under the Contract Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment.<sup>1</sup> P. 413.

274 Pa. St. 489, reversed.

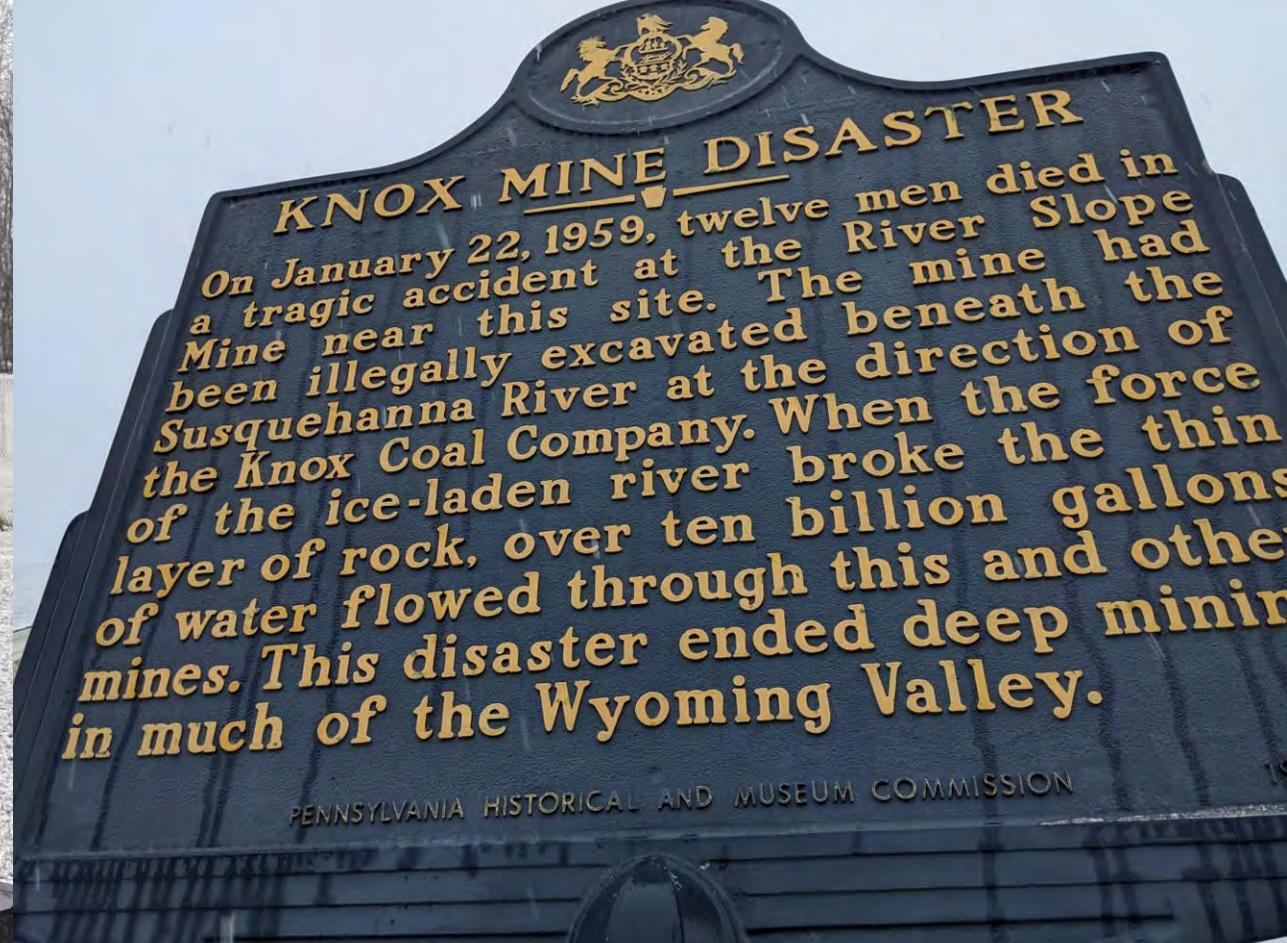
Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule,

HAROLD J.  
MAHON  
1874 — 1937

MARGARET C.  
MAHON  
1869 — 1950





Knox Mine Disaster (1959)

 Abrogation Recognized by [Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency](#), 9th Cir.(Nev.), June 15, 2000

Negative Treatment (32)

History (2)

Citing References (9,650) ▼



## ERIE RAILROAD CO. v. TOMPKINS

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal "general common law." Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION 1967

PROHIBITED  
102' TRAILS  
102' TRAILERS  
OVER 28 1/2 FT

300' NO  
LEFT TURN  
FINE

NO  
LEFT TURN  
FINE

40

NO  
TRACTOR  
TRAILERS  
ALLOWED

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Syllabus.

PENNSYLVANIA COAL COMPANY v. MAHON  
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...coal deposits had deeded the...  
...the right to remove all the coal...  
...the risk and waiving all claim to...  
...from such mining, and the property...  
...contracts made, were valid under the...  
...enacted later, forbade mining in such way...  
...of any human habitation, or public street...  
...thereby made commercially impractical...  
...valuable coal deposits...



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## The 100th Anniversary of Pennsylvania Coal v. Mahon

*“The Lucas Decision and the Takings Clause as a Check on Government Power”*

Friday, December 8, 2023

11:00AM-12:20PM

Carol N. Brown

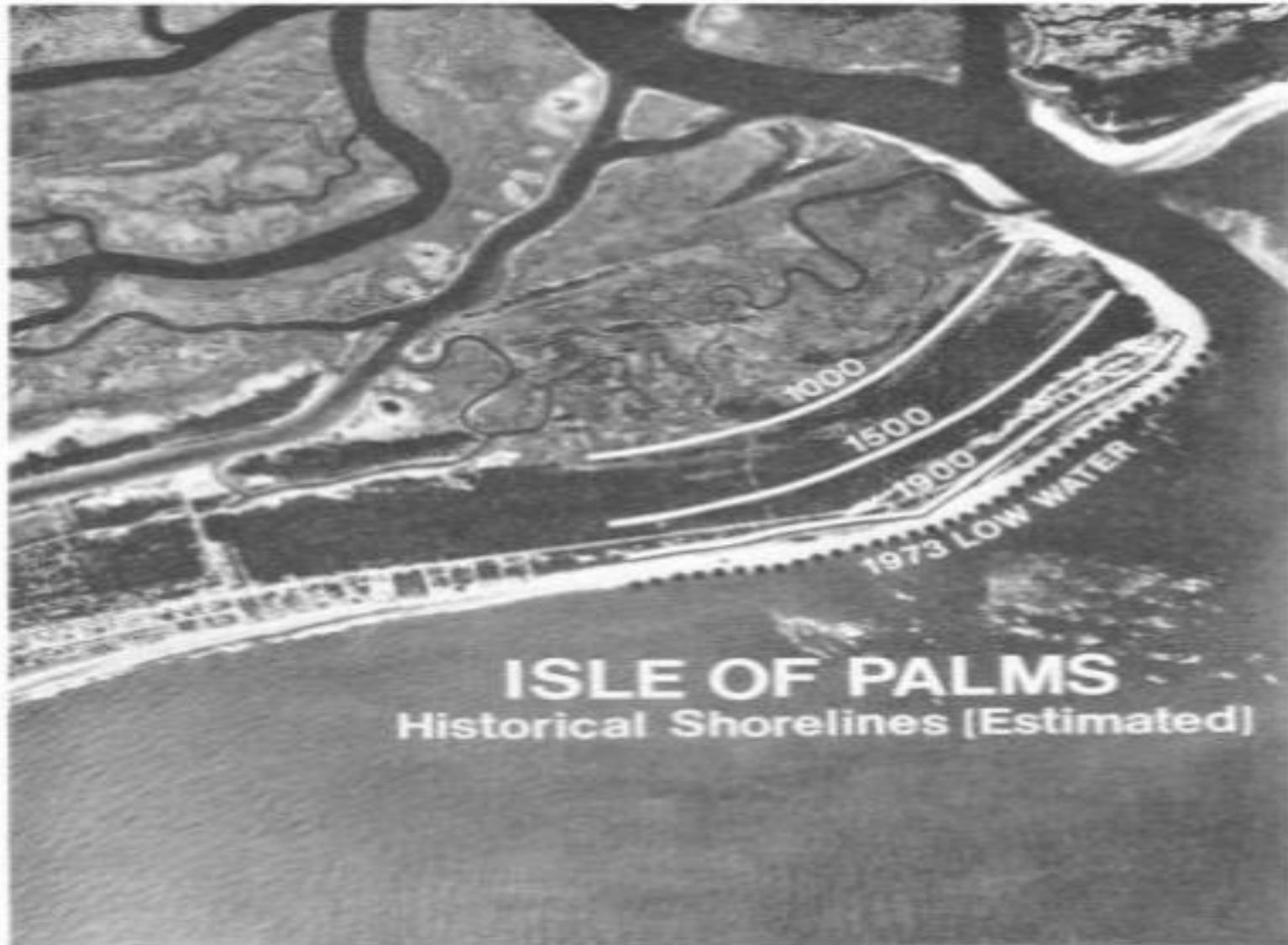
The University of Richmond School of Law

*Lucas v. South Carolina  
Coastal Council (1992)*

Rules for Thee . . .



# Historical Shorelines Estimated



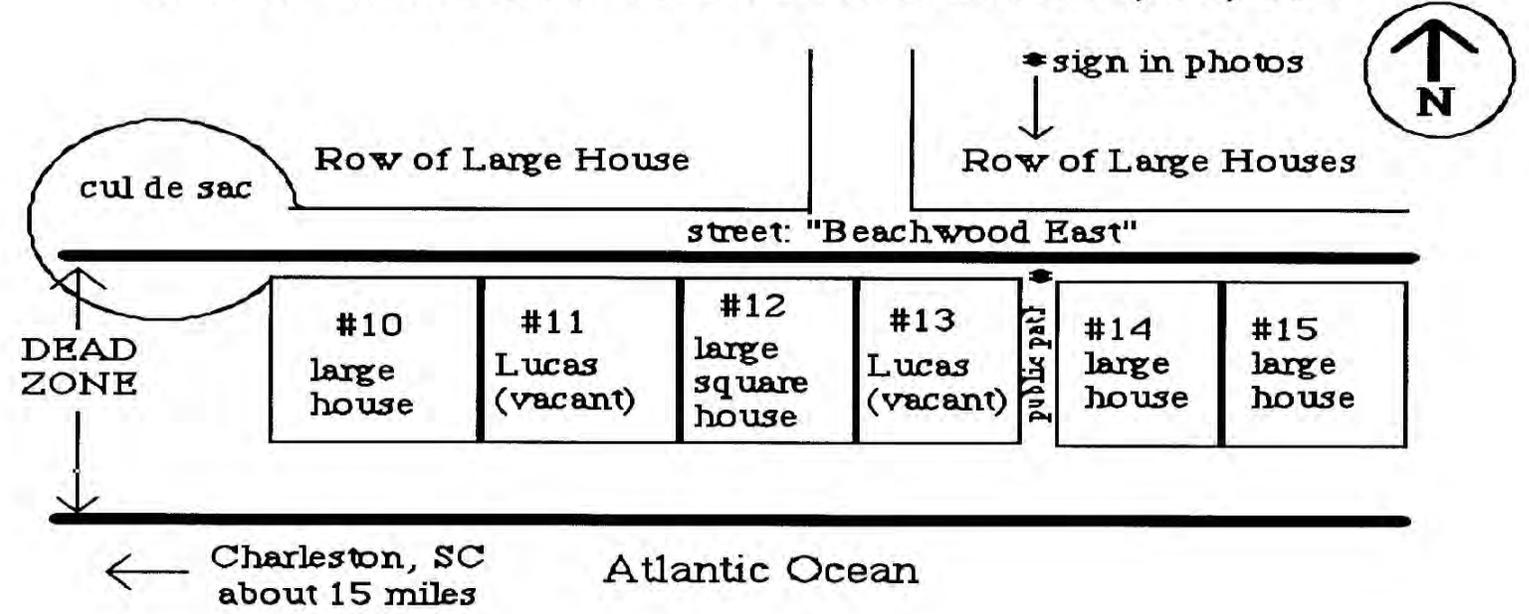


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## LUCAS

Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94



View of Lucas's two lots, on either side of the large square house in the center from the edge of the ocean looking northwest. His two lots are the only vacant ones in sight along the beach.



Photo 1 (3/11/00): The cube-shaped house, as before, is between Lucas's original two lots. (Lucas did not own the cube-shaped house or its lot.) On the left is the new house (salmon-pink color) built after 1994. William A. Fischel, <http://www.dartmouth.edu/~wfischel/lucasupdate.html>



**Photo 2 (3/11/00)**

A closer view of the salmon pink house





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**TODAY**



# Beachfront Houses in Wild Dunes, Isle of Palms, South Carolina





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## AFTER THE SUPREME COURT DECISION

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### [A Photographic Update on the Lucas Property](#)

This website was created and is maintained  
by [kory.hirak@dartmouth.edu](mailto:kory.hirak@dartmouth.edu)



# **The 100th Anniversary of Pennsylvania Coal v. Mahon**

**“The Risk of Overreaction”**

**Friday, December 8, 2023**

**11:00AM-12:20PM**

**Dwight Merriam, FAICP**

[www.dwightmerriam.com](http://www.dwightmerriam.com)

# Thesis

**We tend to overreact  
to U. S. Supreme Court decisions  
on property rights and land use.**

The Story of  
**CHICKEN LITTLE**



Rhymed and Retold by  
**WATTY PIPER**

600-40

# ***First Lutheran Church v. Los Angeles County (1987)***

## **Facts of the case**

**In 1979, the County of Los Angeles passed an ordinance which prohibited construction or reconstruction on land which had been devastated by a flood one year earlier. The First English Evangelical Lutheran Church owned a campground which was affected by this ordinance, and it was not allowed to reconstruct buildings on this land which the flood had destroyed.**

## **Question**

**Did the ordinance violate the Fifth Amendment (as applied to the states through the Fourteenth) which prevents government from taking private property for public use without providing just compensation to the owner of the property?**

**From Oyez.org**



# *Lucas v. South Carolina Coastal Council (1992)*

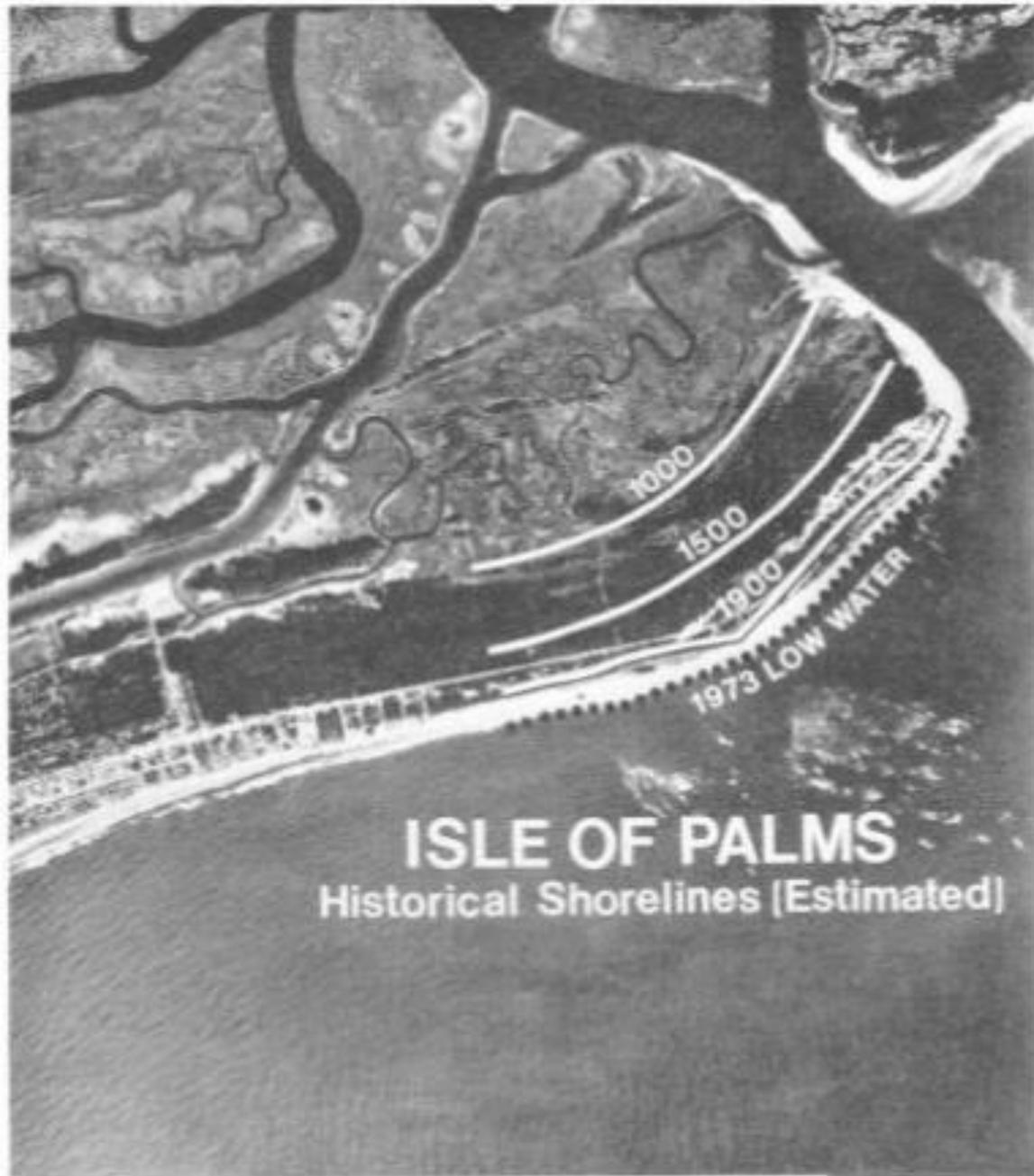
## Facts of the case

In 1986, Lucas bought two residential lots on the Isle of Palms, a South Carolina barrier island. He intended to build single-family homes as on the adjacent lots. In 1988, the state legislature enacted a law which barred Lucas from erecting permanent habitable structures on his land. The law aimed to protect erosion and destruction of barrier islands. Lucas sued and won a large monetary judgment. The state appealed.

## Question

Does the construction ban depriving Lucas of all economically viable use of his property amount to a "taking" calling for "just compensation" under the Fifth and Fourteenth Amendments?

From Oyez.org



1994



# ZONING AND PLANNING LAW REPORT

AUG 30 1993



Vol. 16, No. 7

ROBINSON & COLE

July-August 1993

LIBRARY

NO, NORMAN, THE SKY IS NOT FALLING

by Dwight H. Merriam

*Dwight Merriam is a partner in the law firm of Robinson & Cole with offices in Boston, Hartford, Stamford and New York City. He is past president of the American Institute of Certified Planners and the author of over forty articles and co-editor of Inclusionary Zoning Moves Downtown.*

• **The Lucas Decision Interpreted**

• **Post-Lucas Decisions**

• **Avoiding the Lucas Trap**

*(Professor Norman Williams, Jr. authored a two-part article on the Lucas decision in the April-May 1993 issues of Zoning and Planning Law Report. He suggested that Lucas is a significant step towards greater protection for property rights. In this article, Dwight Merriam assesses that view in light of post-Lucas decisions and offers some guidelines on how to avoid Lucas-type takings.)*

# Lucas categorical takings cases...

## On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim

*Carol Necole Brown and Dwight H. Merriam\**

*ABSTRACT: In Lucas v. South Carolina Coastal Council, the United States Supreme Court established the premier categorical regulatory takings standard with certain limited exceptions. The Lucas rule establishes that private property owners are entitled to compensation for a taking under the Fifth Amendment Takings Clause when a government regulation “denies all economically beneficial or productive use of land.” Today, Lucas remains the controlling law on categorical regulatory takings. But in application, how much does Lucas still matter?*

*In reviewing more than 1,700 cases in state and federal courts, we identified that Lucas claims were successful in just 1.6% of the cases. This does not mean Lucas is unimportant, however. The small Lucas claim success rate suggests the importance of being strategic in pleading takings claims. The problem of defining the denominator in the regulatory takings equation is essential to understand for litigants pursuing the Lucas categorical regulatory takings analysis. Based upon our research, we argue that Lucas’s holding incentivizes the private contractual agreements entered into by property owners to shrink the takings denominator and tilt the scales slightly in favor of the plaintiff. The ability of a property owner to reduce the denominator remains the loadstar for a Lucas case-winning strategy.*

*This is important for not only theorists but also for practitioners to know—those who litigate and conduct transactions in Lucas’s shadow.*

In reviewing more than 1,600 cases in state and federal court, we identified only 27 cases in 25 years in which courts found a categorical regulatory taking under Lucas. By percentage, that works out to a **Lucas claim success rate of just 1.6 percent.** This does not mean Lucas is unimportant, however. Rather, the paucity of successful Lucas claims itself tells a significant story about the importance of pleading takings claims. We contend that Lucas' **most enduring value** is not its contribution to the positive law but rather its effect on **how litigants shape their cases.**

# 2014



# *Knick v. Twp. of Scott, Pennsylvania, (2019)*

## Facts of the case

In 2012, the Township of Scott, Pennsylvania, passed an ordinance affecting private properties determined to be or contain cemeteries. In relevant part, the ordinance required that “all cemeteries within the Township ... be kept open and accessible to the general public during daylight hours” and that no owner could unreasonably restrict nor charge any fee to access the cemetery (the “public-access provision”). Additionally, the ordinance permitted a Township officer to enter any property within the Township to determine whether there is a cemetery on the property, in order to enforce the public-access provision.

...

From Oyez.org

[Claims] not ripe until she has sought and been denied just compensation using state inverse-condemnation procedures as required in the US Supreme Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.

### Question

Should the Court affirm or abrogate its holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, which requires property owners to exhaust state court remedies before bringing federal Takings Clause claims?

Does the ripeness doctrine established in *Williamson County* apply to takings claims that assert that a law is unconstitutional on its face?



# ROSE MARY KNICK AND THE STORY OF CHICKEN LITTLE

*Dwight Merriam\**

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# More recently decided cases

- ***Cedar Point Nursery v. Hassid (2021)***
  - Physical invasion (6-3) Breyer, Sotomayor, Kagan
- ***Shurtleff v. Boston (2022)***
  - Government speech (9-0)
- ***Kennedy v. Bremerton School District (2022)***
  - Free exercise and free speech clauses (6-3) (Sotomayor, Breyer, Kagan)
- ***City of Austin v. Reagan National Advertising (2022)***
  - Content-based sign regulation (6-3) Thomas , Gorsuch, Barrett
- ***Wilkins v. U.S. (2023)***
  - Time limit not a jurisdictional bar (6-3) Thomas, Roberts, Alito

- ***Sackett v. Environmental Protection Agency (2023)***
  - What are "waters of the United States" aka “Where’s Waldo?”
- ***Tyler v. Hennepin (2023)***
  - Property interest under state law

Geraldine Tyler



**Remanded, Denied, Cert. Granted...**

- ***Sandra K. Nieveen v. TAX 106***
  - Tyler redux? Just Compensation and Excessive Fines Clauses.
  - Petition for certiorari granted, judgment vacated, and case remanded to the Supreme Court of Nebraska for further consideration in light of *Tyler v. Hennepin County* on June 5, 2023.
- ***Evans Creek, LLC v. City of Reno, Nevada***
  - *Penn Central* three-part test. Cert. denied.
- ***Devillier v. Texas***
  - Is the Fifth Amendment self-executing?

**Issue:** Whether a person whose property is taken without compensation may seek redress under the self-executing takings clause of the Fifth Amendment even if the legislature has not affirmatively provided them with a cause of action.



**Richard Devillier**

**Fini...**

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